#63 7/8/66

Memorandum 66-39

Subject: Study 63(L) - The Evidence Code (Revision of the Evidence Code)

We distributed our tentative recommendation to all persons who have requested copies of tentative recommendations on evidence. The State Bar publications and the legal newspapers published notices that we had a tentative recommendation on this subject. As a result, we received a number of comments on the tentative recommendation. Some of these were considered at a previous meeting.

General reaction to tentative recommendation

With the exception of the Committee of the Conference of Judges and the Subcommittee of the Judicial Council (which together submitted the Report, hereinafter referred to as "Joint Report," which is attached as Exhibit I --white pages), the tentative recommendation met general approval. The general reaction of the Joint Report is that many of the changes are unnecessary and some undesirable. The Joint Report takes the view that it is undesirable to make unnecessary changes in the new code and that there should be time for experience under the new code before substantial statutory revision is undertaken. (It may be of interest to note that Larry Baker of the Northern Section of the State Bar Committee reported that the Northern Section had gone along with our tentative recommendation but nevertheless at least some members thought that most of the changes were unnecessary. However, they did not feel that they should object to these changes since the Commission apparently had taken the view that they were necessary.)

We did not receive a report from the Southern Section of the State Bar Committee on the tentative recommendation. (We sent the tentative recommendation out in January and requested comments not later than July 1.)

Schedule on this recommendation

With several exceptions noted in this memorandum, we are concerned at this time only with the text of the statutory provisions. We will approve the statute for preprinting at the August meeting and the pamphlet for printing at the September meeting.

Section 402 (page 9)

The Joint Report (Exhibit I, white pages 3-6) approves the principle of the suggested change in subdivision (b). However, the Joint Report suggests that subdivision (b) be revised to read:

> (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury ~~if any party so requests~~ unless the defendant expressly waives this requirement and his waiver is made a matter of record, in which case the court in its discretion may hear and determine the question of admissibility out of the presence or hearing of the jury .

The Joint Report adds the "in which case" clause at the very end of the subdivision. The judges state that they see no legitimate purpose served by arguing this question before a jury and certainly no reason for requiring it to be so argued. The staff recommends the adoption of the suggested change.

In connection with this section, the recent case of People v. Oats, 48 Cal. Rptr. 579 (1966), Exhibit XI (green pages), should be noted.

Section 403 (pages 10-11)

The Joint Report (Exhibit I, pages 6-7) disapproves the changes suggested in this section. The Commission considered this section at the May 27-28 meeting. The following is an extract from the Minutes of that meeting:

> The Commission considered the comment of Professor Chadbourn on the proposed amendment of Section 403 contained in the tentative recommendation previously distributed for comment. Individual members of the Commission expressed the view that the proposed

amendment of Section 403 contained in the tentative recommendation did not appear to be necessary and that the Evidence Code as originally enacted probably needs no change.

The Commission deferred taking any action on Section 403 and directed the staff to place this matter on the agenda at a future meeting. The materials prepared for that meeting are to include the original materials that led to the suggested amendment as well as any comments on the suggested amendment.

It was also suggested that the Committee of the Conference of Judges and the Subcommittee of the Judicial Council be sent a copy of Professor Chadbourn's suggestion with a request that they comment on his proposal as well as the tentative recommendation.

My recollection is that the suggestion that caused us to include the amendment of Section 403 in the tentative recommendation originated with a judge. Since the judges approve Section 403 as enacted in 1965, the staff recommends that the section be deleted from the tentative recommendation. (See Exhibit XII (buff pages) for original materials.)

Section 405 (not included in tentative recommendation)

Sections 403 (determination of preliminary facts where relevancy, personal knowledge, or authenticity is disputed) and 404 (determination of whether proffered evidence is incriminatory) both clearly indicate the extent of the burden imposed upon the party having the burden of proof. Under Section 403, the proponent's burden is to produce "evidence sufficient to sustain a finding of the existence of the preliminary fact." Under Section 404, "the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appers to the court that the proffered evidence cannot possibly have a tendence to incriminate the person claiming the privilege."

With respect to Section 405 (which covers preliminary fact determinations in all othe cases), the extent of the burden of proof is not

clearly stated. The Comment to Section 405 states that the burden is to "persuade" the judge as to the existence of the preliminary fact. We assumed, I believe, that the definition of "burden of proof" in Section 115 applied and required proof of the existence of the preliminary fact by a preponderance of the evidence.

In order to make the matter clear, the staff suggests that Section 405 be amended to read:

> 405. With respect to preliminary fact determinations not governed by Section 403 or 404:
> (a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The party having the burden of proof is required to establish the existence of the preliminary fact by a preponderance of the evidence. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.
> (b) [no change]

Comment. The second sentence is added to subdivision (b) of Section 405 to make it clear that the burden of proof as to the existence of a preliminary fact under Section 405 requires proof by a preponderance of the evidence. Thus, for example, if the disputed preliminary fact is whether the proffered statement was spontaneous, as required by Section 1240, the proponent must establish by a preponderance of the evidence that the statement was spontaneous. If the disputed preliminary fact is whether a person is married to a party and, hence, whether their confidential communications are privileged under Section 980 the party asserting the privilege must establish the existence of the marriage by a preponderance of the evidence. Similarly, if the disputed preliminary fact is whether a confession is voluntary, as required by Section 1204, the prosecution must establish the voluntariness of the confession by a prepondereance of the evidence.

The primary reason for the suggested revision is to clarify the extent of the prosecution's burden of proof as to the existence of the preliminary fact where evidence (such as a confession, declaration against interest, alleged privileged communication or the like) is offered against a criminal defendant. Prior to the enactment of the Evidence Code the extent of the prosecution's burden of proof was unclear. See the exchange of letters between the staff and the office of the Los Angeles County District Attorney attached as Exhibit III (yellow pages).

Sections 412, 413, and 414

Concerning Section 414, Mr. Richard H. Perry commented:

> I would like to express doubt as to the suggested revision of the Evidence Code by addition of Section 414 thereto. The proposed Section 414 states an obvious truism, i.e. that the statutes are applicable only insofar as no constitutional right is violated. . . .

You will recall that the Northern Section of the State Bar Committee on the Evidence Code suggested that, in light of the addition of Section 414 to the Evidence Code, two sections of the Penal Code should be amended to insert a proviso "subject to any limitations provided by the Constitution of the United States or the State of California." We declined to add this language to the Penal Code sections and, instead, forwarded the suggestion of Professor Sherry for consideration in connection with the revision of the Penal Code. The Northern Section did, however, approve Sections 412, 413, and 414.

The Joint Report (Exhibit I, pages 7-9) disapproves the revision of Sections 412 and 413 and the addition of Section 414. See the discussion in the Joint Report at pages 7-9.

Professor Madden approves all changes except the revision of Sections 412 and 413 and the addition of Section 414. Perhaps he overlooked these

sections. See Exhibit VI (blue pages). (The references in Professor Madden's letter to paragraphs are to the numbered recommendations in the preliminary portion of the recommendation.)

The case of People v. Ing, 242 A.C.A. 261, 272-273 (1966) is interesting. In this case the defendant in a criminal action took the stand and testified. The court stated: "Hence, the court may instruct the jury concerning the failure of the accused to explain acts of an incriminatory nature which the evidence for the prosecution tended to establish against him, and the inference to be drawn from his silence. Moreover, the defendant who takes the stand and fails to explain evidence against him may properly be the subject of comment by the prosecution." [Citations omitted.]

The staff believes that the Joint Report makes a persuasive case for the deletion of Sections 412, 413, and 414 from the tentative recommendation.

Section 646 (pages 15-18)

The Joint Report (pages 9-12) approves the classification of the judicial doctrine of res ipsa loquitur as a presumption affecting the burden of producing evidence. Judge Richards reports that two members of the BAJI Committee felt that the res ipsa presumption should be classified as a presumption affecting the burden of proof. Apparently, the majority of the Committee took the view that the presumption is properly classified as a presumption affecting the burden of producing evidence. See the introductory comment to Instruction 206 (Exhibit VII, gold pages).

The Northern Section of the State Bar Committee approved the section as drafted. So did Professor Madden. The Joint Report, however, recommends the deletion of the second sentence of Section 646. The Report states:

> The res ipsa loquitur presumption should be treated in Section 646 exactly the same way as the other presumptions affecting the burden of producing evidence that are classified

in Article 3 of Chapter 3 of Division 5 of the Evidence Code. It was not found necessary in any other section in this article to declare specially the court's duty to instruct on the inferences that may be drawn by the trier of fact when the party against whom the particular presumption operates has satisfied his burden of producing evidence. Instead, the court's duty is described generally in Section 604 and the Comment thereto. This description would cover as well the operation of the newly classified res ipsa loquitur presumption. Hence, we see no need for special treatment by statute of this matter.

You will recall that Section 646 was drafted with the mandatory-upon-request-instruction provision as a compromise. This provision was included to satisfy objections similar to the two judges referred to in the letter from Judge Richards:

> Two of our judicial members on the BAJI Committee feel that making res ipsa merely a permissive inference destroys the underlying principle of the doctrine which should compel the defendant to explain the accident or establish his due care sufficiently to meet or balance a mandatory inference that he was negligent if the conditional elements are found to exist. I have a feeling that as a practical matter if the jury is told that they may infer negligence, they are as likely to do so as if they were told that they must infer negligence.

The staff believes that the second sentence of Section 646 should be retained. We believe that the plaintiff should be entitled as a matter of right to an instruction that negligence may be inferred if the facts that give rise to the presumption are found or otherwise established even where the defendant has introduced sufficient evidence to sustain a finding that he exercised due care. Although Section 604 indicates that the fact that the presumption has disappeared from the case does not preclude the jury from drawing an inference of the presumed fact, Section 604 does not give the plaintiff an absolute right to obtain an instruction to that effect upon request. In view of the unique nature of the res ipsa presumption, the staff believes that the plaintiff should be entitled to the permissive inference instruction as a matter of right.

The Joint Report also suggests that the Comment to Section 646 be revised so that it is less of a justification for the classification of the presumption and a description of how the previous law operated. Instead, the Joint Report suggests that the Comment should contain a more complete description of just how the res ipsa.. presumption will operate in a given case. We believe that there is considerable merit to the suggestion that the Comments explain primarily how the particular section should be interpreted and applied and that the justification for any changes in existing law (or in this case for the classification of the presumption as one affecting the burden of producing evidence) should be contained in the preliminary portion of the recommendation. We recognize that few persons have occasion to refer to the Comments before the legislation becomes law. After the legislation becomes law, Comments that refer to the prior law as "existing law" and contain extended discussions of "existing law" (that is in fact no longer existing law) cause confusion.

We believe that the Comment to Section 646 does contain a fairly complete and "practical" discussion of how the res ipsa presumption will operate in a given case. Nevertheless, we have had an opportunity to examine the instructions on this presumption that have been prepared by the BAJI Committee. Despite the fact that the Committee had an opportunity to examine the Comment to Section 646, the instruction prepared by the Committee is somewhat unclear on exactly how the res ipsa presumption will operate in a given case. See Instruction 206 attached as Exhibit VII (gold pages). We believe that the last paragraph of this instruction may give the impression to the jury that the presumption, in effect, shifts to the defendant the burden of proof ("must show"). Instruction 206.1 (part of Exhibit VII) is correct. We suspect that the BAJI instruction is the

reason why the Joint Report suggests a more complete discussion of this matter with examples. Accordingly, we have prepared as Exhibit VIII (white pages) a revised Comment to Section 646. Is this Comment satisfactory?

Section 669 (page 19)

The classification of this section as a presumption affecting the burden of proof was approved by all who reviewed the tentative recommendation. The Northern Section of the State Bar Committee and the Joint Report (pages 12-13) and others approved the language used in the section.

Judge Richards has a suggested revision of the subdivision (a) of the section and suggests deletion of subdivision (b). See Exhibit II (pink pages). However, we believe that Section 669 should be retained in its present form and the Joint Report takes the same view. Others who examined the section approved it and recommended no change in language.

The Joint Report suggests that the Comment to Section 669 should contain a "practical discussion of the way in which this particular presumption will operate under the Evidence Code." Exhibit IX contains additional material that could be added to the existing Comment to Section 669. Is this additional material satisfactory?

Section 776 (pages 20-22)

This section was approved by all persons who examined the section except the Joint Report (pages 13-15). The Joint Report disapproves that suggested revision of Section 776 "because we believe the objective sought to be accomplished is adequately taken care of in Section 767." There is considerable merit to this position. Nevertheless, the Commission made a change in existing law when it drafted Section 776 and failed to call this change to the attention of the Legislature. The revision would merely restore what formerly was existing law. You will recall that the railroad

attorneys take the view that the change made by Section 776 in the prior law will cause great difficulty in the trial of certain cases involving railroad employees.

The staff recommends that Section 776, as revised, be retained in the recommendation.

Sections 952, 992, and 1012 (pages 23-25)

These sections were approved by the persons who sent us comments except that the Joint Report (pages 15-16) takes the view that there is no need for the suggested changes.

We believe that the revisions of Sections 992 and 1012 are desirable. We see no need for the change proposed to be made in Section 952, especially in view of the comments of the Joint Report. The "work product privilege" is also available to protect the attorney, and this would provide protection to the impressions and conclusions of the attorney if the attorney-client privilege itself does not provide such protection.

If the Commission determines that an amendment of the attorney-client privilege is necessary, we believe that there is some merit to the suggestion of the Joint Report that the basic privilege section (rather than the definition of "confidential communication") be revised.

Section 1017 (page 26)

No objection to this section.

Marriage counselor's privilege (not in tentative recommendation)

As requested by the Commission, the staff wrote to Justice Kaus to obtain a further statement of his views on this matter. His reply to our letter is attached as Exhibit V, (buff pages). We believe that there is

considerable merit to the solution suggested by Justice Kaus. However, we also believe that a study should be prepared on this matter before the Commission makes a recommendation for a new "privilege." This is more than merely making a slight revision in an existing section. We see no possibility of preparing such a study in time to permit us to prepare a recommendation to the 1967 legislative session. Hence, we suggest that this matter be deferred pending preparation of a research study and that such study be given a fairly low priority on staff time.

Section 1040 (not in tentative recommendation)

Attached as Exhibit IV (green pages) is a letter from Mr. Bein, Deputy District Attorney of San Diego County. After we had discussed this matter at a recent meeting, the staff discovered two sections of the Welfare and Institutions Code that make certain information received by a district attorney (concerning aid to needy children) confidential. These sections might be construed to provide protection to the communications between a district attorney and a private citizen concerning possible violations of Section 270 of the Penal Code (failure to support child). If they do not, a modest amendment to one or both of the sections would make it clear.

The staff recommends that the Commission take no action on this matter. We believe that the Evidence Code provisions are sound and made no significant change in prior law. We believe that a change to provide more protection to official information would be contrary to the current trend at the national and state level.

The Commission agreed to reconsider this matter if Mr. Bein could provide us with information showing that there was general concern among the various district attorneys. So far he has not provided us with such information.

Section 1042 (not in tentative recommendation)

It should be noted that subdivision (c) of Evidence Code Section 1042 was held unconstitutional by the Second District Court of Appeal in Martin v. Superior Court, 242 A.C.A. 573 (May 1966). This subdivision provides that information communicated to a peace officer by a confidential informer concerning a narcotics violation is admissible on the issue of probable cause for an arrest or search without a warrant without having to disclose the identity of the informer. The subdivision was not included in the Evidence Code as enacted but was added by subsequent legislation at the 1965 legislative session.

We recommend that no action be taken with respect to this subdivision until the California Supreme Court has determined whether the subdivision is constitutional.

Section 1201 (page 27)

There were no objections to this section.

Section 1152

In April, 1965, Charles T. Van Deusen made a suggestion concerning this section, but it was not possible to consider the suggestion before the Evidence Code was enacted. Mr. Van Deusen recently requested that the Commission consider the suggestion with a view to including it in the Commission's recommendation to the 1967 legislative session.

Mr. Van Deusen suggests that Evidence Code Section 1152 be amended to read:

> 1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims ~~to have~~ that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it.
> (b) [no change]

See Exhibit X (yellow pages) for the letter from Mr. Van Deusen giving the reason for this change. Briefly, he is concerned that the conduct or statements covered by Section 1152 relate to past liability only and that in an eminent domain proceeding the parties really negotiate concerning future liability. To make clear that Section 1152 applies to eminent domain proceedings, he suggests the revision set out above.

We do not believe that the addition is necessary. The Comment to Section 1152 indicates clearly that the section was intended to change the rule in the Forster case which was an eminent domain case. The Comment also refers to the Glen Arms Estate case, another eminent domain case. In fact, almost all of the discussion of this section has been in connection with eminent domain cases. Nevertheless, the addition may be a clarifying one that the Commission will wish to make. In this connection, does the revision introduce any ambiguity into the section?

Penal Code Sections 1093 and 1127 (pages 28-30)

There were no objections to the revision of these sections. However, the Joint Report correctly notes that this recommendation is to deal with revision of the Evidence Code. The staff suggests that we prepare a separate recommendation on the two Penal Code sections for consideration at the next meeting.

Sections 1600, 1602, 1603, 1604, and 1605 (Minutes of May 27-28 Meeting, pages 14-15

Various groups that we have contacted concerning these Evidence Code sections have requested to be advised of the Commission's determinations and have indicated that they would give us their views. The California Land Title Association has a subcommittee working on these sections (and some of the

sections in the Public Resources Code). The subcommittee has requested that we provide them with all available material and we have sent them the memorandum prepared by the staff which was considered by the Commission at the May 27-28 meeting and the Minutes of that meeting. It is difficult, however, to obtain reactions from interested persons unless they have something specific to approve, disapprove, or revise.

The Joint Report approves the Commission's determinations with respect to Sections 1600, 1602, 1603 and 1604 and reports that the judges await news of the Commission's action with respect to Section 1605. We plan to bring this matter up for discussion at our August meeting. By the time of that meeting, we hope to have some suggestions from the California Land Title Association.

Evidence in Eminent Domain Statute (not in tentative recommendation)

The Joint Report (pages 17-19) reports that some confusion has arisen in the trial of eminent domain actions since the enactment of Code of Civil Procedure Sections 1270-1272.4 (recodified as Evidence Code Sections 810-822). We do not believe that the problem is a serious one and undoubtedly, if it is, it will be resolved by a court decision prior to the 1967 legislative session.

The staff suggests that the Commission not deal with this problem in the recommendation to the 1967 legislative session. However, we will have to make a study of this statute in connection with our study of condemnation law and procedure and will have to make necessary revisions to conform to our decisions on the substantive law of compensation.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Mem. 66-39

EXHIBIT II

EXTRACT

from

ETTER, DATED FEBRUARY 11, 1966, FROM JUDGE PHILIP H. RICHARDS, CONSULTANT

OMMITTEE ON BAJI AND COMMITTEE ON CALJIC

The Committee discussed the proposed Section 669 relating to the presumption of negligence from a statutory violation and are pleased that the Commission recognized the advisability of classifying this presumption in the Evidence Code. However, I have some personal observations to make on the wording of the proposed section for whatever they may be worth.

My basic concern is whether the proposed section adequately covers the existing negligence per se presumption. As Witkin says, California Law, Vol. 2 page 1423: "What constitutes due care under the circumstances is ordinarily a question of fact for the jury in each case. But the proper conduct of a reasonable person may become settled by judicial decision, or be prescribed by statute or ordinance, and conduct below this standard is negligence per se, or negligence as a matter of law."

Ordinarily, "due care" is a question of fact for the jury, but negligence per se is not necessarily equated to the failure to exercise due care. The statute fixes the standard, a violation of which may or may not be a failure to exercise what otherwise would be due care. In Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 587, the Supreme Court says: "The standard of care to which ordinarily one must conform is usually that of the ordinarily prudent or reasonable person under like circumstances [citations]. But the proper conduct of a reasonable person under particular situations may become settled by judicial decisions or prescribed by statute or ordinance. . . An act or failure to act below the statutory standard is negligence per se, or negligence as a matter of law. And if the evidence establishes that the plaintiff's or defendant's violation of the statute or ordinance proximately caused the injury and no excuse or justification for violation is shown by the evidence, responsibility may be fixed upon the violator without other proof of failure to exercise due care."

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Prosser on Torts, 3d Ed. at p. 502, expresses the same idea. In Alarid v. Vanier, 50 Cal.2d 617, the court says: "The presumption of negligence which arises from the violation of the statute," etc. It did not say: "The presumption of failure to exercise due care." In California "Words, Phrases and Maxims", under "Negligence", beginning on page 87, is a long list of California decisions using the term "negligence per se" as the resultant of a statutory violation. This is a long way around to state the basic proposition that while "lack of due care" is the standard to establish negligence generally, in statutory violations the standard is established by the statute itself.

So far as I know, our present Instruction 149 (Revised) has never been criticized as to the opening sentence, which reads: "If a party to this action violated the [statute]. . . just read to you, a presumption arises that he was negligent."

Another point in the proposed Section 669 disturbs me. The presumption of negligence per se as it now exists relates only to the fact of negligence. The presumption arises whether or not the negligent act was the proximate cause of the injury. Proximate cause is involved in the substantive law of actionable negligence. The purpose of the presumption is to establish the assumed fact of negligence and not to establish an entire cause of action.

I wonder, too, if subdivision (b) of proposed Section 669 is necessary. Unquestionably it states the present law. Among the presumptions in Article 4 only Sections 661 and 662 state the quantum of proof to "rebut" the presumption, and each of these require "clear and convincing proof". My concern is whether it is wise to freeze the Alarid rule as to the sufficiency of evidence to overcome the presumption into a statute.

With considerable temerity I submit the following suggested revision of proposed Section 669:

> "669. A person who violated a statute, ordinance, or regulation of a public entity, is presumed to have been negligent if: (1) a death or injury to person or property resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (2) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted."

Memo 66-39

EXHIBIT III

COUNTY OF LOS ANGELES

OFFICE OF THE DISTRICT ATTORNEY

600 HALL OF JUSTICE
LOS ANGELES, CALIFORNIA 90012

EVELLE J. YOUNGER, DISTRICT ATTORNEY
HAROLD J. ACKERMAN, CHIEF DEPUTY
LYNN D. COMPTON, ASSISTANT DISTRICT ATTORNEY

May 24, 1966

J. MILLER LEAVY, CHIEF, TRIALS DIVISION
ALLAN H. McCURDY, CHIEF, BRANCH AND AREA OFFICES DIVISION
JOSEPH L. CARR, CHIEF, COMPLAINT AND CITY PRELIMINARY DIVISION
HARRY WOOD, CHIEF, APPELLATE DIVISION
A. B. NATHANSON, CHIEF, MAJOR FRAUD DIVISION
JUNE SHERWOOD, FIELD DEPUTY

Mr. Joseph B. Harvey
Assistant Executive Secretary
California Law Revision Commission
30 Crothers Hall
Stanford, California 94305

Dear Mr. Harvey:

During the District Attorneys' Institute held in Los Angeles on February 3, 1966, I spoke to you with regard to the quantum of proof necessary to establish that a confession was made freely and voluntarily, or to establish that the Escobedo-Dorado rules have not been violated. As I indicated to you it is the position of this office that the quantum of proof required is not "beyond a reasonable doubt." Apparently you were in agreement.

However, after reviewing the Evidence Code, this office is concerned that an argument might be made that under the Evidence Code the prosecution is given the burden of establishing such matters beyond a reasonable doubt.

According to the comment to Section 405 of the new Evidence Code:

> "Under the Evidence Code, however, the court is required to withhold a confession from the jury unless the court is persuaded that the confession was made freely and voluntarily."

No indication is given in that comment as to the degree of persuasion that is required and there is nothing which explicitly seems to indicate the degree of proof. However, the comment to Section 501 of the Evidence Code states that that section:

> ". . . makes it clear that, when a statute assigns the burden of proof to the prosecution in a criminal action, the prosecution must discharge that burden of proof beyond a reasonable doubt."

Thus, it could be argued that we will have to prove the voluntariness of a confession to the satisfaction of a judge "beyond a reasonable doubt."

I am enclosing herewith a memorandum prepared by this office which indicates the reasons why we believe such a view is unsound. We would suggest that this matter might be further clarified by the Law Revision Commission in order that the present uncertainty surrounding the effect of the Evidence Code in this regard be dispelled.

We would appreciate any consideration that the Law Revision Commission may give to this matter, and if this office can be of any help in this regard, please do not hesitate to let me know.

Sincerely,

EVELLE J. YOUNGER
District Attorney

By Harry B. Sondheim

HARRY B. SONDHEIM
Deputy District Attorney

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Enclosure

Memo 66-39

EXHIBIT III

COUNTY OF LOS ANGELES

OFFICE OF THE DISTRICT ATTORNEY

600 HALL OF JUSTICE
LOS ANGELES, CALIFORNIA 90012

EVELLE J. YOUNGER, DISTRICT ATTORNEY
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California Law Revision Commission
30 Crothers Hall
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> ". . . makes it clear that, when a statute assigns the burden of proof to the prosecution in a criminal action, the prosecution must discharge that burden of proof beyond a reasonable doubt."

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Sincerely,

EVELLE J. YOUNGER
District Attorney

By Harry B. Sondheim

HARRY B. SONDHEIM
Deputy District Attorney

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Enclosure

DEGREE OF PROOF REQUIRED IN ORDER FOR STATEMENTS OF DEFENDANT TO BE ADMITTED FOR CONSIDERATION BY A JURY

This memorandum reviews the degree of proof required in the procedures established by New York in accordance with Jackson v. Denno 378 U.S. 368 and People v. Huntley (1965) 15 N.Y. 2d 72, 255 N.Y.S. 2d 838. These procedures are described in an attachment to the letter of Judge Rittenband dated July 6, 1965 and addressed to Judge Chantry. The conclusions reached herein may be stated as follows:

1. Nothing stated in Jackson v. Denno compels the requirement that the voluntariness of a statement be found "beyond a reasonable doubt" before it is submitted to the jury during the trial, as is the procedure in New York;

2. In California, it would appear proper to require a degree of proof which is less than "beyond a reasonable doubt" before a statement is admitted.

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JACKSON V. DENNO

A majority of the Court in Jackson v. Denno, 378 U.S. 368 held that before a statement may be submitted to a jury which is considering the guilt or innocence of a defendant, there must be a preliminary inquiry separate and apart from the hearing on the guilt or innocence which leads to a reliable and clear-cut determination of the voluntariness of the statement, including the resolution of disputed facts upon which the voluntariness issue may depend. The opinion of the Court gives no guidance whatsoever as to what degree of proof is required during that proceeding before the statement is admissible. As stated by Justice Black in his dissenting and concurring opinion:

> "Another disadvantage to the defendant under the Court's new rule is the failure to say anything about the burden of proving voluntariness. The New York rule does now and apparently always has put on the State the burden of convincing the jury beyond a reasonable doubt that a confession is voluntary. See Stein v. New York, supra, 346 U.S., at 173 and n. 17, 73 S.Ct., at 1087; People v. Valletutti, 297 N.Y. 226, 229, 78 N.E. 2d 485, 486. The Court has not said that its new constitutional rule, which requires the judge to decide voluntariness, also imposes on the State the burden of proving this fact beyond a reasonable doubt. Does the Court's new rule allow the judge to decide voluntariness merely on a preponderance of the evidence? If so, this is a distinct disadvantage to the defendant. In fashioning its new constitutional rule, the Court should not leave this important question in doubt." 378 U.S. at 404-405; 84 S.Ct. at 1795-1796.

Thus, at the present time the degree of proof would appear to be an open question and each state, subject to possible limitations imposed by the United States Supreme Court, pursuant to constitutional prerequisites, should be free to adopt its own standards of degree of proof in accordance with its own appropriate procedures and law.

II

THE NEW YORK RULE

The degree of proof required in New York before a statement can be considered by the trial jury, as is stated in the attachment to Judge Rittenband's letter, is "beyond a reasonable doubt." This degree of proof, however, is the degree of proof which was required in New York even prior to Jackson v. Denno, as is noted in the quotation from Justice Black, set forth above. Consequently, New York, in adopting procedures pursuant to Jackson v. Denno, merely continued to perpetuate a pre-existing burden of proof.

It should be noted that the burden of proof existing prior to Jackson v. Denno in some jurisdictions other than New York before a statement would be deemed admissible for consideration by a trial jury was not as onerous as that provided under the New York rule. Thus, in People v. Scott, (1963) 29 Ill. 2d 97, 193 N.E. 2d 814 it was held that upon preliminary inquiry into the voluntary nature of a confession, the question of its competency is for the trial court; and in making its decision, that court is not required to be convinced of its voluntary nature beyond a reasonable doubt. Similarly, in Arkansas, it is not required that the judge, upon a preliminary inquiry, be convinced beyond a reasonable doubt that a statement was freely and voluntarily made. See: Forrester v. State, (1954) 224 Ark. 194, 272 S.W. 2d 320, Hall v. State, 125 Ark. 263, 188 S.W. 801 (1916).

III

THE LAW IN CALIFORNIA

In California the degree of proof required before a statement can be heard by the jury has not been adequately considered in the reported cases. Generally, such cases merely indicate that the initial determination is a matter of discretion for the trial court, and the trial court's discretion will not be overturned unless, as a matter of law, the statement should have been held to have been inadmissible. Thus, for example, in People v. Mehaffey, 32 Cal. 2d 535 (1948) the court stated as follows:

"[B]ut whether a confession is of that character [voluntary] is a preliminary question addressed to the trial court . . . and a considerable measure of discretion must be allowed that court in determining it . . . ." (32 Cal. 2d at 548; citations omitted)

However, it would appear that the degree of proof appropriate to the admissibility of a confession should be no different from the degree of proof relating to the admissibility of other evidence whose competency the trial court must pass upon. Penal Code Section 1102 states as follows:

"The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code."

While the rules set forth in the reported cases relating to the admissibility of evidence in civil cases are also unenlightening since usually it is merely said to be a matter of sound discretion without any explanation of the degree of proof required, it would certainly be true that the degree of proof need not be beyond a reasonable doubt. Thus, since there is nothing contained in the Penal Code which provides otherwise (as is required in Penal Code Section 1102), the degree of proof required for the admissibility of a statement should be less than beyond a reasonable doubt.

Indeed, it should be noted that in comparable situations proof beyond a reasonable doubt has not been required in criminal cases. As stated in People v. McMonigle 29 Cal. 2d 730, 742 (1947), "The quantum of evidence, if it is relevant to a fact in issue, does not enter into the question of its admissibility." (Emphasis in original.) Thus, recently the California Supreme Court stated that during the trial on the issue of guilt, "the jury must only be convinced that it is more probable than not that the defendant committed other crimes before it may consider them." People v. Polk, 62 A.C. 951, 963 (1965). Because of policy reasons, the court went on to then create what it deemed to be an exception to the normal rule relating to the trial on the issue of penalty in that it required the jury on the issue of penalty to be convinced beyond a reasonable doubt that the defendant committed other crimes before it might consider them.

There would appear to be no policy reason for requiring proof beyond a reasonable doubt during the trial on the guilt of the defendant with reference to the admissibility of a purported voluntary statement. Indeed, (with one exception) it has often been held that the doctrine of reasonable doubt only applies to the guilt of the defendant, and not to any particular item of

evidence from which a determination of guilt can be made. See People v. Lisenba, 14 Cal. 2d 403, 429-430 (1939), quoting Lund v. State, 207 Ind. 347, 190 N.E. 850 (1934); People v. McMonigle, 29 Cal. 2d 738 (1947). That exception relates to proof of guilt by means of circumstantial evidence for which it is required that each fact which is essential to complete a chain of circumstances that will establish defendant's guilt must be proved beyond a reasonable doubt. People v. Watson, 46 Cal. 2d 818 (1956). This exception may perhaps be based upon the inherent distrust of circumstantial evidence as distinguished from direct evidence, even though in California both are deemed to be appropriate means of proving guilt. However, it should be noted that out-of-court statements made by a defendant are not to be tested by the standards relating to circumstantial evidence (People v. Gould, 54 Cal. 2d 621 [1960]), and thus the policy reasons requiring proof beyond a reasonable doubt in the case of circumstantial evidence would not appear to apply to out-of-court statements.

In short, it may be concluded that the degree of proof required before a purported voluntary statement can be admitted by the trial court for consideration by the jury should be a standard less than "beyond a reasonable doubt."

Unfortunately, those few cases which have discussed this issue appear to have failed to consider the general principles set forth above, and, indeed, do not appear to have even analyzed or probed the various considerations which would appear to be appropriate to the formulation of a rule relating to the degree of proof required. Thus, in People v. Fouts, (1923) 61 Cal. App. 242, the court stated as follows:

> "Under such circumstances it was the duty of the trial judge, in the first instance, to determine whether the evidence showed beyond a reasonable doubt that the confession was free and voluntary (People v. Zarate, 54 Cal. App. 372 [201 Pac. 955])." 61 Cal. App. at 243-244.

However, the case relied upon in People v. Fouts, (namely, People v. Zarate) did not discuss the standard which was to be used by the trial court in determining the admissibility of a confession. Indeed, that case merely held that an instruction to the jury which told the jury that they must find the confession was freely and voluntarily made beyond a reasonable doubt, was a proper instruction when considered in the context of the entire instruction. It should be noted that in Zarate the court does not even hold that the jury must find the confession to be free and voluntary beyond a reasonable doubt, because the parties did not litigate the propriety of this portion of the instruction, since the issue the appellant raised was that the trial court had erred in stating to the jury that it had ruled on the question of

the free and voluntary character of the confession of the appellant. Also, Fouts considered the question of proof required in a preliminary determination by a judge, while Zarate referred to a jury instruction. Thus, People v. Fouts cannot be considered as adequate authority for the proposition which it states and, indeed, People v. Fouts has never been cited for that proposition in any subsequent case.

Recently, the California Supreme Court stated as follows:

> "In other words, trial judges in criminal cases should give a defendant the benefit of any reasonable doubt when passing on the admissibility of evidence, as well as in determining its weight." People v. Murphy (1963) 59 Cal. 2d 818, 829.

Although this quotation would appear to indicate that a reasonable doubt standard must be adopted in determining the admissibility of a confession, it is submitted that in fact the quoted statement would not appear to be adequate authority in the context of the issue presented in this present memorandum. In People v. Murphy, the court dealt with a ruling by the trial court that certain evidence which the defendant desired to produce should not be admitted. Thus, the Supreme Court was indicating in People v. Murphy that where the defendant desires to produce evidence, the admissibility of such evidence should be judged by a reasonable doubt rule favoring its admissibility. This does not, however, mean that where the prosecution desires to introduce evidence, the inadmissibility of such evidence should be guided by a reasonable doubt rule favoring its exclusion. For the reasons which were stated in the beginning of Point III of this memorandum, it would appear that the appropriate standard when determining the inadmissibility of an out-of-court statement is less than a reasonable doubt rule.

In the second edition of the treatise by McBaine entitled "California Evidence Manual" it is stated:

> "A finding that a confession was free and voluntary must be supported by circumstantial evidence, evidence which justifies the conclusion that it is more probable that it was voluntary than that it was involuntary." (Section 855, page 290 of that treatise.)

However, probably for the reason that none of the cases are really explicit on this issue of law, no authority is cited for this proposition.

Some analogous problems are presented by both the admission of spontaneous declarations and the admission of dying

declarations, since both of these are first considered by the court and then re-considered by the jury, just as is true of confessions. Unfortunately, here again there is not much discussion in the reported cases as to the degree of proof required, and the little discussion which is found in the cases does not appear to be a very probing or considered analysis of the problem involved.

In People v. Singh (1920) 182 Cal. 457, it was stated as follows:

> "If the jury is not convinced beyond a reasonable doubt that the declarant was in extremis and believed at the time that he was, they must, in arriving at their verdict, disregard such declarations. But if, on the other hand, the jury are [sic] satisfied beyond a reasonable doubt that the declarant acted under a sense of impending death, they must then determine what facts, if any, are established by his declarations and apply them accordingly. (People v. Glenn, 10 Cal. 32; People v. Lem You, 97 Cal. 224, [32 Pac. 11]; People v. Thomson, 145 Cal. 717, [79 Pac. 435]; People v. Profumo, 23 Cal. App. 376, [138 Pac. 109]; Greenleaf on Evidence, sec. 161.)" 182 Cal. at 476.

With the exception of People v. Profumo, none of the authorities cited in the quotation above stands for the proposition that the proof must be beyond a reasonable doubt. Although People v. Profumo does state that the jury must be satisfied beyond a reasonable doubt, it in turn relies upon the case of People v. Thomson, 145 Cal. 717 (1905) which merely stated that the jury should give a statement "no consideration whatsoever unless they are satisfied that it was made by the deceased under such sense of impending death." 145 Cal. at 725. Thus, People v. Profumo without explanation has changed the character of the test set forth in People v. Thomson. In any event, as was true with People v. Fouts, People v. Singh has never been cited by any subsequent case with regard to the quantum of proof, although the sentence relating to quantum of proof is quoted in subsequent cases. See, for example, People v. Keelin (1955) 136 Cal. App. 2d 860, in which there appears to be no discussion or issue relating to the actual quantum of proof which is required by the judge before he permits a dying declaration or spontaneous declaration to be considered by the jury. Indeed, it should be noted that in People v. Keelin, the instruction given to the jury contained no indication as to what quantum of evidence was necessary for the jury to find that the statement was a dying declaration. In any event, even if under the language of People v. Singh, the jury must find beyond a reasonable doubt that the declaration was made in extremis, this does not mean

that the preliminary determination by the trial court must be beyond a reasonable doubt. Thus, in People v. Profumo, supra, the court held that although the jury must be satisfied beyond a reasonable doubt, the court must only be "reasonably satisfied." 23 Cal. App. at 378.

CONCLUSION

Neither the cases nor the commentaries such as law reviews or treatises appear to adequately discuss this problem. Indeed, the most adequate discussion that has been found was written in 1897 in what may be considered a relatively obscure treatise entitled, "Indirect and Collateral Evidence" by John H. Gillett and states as follows:

> "There are authorities to the effect that the judge should exclude the confession if he has any reasonable doubt as to its competency, and that if he admits it he should direct the jury not to give it any weight unless satisfied beyond a reasonable doubt that it was voluntary. It is believed, however, that these two propositions can not be given unrestricted application. No doubt, the judge should exclude the confession in cases where the evidence without conflict generates a reasonable doubt as to whether the confession was voluntary, but, where there is a conflict of evidence on that subject, a question of fact is presented which may be submitted to the jury. As to the duty of the jury, it may be said that if the case is one where, after proof of the corpus delicti, the whole evidence against the defendant is his confession, he ought not to be convicted unless the evidence shows beyond a reasonable doubt that it was voluntary. In such a case a reasonable doubt as to whether the confession should be given weight is the equivalent of a reasonable doubt as to guilt. But in cases where there is other evidence which, if true, would work a conviction of the defendant, an instruction that the jury should disregard the confession unless satisfied beyond a reasonable doubt that it was voluntary, would be clearly wrong, for it is not the law that the doctrine of reasonable doubt is to be applied to each item of testimony. The test question in such a case is, does a reasonable doubt remain as to the guilt of the defendant after all the evidence has been introduced?" (Section 120, pages 168-169; footnotes omitted)

#63

June 3, 1966

Mr. Harry B. Sondheim
Deputy District Attorney
County of Los Angeles
600 Hall of Justice
Los Angeles, California 90012

Dear Mr. Sondheim:

My personal analysis of the requirements of the Evidence Code on the question of the quantum of proof required to establish the admissibility of a confession is as follows:

Section 115 of the Evidence Code states that the burden of proof always requires proof by a preponderance of evidence except where the law otherwise specifically requires. Section 501 provides that any allocation of the burden of proof in a criminal action is subject to Penal Code Section 1096. Inasmuch as Section 501 is the only provision in the Evidence Code that may alter the general rule stated in Section 115 so far as criminal actions are concerned, Section 115 requires that the prosecution establish the admissibility of evidence under Section 409 by a preponderance of the evidence unless Penal Code Section 1096 provides something different. Penal Code Section 1096 provides that a defendant in a criminal action is presumed to be innocent until the contrary is proved and that the prosecution has the burden of proving him guilty beyond a reasonable doubt. Penal Code Section 1096 is concerned only with the guilt or innocence of the defendant. It relates only to proof of the elements of the crime charged. It is not concerned with other issues such as the admissibility of evidence. The presumption is of innocence of the charged crime, not of the involuntary nature of a confession, the illegality of a search, the unavailability of hearsay declarants, the incompetence of prosecution experts, the existence of privileges invoked by the defendant, etc. Inasmuch as Penal Code Section 1096 is concerned only with guilt or innocence, neither it nor Evidence Code § 501 (which merely incorporates Section 1096 by reference) provides an exception to the general rule prescribed in Section 115 as to the quantum of proof of admissibility that must be shown under Section 405. Therefore, the burden of proof the prosecution must bear on any factual issue under Section 405 (where it has the burden) is the burden of proof by a preponderance of the evidence.

10

The above analysis expands upon the scope of Penal Code Section 1096. That Section 1096 is concerned only with the elements of guilt and not with other issues that have nothing to do with guilt or innocence is evident from the language of Section 1096 itself. It is also evident from the California cases which have not required proof beyond a reasonable doubt on a variety of issues that do not go to guilt or innocence. See Witkin, California Evidence § 57 (1958). Note particularly the discussion in People v. McGill, 10 Cal. App.2d 155, 51 P.2d 433 (1935).

The weakness in the above analysis lies in the fact that the Commission used "law" in Section 115 and not "statute." Therefore, it is possible to argue that decisional law in California requires that the trial judge be persuaded of the admissibility of a confession beyond a reasonable doubt. But such an argument must be predicated on the decisional law in California, not on the language of the Evidence Code itself. The state of the existing decisional law is well discussed in the memorandum attached to your letter. That memorandum seems to overlook, however, the quantum of the proof required on other issues tried by the judge alone. A judge who must decide this issue should be aware of the fact that it is indistinguishable in principle from a question of admissibility that turns on the legality or illegality of an arrest. In both instances a question of admissibility involving a constitutional right is involved. In both instances the factual dispute does not revolve around an element of the offense. Logically, the same standards of proof should be required. Although I haven't thoroughly researched the matter, it appears from the little I have done, however, that the courts are no more explicit on the quantum of proof required in illegal search cases than they are in confession cases. Frequent use of the term "discretion" appears. Nevertheless, the standards of proof on this and other issues tried by the judge alone should be thoroughly explored. This would include exceptions to privileges invoked by the defendant, qualifications of experts, proof of writing exemplars, etc.

The important question, of course, is whether the Law Revision Commission should clarify the matter. I will bring the matter to the attention of the Commission if you so desire. But you should be aware that the result of opening the matter up may well be that the law will be revised to make it clear that proof beyond a reasonable doubt is required. In deciding whether you want the Commission to consider the matter, you should attempt to assess your chances with the Legislature (who will decide what goes in the statute no matter what the Commission recommends) and with the courts. Let me know if you want the Commission to consider the matter, and if you do, I will present the problem to the Commission.

Very truly yours,

Joseph B. Harvey
Assistant Executive Secretary

JBH:vh

COUNTY OF LOS ANGELES
OFFICE OF THE DISTRICT ATTORNEY

600 HALL OF JUSTICE
LOS ANGELES, CALIFORNIA 90012

June 30, 1966

Mr. Joseph B. Harvey
Assistant Executive Secretary
California Law Revision Commission
30 Crothers Hall
Stanford, California 94305

Dear Mr. Harvey:

After reviewing our correspondence regarding the problem that I have previously posed to you, namely the burden of proof which must be sustained by the prosecution in order that a confession be admissible, I have concluded that this matter should be brought to the attention of the Law Revision Commission for further clarification. I certainly believe that the only correct standard which could be adopted is that we must sustain the burden by the preponderance of the evidence, but if the law is to be otherwise, the prosecution should be made aware of this as soon as possible instead of leaving the matter unresolved and subject to further litigation.

Thank you for bringing this matter to the attention of the Commission. If I can be of any help in this regard, please do not hesitate to let me know.

Very truly yours,

EVELLE J. YOUNGER
District Attorney

By Harry B. Sondheim

HARRY B. SONDHEIM
Deputy District Attorney

vh

Memo 66-39

EXHIBIT IV

County of San Diego

OFFICE OF

DISTRICT ATTORNEY

COURTHOUSE

SAN DIEGO, CALIFORNIA 92112

JAMES DON KELLER
DISTRICT ATTORNEY

ROBERT J. STAHL, JR.
Assistant District Attorney

ROBERT L. THOMAS
Chief Deputy District Attorney

EUGENE D. ALLEN
Chief Investigator

June 17, 1966

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

Dear Mr. DeMoully:

Thank you for your letter of May 31, 1966.

I do not believe Sections 10850 and 11478 of the Welfare and Institutions Code, either together or separately, provide a clear answer to whether communications between a district attorney and an applicant for or recipient of aid to needy children are confidential. These Sections appear to be directed to the confidentiality of information received by a district attorney from other agencies as distinguished from information received by a district attorney directly from the applicant or recipient--and it is the latter communication which is our concern.

And, as I explained to the Commission, our concern is not restricted to communications between a district attorney and a private citizen concerning possible violations of Section 270 of the Penal Code but, instead, is directed to the confidentiality of communications between law enforcement officers and private citizens concerning the commission of public offenses, generally. We are, therefore, interested in pursuing the suggestion made during the Commission meeting that Section 1040 of the Evidence Code be amended to provide that when a public officer invokes his privilege in a court, the presumption is that the public interest would suffer by the disclosure of the particular information sought and that the court must find that the public interest in seeing that justice be done in a particular case clearly outweighs the public interest in the secrecy of the information.

I understand and respect your views in this matter. Indeed, I appreciated your having expressed them during the Commission meeting as, by having both sides expressed, I believe the Commission was provided with a better opportunity to study all aspects of the questions presented.

The significant fact is that but for the agreement to keep things confidential, the revelation would not have been made, therefore, such a rule would not suppress otherwise available evidence. This is the philosophy of Murphy v. Waterfront Commission, 378 U. S. 52, 79.

Sincerely,

OMK:jg

Memo 66-39 EXHIBIT V

District Court of Appeal
State of California
State Building, Los Angeles

Otto M. Kaus
Justice

June 6, 1966

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 93405

Dear John:

Thank you for your letter of June 3 about Simrin v. Simrin, 233 Cal. App. 2d 90.

Of course, it is difficult to tell whether Simrin purports to create a new privilege or merely says that in this particular instance it is all right to enforce a contract to suppress evidence. The writer of the note in 13 U.C.L.A. Law Review 178 seemed to think that it created a privilege and that section 911 of the Evidence Code killed it.

Personally, I think that the suggestion that the rule of Simrin might be preserved by way of expanding the provisions of section 1152 of the Evidence Code is worthwhile. After all the court in Simrin relied upon the analogy to "statements that are made in offer of compromise and to avoid or settle litigation." Without trying to draft a section, it seems to me, that it should provide that where a husband and wife, for the purpose of preserving a marriage which is on the rocks, repose confidences in a third person who is mutually chosen by them to help patch things up and where they expressly agree that their communications to him would be confidential, then either of the parties may properly object to any statements made by either to such third person.

Personally, I do not believe that it should make much difference whether the third person is a doctor, a marriage counselor, a priest, a rabbi or friend of the family.

Memo 66-39

EXHIBIT VI

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
198 McALLISTER STREET
SAN FRANCISCO, CALIFORNIA 94102

J. WARREN MADDEN

February 14, 1966

Mr. John H. DeMoully
Executive Secretary
The California Law Revisions Commission
Room 30, Strothers Hall
Stanford, California

Dear Mr. DeMoully:

This letter is in response to your letter of January 2, 1966.

1. I agree with the suggestion of paragraph 1 of your letter. You have no doubt seen the case of People v. Oats, 48 Cal. Rep. 579. Nevertheless I think it would be prudent to anticipate the extension of the Jackson v. Denno philosophy. Your proposed rule would be definite and easy for a trial court to follow, and such repetition of testimony as it would involve would be worth what it would cost.

2. I agree with what is proposed in paragraph 2 of your letter.

3. I agree with the proposal to add the two new sections discussed in paragraphs 4, 5 and 6 of your letter, and with the classifications which you would assign to the new presumptions.

With regard to all of the presumptions affecting the burden of producing evidence, I foresee that trial judges will have difficulty in framing instructions advising the jury that inferences which may be drawn from the evidence which gave rise to the presumption should be weighed against the contrary evidence. The problem is a subtle one and I think that to leave all the trial judges at large to compose their own instructions will produce an intolerable amount of appellate litigation. Would it not be well for the Commission to write one or some instructions which would, by the authority of the code, be free of error?

5. I agree with what is proposed in paragraph 7 of your letter.

6. I agree with what is proposed in paragraph 8 of your letter.

7. I would amend section 1017 of the code in the way suggested in paragraph 9 of your letter.

8. I think the proposed amendment of section 1201 of the code is desirable.

9. I agree with the proposed amendments of sections 1093 and 1127 of the Penal Code.

10. I have no useful opinion as to whether or not the proposed changes should be presented to the budget session of the legislature.

Yours truly,

J Warren Madden

Professor of Law

EXHIBIT VII

Memo 66-39 Minutes 1/12/66

206 (Evid. Code Revision)

RES IPSA LOQUITUR: THE INFERENCE OF NEGLIGENCE

PRESUMPTION DISPELLED

Note: Under existing California law the doctrine of res ipsa loquitur appears to function as an Evidence Code presumption affecting the burden of producing evidence and this instruction and Instruction 206.1 (New) have been drafted on the assumption that the doctrine will be so classified either by amendment to the Evidence Code or by judicial decision.

Treated as a presumption affecting the burden of producing evidence (Evidence Code § 604), the presumption of negligence arising from the establishment of the conditional facts vanishes where there is evidence sufficient to sustain a finding of the nonexistence of defendant's negligence. However, an inference of defendant's negligence may still be drawn from the conditional facts upon which the res ipsa loquitur doctrine is based.

This form is to be used where the presumption of defendant's negligence is no longer operative because of contrary evidence but where an inference of defendant's negligence may still be drawn from the conditional facts.

This form is to be used alone only where the conditional facts are established by uncontradicted evidence or admission. Where the conditional facts are in dispute, this instruction must be preceded by 206-A(Revised) or 206-B (Revised), or both, depending upon the facts.

From the happening of the accident involved in this case, an inference may be drawn that a proximate cause of the occurrence was some negligent conduct on the part of the defendant.

If you draw such inference of defendant's negligence then, unless there is contrary evidence sufficient to meet or balance it, you will find in accordance with the inference.

In order to meet or balance such an inference of negligence, the evidence must show either (1) a definite cause for the accident not attributable to any negligence of defendant, or (2) such care by defendant that leads you to conclude that the accident did not happen because of defendant's lack of care but was due to some other cause, although the exact cause may be unknown. If there is such sufficient contrary evidence you shall not find merely from the happening of the accident that a proximate cause of the occurrence was some negligent conduct on the part of the defendant.

206.1 (Evid. Code New)

RES IPSA LOQUITUR: THE PRESUMPTION OF NEGLIGENCE

NO EVIDENCE DISPELLING PRESUMPTION

Note: This form is to be used alone only where it is established either by uncontradicted evidence or admission that the facts exist which give rise to the res ipsa loquitur doctrine and where there is no evidence sufficient to sustain a finding of the nonexistence of defendant's negligence.

Where the existence of the facts which give rise to the res ipsa loquitur is in issue but there is no evidence sufficient to sustain a finding of the non-existence of defendant's negligence, this instruction must be preceded by 206-A (Revised) or 206-B (Revised), or both, depending on the facts in dispute.

You will find from the happening of the accident involved in this case that a proximate cause of the occurrence was some negligent conduct on the part of the defendant.

206-A. (Revised)

Introduction to 206: Conditions to be Met Before the Doctrine may be Applied

Note: This instruction and 206 must be modified if more than one defendant is involved. This instruction should precede No. 206 (Revised) when there is a question whether the facts exist which give rise to the res ipsa loquitur doctrine. See Kite v. Coastal Oil Co., 162 Cal.App.2d 336, 328 P.2d 45; Rayner v. Ramirez, 159 Cal.App.2d 372, 324 P.2d 83; Borenkraut v. Whitten, 56 Cal.2d 538, 15 Cal.Rptr. 635, 364 P.2d 467; Guerrero v. Brown's Lumber Co., 196 Cal.App.2d 530, 16 Cal. Rptr. 628; Mahoney v. Hercules Powder Co., 221 A.C.A. 436, 34 Cal.Rptr. 468. In malpractice cases use new instruction 214-W rather than this form. See Seneris v. Haas, 45 Cal.2d 811, 291 P.2d 915, 53 A.L.R.2d 124; Salgo v. Leland Stanford, Jr., University Board of Trustees, 154 Cal.App.2d 560, 317 P.2d 170.

This form is adapted to a situation where the jury must determine whether all of the conditions for res ipsa loquitur are present. If one or two of these conditions exist as a matter of law they should be omitted from the instruction.

Include bracketed portion in third paragraph when there is evidence that the instrumentality which caused the injury was out of defendant's control for a time prior to the accident, and during that time was under the control of other persons. See Burr v. Sherwin-Williams Co., 42 Cal.2d 682, 268 P.2d 1041; Trust v. Arden Farms Co., 50 Cal.2d 217, 324 P.2d 583, 81 A.L.R.2d 332; Tallerico v. Labor Temple Ass'n, 181 Cal.App.2d 15, 4 Cal.Rptr. 880.

As to the meaning of exclusive control, see Owens v. White Memorial Hospital, 138 Cal.App.2d 634, 640, 292 P.2d 288, 292; Poulson v. Charlton, 224 A.C.A. 365, 36 Cal.Rptr. 347.

As to what constitutes action or contribution by plaintiff which precludes his reliance on the doctrine, see Guerrero v. Westgate Lumber Co., 164 Cal.App.2d 612, 331 P.2d 107. This must not be confused with contributory negligence. Shahinian v. McCormick, 59 Cal.2d 554, 30 Cal.Rptr. 521, 381 P.2d 377; Gillespie v. Chevy Chase Golf Club, 187 Cal.App.2d 52, 9 Cal.Rptr. 437; Dunn v. Vogel Chevrolet, 168 Cal.App.2d 117, 335 P.2d 492.

One of the questions for you to decide in this case is whether the accident [injury] involved occurred under the following conditions:

First, that it is the kind of accident [injury] which ordinarily does not occur in the absence of someone's negligence;

Second, that it was caused by an agency or instrumentality in the exclusive control of the defendant [originally, and which was not mishandled or otherwise changed after defendant relinquished control]; and

Third, that the accident [injury] was not due to any voluntary action or contribution on the part of the plaintiff.

If, and only in the event that you should find all these conditions to exist, you are instructed as follows.

206-B. (Revised)

Introduction to 206 When Accident and/or Injury Denied

Note: This instruction should precede No. 206 (Revised) when there is a question whether the alleged accident occurred (e. g., Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63. McMillen v. Southern Pacific Co., 146 Cal.App.2d 216, 303 P.2d 788), or, if the accident occurred, whether plaintiff was injured thereby.

Plaintiff claims there was an accidental occurrence; defendant denies it. If, and only in the event you should find that as claimed by plaintiff, there was an accidental occurrence [and plaintiff was injured thereby], then [you are instructed as follows:] * it will be your further duty to determine whether the accident [injury] involved occurred under the following conditions:

First, that it is the kind of accident [injury] which ordinarily does not occur in the absence of someone's negligence;

Second, that it was caused by an agency or instrumentality in the exclusive control of the defendant [originally, and which was not mishandled or otherwise changed after defendant relinquished control]; and

Third, that the accident [injury] was not due to any voluntary action or contribution on the part of the plaintiff.

If, and only in the event that you should find all these conditions to exist, you are instructed as follows.

*** If the three classic conditions for application of the res ipsa loquitur doctrine are established as a matter of law, the court should omit the balance of this instruction and proceed to give 206 (Revised) at this point.**

EXHIBIT VIII

REVISED COMMENT TO SECTION 646

SEC. 6. Section 646. is added to the Evidence Code, to read:

646. The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. If the facts that give rise to the presumption are found or otherwise established in the action and the party against whom the presumption operates introduces evidence which would support a finding that he was not negligent, the court may, and on request shall, instruct the jury as to any inference that it may draw from the facts so found or established.

Comment. Section 646 is designed to clarify the manner in which the doctrine of res ipsa loquitur functions under the provisions of the Evidence Code relating to presumptions.

The doctrine of res ipsa loquitur, as developed by the California courts, is applicable in actions to recover damages for negligence when the plaintiff establishes three conditions:

> (1) [T]he accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. [Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687 (1944).]

Section 646 provides that the doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. Therefore, when the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find the defendant negligent unless he comes forward with evidence that would support a finding that he exercised due care. EVIDENCE CODE § 604. Under the California cases such evidence must show either a specific cause for the accident for which the defendant

was not responsible or that the defendant exercised due care in all respects wherein his failure to do so could have caused the accident. See, e.g., Dierman v. Providence Hospital, 31 Cal.2d 290, 295, 188 P.2d 12 (1947). If evidence is produced that would support a finding that the defendant exercised due care, the presumptive effect of the doctrine vanishes. However, the jury may still be able to draw an inference of negligence from the facts that gave rise to the presumption. See EVIDENCE CODE § 604 and the Comment thereto. In rare cases, the defendant may produce such conclusive evidence that the inference of negligence is dispelled as a matter of law. See, e.g., Leonard v. Watsonville Community Hospital, 47 Cal.2d 509, 305 P.2d 36 (1956). But, except in such a case, the facts giving rise to the doctrine will support an inference of negligence even after its presumptive effect has disappeared.

To assist the jury in the performance of its fact-finding function, the court may instruct that the facts that give rise to res ipsa loquitur are themselves circumstantial evidence of the defendant's negligence from which the jury can infer that he failed to exercise due care. Section 646 requires the court to give such an instruction when a party so requests. Whether the jury should draw the inference will depend on whether the jury believes that the probative force of the circumstantial and other evidence of the defendant's negligence exceeds the probative force of the contrary evidence and, therefore, that it is more likely than not that the defendant was negligent.

At times the doctrine of res ipsa loquitur will coincide in a particular case with another presumption or with another rule of law that requires the defendant to discharge the burden of proof on the issue.

See Prosser, Res Ipsa Loquitur in California, 37 CALIF. L. REV. 183 (1949). In such cases the defendant will have the burden of proof on issues where res ipsa loquitur appears to apply. But because of the allocation of the burden of proof to the defendant, the doctrine of res ipsa loquitur will serve no function in the disposition of the case except to the extent that the facts giving rise to the doctrine may constitute evidence tending to rebut that produced by the party with the burden of proof.

For example, a bailee who has received undamaged goods and returns damaged goods has the burden of proving that the damage was not caused by his negligence. See discussion in Redfoot v. J. T. Jenkins Co., 138 Cal. App.2d 108, 112, 291 P.2d 134 (1955). Where the defendant is a bailee, proof of the elements of res ipsa loquitur in regard to an accident damaging the bailed goods while they were in the defendant's possession places the burden of proof on the defendant, not merely the burden of producing evidence. When the defendant has produced evidence of his exercise of care in regard to the bailed goods, the facts that would give rise to the doctrine of res ipsa loquitur may be weighed against the evidence produced by the defendant in determining whether it is more likely than not that the goods were damaged without fault on the part of the bailee. But because of the stronger force of the presumption of the bailee's negligence that arises from the same facts that support res ipsa loquitur, the presumption of negligence arising from res ipsa loquitur cannot have any effect on the proceeding.

Effect of the failure of the plaintiff to establish all the preliminary facts that give rise to the presumption. The fact that the plaintiff fails to establish all of the facts giving rise to the res ipsa presumption does not necessarily mean that he has not produced sufficient evidence of negligence to sustain a jury finding in his favor. The requirements of res ipsa loquitur are merely those that must be met to give rise to a compelled conclusion (or presumption) of negligence in the absence of contrary evidence. An inference of negligence may well be warranted from all of the evidence in the case even though the plaintiff fails to establish all the elements of res ipsa loquitur. See Prosser, Res Ipsa Loquitur: A Reply to Professor Carpenter, 10 SO. CALIF. L. REV. 459 (1937). In appropriate cases, therefore, the jury may be instructed that even though it does not find that the facts that give rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more likely than not that the defendant was negligent. Such an instruction would be appropriate, for example, in a case where there was evidence of the defendant's negligence apart from the evidence going to the elements of the res ipsa loquitur doctrine.

Examples of operation of res ipsa loquitur presumption

The doctrine of res ipsa loquitur may be applicable to a case under four varying sets of circumstances. First, the facts giving rise to the doctrine may be established by the pleadings, by stipulation, or by uncontradicted evidence and there may be no evidence sufficient to sustain a finding that the defendant was not negligent. Second, the facts giving rise to the doctrine may be established by the pleadings, by stipulation, or by uncontradicted evidence but the defendant may have produced evidence sufficient to sustain a finding of his exercise of due care. Third, the defendant may introduce evidence tending to show the nonexistence of the essential conditions of the doctrine but without introducing evidence of his exercise of due care. Fourth, the defendant may introduce evidence to contest both the conditions of the doctrine and the conclusion of negligence. Set forth below is an explanation of the manner in which Section 646 functions in each of these situations.

(1) Basic facts established as matter of law; no evidence of due care. If the basic facts that give rise to the presumption are established as a matter of law (by the pleadings, by stipulation, by uncontradicted evidence), the presumption requires that the jury find the defendant was negligent unless and until there is evidence introduced sufficient to sustain a finding that the accident resulted from some cause other than the defendant's negligence. When the defendant fails to introduce evidence sufficient to sustain a finding either that he exercised due care in all possible respects wherein he might have been negligent or that the accident resulted from some specific cause unrelated to his negligence, the court must simply instruct the jury that it is required to find that the defendant was negligent.

For example, if a plaintiff automobile passenger sues the driver for injuries sustained in an accident, the defendant may determine not to contest the fact that the accident was of a type that ordinarily does not occur unless the driver was negligent. Moreover, the defendant may introduce no evidence that he exercised due care in the driving of the automobile. Instead, the defendant may rest his defense solely on the ground that the plaintiff was a guest and not a paying passenger. In this case, the court should instruct the jury that it must assume that the defendant was negligent. Cf. Phillips v. Noble, 50 Cal.2d 163, 323 P.2d 385 (1958); Fiske v. Wilkie, 67 Cal. App.2d 440, 154 P.2d 725 (1945).

(2) Basic facts established as matter of law; evidence introduced of due care. Where the facts giving rise to the doctrine are established as a matter of law but the defendant has introduced evidence of his due care, the presumptive effect of the doctrine vanishes. In most cases, however, the basic facts will still support an inference of negligence. In this situation the court may instruct the jury that it may infer from the established facts that the defendant was negligent. The court is required to give such an instruction when requested. The instruction should make it clear, however, that the jury should draw the inference and find the defendant negligent only if it believes after weighing the circumstantial evidence of negligence together with all of the other evidence in the case that it is more likely than not that the defendant was negligent.

(3) Basic facts contested; no evidence of due care. The defendant may attack only the elements of the doctrine. His purpose in doing so would be to prevent the application of the doctrine. In this situation, the court cannot determine whether the doctrine is applicable or not, because the basic facts that give rise to the doctrine must be determined by the

jury. Therefore, the court must give an instruction on what has become known as conditional res ipsa loquitur.

Where the basic facts are contested by evidence, but there is no evidence of due care, the court should instruct the jury that it finds that the basic facts have been established by a preponderance of the evidence, then it must also find that the defendant was negligent.

(4) Basic facts contested; evidence introduced of due care. The defendant may introduce evidence that both attacks the basic facts that underlie the doctrine of res ipsa loquitur and tends to show that the accident was not caused by his failure to exercise due care. Because of the evidence contesting the presumed conclusion of negligence, the presumptive effect of the doctrine vanishes, and the greatest effect the doctrine can have in the case is to support an inference of the defendant's negligence.

In this situation, the court should instruct the jury that if it finds that the basic facts have been established by a preponderance of the evidence, then it may infer from those facts that the accident was caused because the defendant was negligent. The jury should draw the inference and find the defendant negligent, however, only if it believes after weighing all of the evidence that it is more likely than not that the accident actually resulted because the defendant was negligent.

SUBSTANCE OF DISCUSSION TO BE ADDED TO

PRELIMINARY PORTION OF RECOMMENDATION

Note: This material will be revised before it is integrated into recommendation.

The effect of Section 646 upon the California law is somewhat uncertain. Prior to the effective date of the Evidence Code, the California courts held that the doctrine of res ipsa loquitur was an inference, not a presumption. But it was "a special kind of inference" whose effect was "somewhat akin to that of a presumption," for if the facts giving rise to the doctrine were established, the jury was required to find the defendant negligent unless he produced evidence to rebut the inference. Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954).

Since the effective date of the Evidence Code (January 1, 1967), it seems clear that the doctrine has been a presumption, for the effect of the doctrine as stated in the Sherwin Williams case is precisely the effect of a presumption under the Evidence Code when there has been no evidence introduced to overcome the presumed fact. See EVIDENCE CODE §§ 600, 604, 606 and the Comments thereto.

It has been uncertain, however, whether the doctrine is a presumption affecting the burden of proof or a presumption affecting the burden of producing evidence. Prior to the effective date of the Evidence Code, the doctrine of res ipsa loquitur did not shift the burden of proof. Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63 (1953). And to this extent, it is clear that Section 646 is consistent with the previous law. But the cases considering res ipsa loquitur suggested that the doctrine required the adverse party to come forward with evidence not merely sufficient

to support a finding in his favor but sufficient to balance the mandatory inference of negligence. Burr v. Sherwin Williams Co., 42 Cal.2d 682 268 P.2d 1041 (1954). If this meant merely that the trier of fact was to follow its usual procedure in resolving conflicting inferences--that is, the party with the burden of proof wins on the issue if the inferences arising from the evidence in his favor preponderate in convincing force, but the adverse party wins if they do not--then the Evidence Code and Section 646 have made no substantive change in the law. If this meant, however, that the trier of fact in some manner was required to weigh the convincing force of the adverse party's evidence against the legal requirement that negligence be found, then the doctrine did not fit within the presumptions scheme of the Evidence Code. In the absence of a decision, however, it is impossible to determine how the Evidence Code may have modified the prior law.

The requirement in Section 646 that, upon request, an instruction be given on the effect of res ipsa loquitur is consistent with the prior law. See Bischoff v. Newby's Tire Service, 166 Cal. App.2d 563, 333 P.2d 44 (1958); 36 CAL. JUR.2d, Negligence, § 340, p. 79 (1957).

Memo 66-39

EXHIBIT IX

Comment on Section 669

Time did not permit us to prepare an expanded comment to this section. We will prepare a supplement to the basic memorandum if we are able to prepare the Comment prior to the meeting.

Memo 66-39 EXHIBIT X

April 19, 1965

Law Revision Commission
Stanford University
Stanford, California

Gentlemen:

I have followed with interest the extensive work the Law Revision Commission has done in preparing an Evidence Code for adoption by the State Legislature. It is a most excellent piece of work.

I would like to make one suggestion which I hope does not come too late to be called to the attention of the Legislature, where Senate Bill 110 and Assembly Bill 333 have been introduced to enact the proposed Evidence Code.

Proposed section 1152, as the comment in the Commission's recommendation makes clear, is designed in part to eliminate the subtle distinctions set forth in People v. Forster, 58 Cal.2d 257, as to what statements made during settlement negotiations are admissible in evidence against a party and what statements are not. The proposed section would essentially protect all conduct and statements made during negotiations.

This is a highly desirable result. However, it seems to me the precise language of section 1152(a) as proposed by the commission might well be construed to prevent the section from applying to many eminent domain cases. Section 1152(a) would make inadmissible evidence of conduct and statements concerning compromise of liability for past events only. It speaks only of promises or offers to a person "who has sustained or claims to have sustained loss or damage."

Negotiations for settlement of eminent domain proceedings in many cases occur before anyone has sustained any legally compensable damage. In many cases there is no right to immediate possession by the condemnor and in many other cases condemnors with such a right have not exercised it at the time of settlement talks. The parties really negotiate concerning future liability. Thus it is quite possible the courts would hold that the language

of the subsection is inapplicable to such eminent domain proceedings.

Such a holding would be clearly contrary to the aim of the commission and also, I think, to the legislative intent. The very case which has stimulated this aspect of the proposed code section is a condemnation case, People v. Forster.

Accordingly, I suggest that the language of section 1152(a) be altered to read something like this:

> "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiations thereof, is inadmissible to prove his liability for the loss or damage or any part of it."

If the commission agrees that something along the lines suggested above should be done to remove uncertainty in the application of section 1152 to condemnation cases generally, perhaps it can draw the matter to the attention of the Legislature before final passage of the bill.

Very truly yours,

CHARLES T. VAN DEUSEN

CTVD:av

cc: Mr. Holloway Jones
Vice Chairman, State Bar Committee
on Condemnation Law and Procedure
359 Pine Street
San Francisco, California

bcc: MAMacKillop

sions. In short, that the jurors heard the confessions before they heard defendant's testimony was not the fault of the procedure, but was a circumstance of his own making.

We note, in passing, that by admitting the confessions into evidence the trial court did not deprive the jury of the right to make the ultimate determination of whether they were voluntary. He instructed the jury:

> "The fact that the court has admitted into evidence the alleged confession or admission of a defendant does not bind the jury to accept the court's conclusion, and the jury, before it may take a confession or admission into consideration, must for itself find whether or not it was a voluntary confession or admission. If the jury concludes that a confession or admission was not made voluntarily, it is the duty of the jury to entirely disregard the same and not consider it for any purpose."

More profound questions are raised by defendant's second point, that he was entitled to have the question of voluntariness heard and determined outside the presence of the jury. Jackson v. Denno makes it clear that before a jury is permitted to hear a confession the trial judge must determine that it was given voluntarily, and that all constitutional safeguards have been met.[1] It does not tell us, however, whether the foundational evidence must be heard by the court outside the presence of the jury. Under the Massachusetts procedure, which California follows (People v. Gonzales, 24 Cal.2d 870, 876, 151 P.2d 251; People v. Schader, 62 Cal.2d 716, 727, 44 Cal.Rptr. 193, 401 P.2d 665), the jury hears the foundational evidence upon which the trial court makes the determination of voluntariness, but it does not hear the confession unless and until the

[2] A collateral question is raised by the admission of the confessions upon the foundational evidence of the prosecution alone. The confessions had been admitted and the People's case rested before defendant took the stand as his own defense witness and gave testimony bearing on the voluntariness of his confessions. But defendant is in no position to complain of the order of proof, first, because he did not challenge the reliability of the People's foundational evidence; second, he elected to present his evidence as to voluntariness as part of his defense rather than as part of the foundational voir dire; and, third, he made no objection to the introduction into evidence of his confes-

[1] The court in Jackson said, 378 U.S. at page 395, 84 S.Ct. at page 1791: "It is both practical and desirable that in cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence."

trial judge has determined that the confession is admissible. In a footnote in Jackson, 378 U.S. at page 378, 84 S.Ct. at page 1781, the court said: "We raise no question here concerning the Massachusetts procedure." Thus the court did not disapprove the Massachusetts and, a fortiori, the California procedure, but neither did it specifically or affirmatively approve it.

There is much to be said for defendant's contention that foundational evidence should be heard by the judge outside the presence of the jury. For one thing, as Jackson points out by a footnote, 378 U.S. page 389, 84 S.Ct. page 1787:

> "* * * an accused may well be deterred from testifying on the voluntariness issue when the jury is present because of his vulnerability to impeachment by proof of prior convictions and broad cross-examination, both of whose prejudicial effects are familiar. The fear of such impeachment and extensive cross-examination in the presence of the jury that is to pass on guilt or innocence as well as voluntariness may induce a defendant to remain silent, although he is perhaps the only source of testimony on the facts underlying the claim of coercion. Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence."

Additionally, it is quite possible that inflexible adherence to the Massachusetts procedure might result in a jury hearing evidence pertinent to the question of voluntariness but prejudicial and inadmissible as to the question of guilt or innocence. For example, where a defendant is charged with the commission of crimes other than that for which he is being tried, evidence concerning such other crimes is ordinarily inadmissible. But if the defendant were promised leniency or immunity as to the other charges as an inducement to confess, or threatened with having the degree of the other crime increased, such evidence would be relevant to the issue of voluntariness but not to the question of guilt or innocence.

However, a defendant is not left without a means to protect himself when such a circumstance appears imminent; he can obviate prejudice to himself by requesting a hearing outside the presence of the jury. There is nothing unusual about this procedure: motions, offers of proof, and questions concerning the admissibility of evidence (People v. Gorg, 45 Cal.2d 776, 780, 291 P.2d 469), are frequently heard outside the presence of the jury. As the defendant is usually the one who has reason to inject matters inadmissible as to the question of guilt, that bear on the voluntariness of his confession, he is in a position to protect himself by requesting a hearing before the judge outside the presence of the jury. Since evidence to be adduced to prove involuntariness is peculiarly within the knowledge of the defendant, it is not unreasonable that the burden rests on him to request that matters he regards as prejudicial on the question of guilt, first be heard outside the presence of the jury. If the trial judge holds the confession involuntary, the jury never hears such foundational evidence. On the other hand, if the confession is admitted, whether he will present prejudicial foundational evidence to the jury for their determination of voluntariness, rests with the defendant. To require evidence of voluntariness, regardless of its nature, to be first heard outside the presence of the jury in every instance, would seem unnecessary duplication under the Massachusetts procedure wherein the question of voluntariness ultimately rests with the jurors, a determination they cannot make without hearing the foundational evidence.

[3] The upshot of our interpretation of Jackson v. Denno is that the trial judge is required to determine that constitutional requirements surrounding the making of a confession are proved before he admits the confession, and that the record must reflect this determination; but it does not require that the court hear the foundational evidence out of the presence of the jury unless the defendant so requests and accompanies his request with a showing that evidence proffered or to be adduced is inadmissible as to the question of guilt.

Memo 66-39

EXHIBIT XII

The last time this matter was considered the Commission requested that the staff provide copies of the original correspondence which resulted in the inclusion of the amendment to subdivision (c) in Section 403 the next time this amendment was considered.

Attached is a series of letters that resulted in the inclusion of the amendment of subdivision (c) of Section 403. You will note that an amendment of subidivision (c) was suggested by Commissioner McDonough in an effort to identify the nature of the objection to Sections 400-406 voiced by Justice Kaus. Justice Kaus stated that the amendment appeared to be desirable, but that his objection was more basic. We spent considerable time discussing the basic objection of Justice Kaus and finally concluded that no change was needed. We did not further discuss the amendment to subdivision (c) that was initially adopted in an effort to meet the objection voiced by Justice Kaus.

Attached as a part of this exhibit are the following:

(1) A letter from Justice Kaus dated September 28, 1965,

(2) A letter from Commissioner McDonough to Justice Kaus dated October 19, 1965,

(3) A letter from Justice Kaus dated November 1, 1965.

District Court of Appeal
State of California
State Building, Los Angeles

Otto M. Kaus
Justice

September 28, 1965

Professor John R. McDonough
California Law Revision Commission
School of Law
Stanford University
Stanford, California

Dear John:

Responding to your kind invitation for comments on the Evidence Code, here are two criticisms which I believe are valid. Both deal with "preliminary determinations," sections 400-406.

The first is this: I cannot find a good reason for the provision in section 403 (c) (1) to the effect that on request the judge must instruct the jury to determine whether the preliminary fact exists and to disregard the evidence unless they find that it exists. While there may be situations where it is desirable to instruct separately with respect to preliminary facts, offhand I cannot think of a case where the same objective is not achieved either by the court's instructions on the substantive law or just plain common sense. (The only exception to this rather sweeping statement might be in a situation under section 403 (a) (2) such as where there may be doubt at the end of a witness' testimony, whether or not he is speaking from personal knowledge or basing what he says on hearsay.)

Take the classical example, mentioned in your discussion, of the contract allegedly negotiated for D by D's alleged agent, A. Here whatever contract A might have made, the jury cannot find against D in the action unless they find the preliminary fact of agency to be proved; conversely, even if they find that A was D's agent, they cannot hold D unless they find that A did in fact negotiate it. Obviously the court will have to tell them exactly that in its instructions on the substantive law. Additional

charges to disregard the evidence of agency unless they find that there was a contract and to disregard the evidence as to the making of the contract unless they find there was agency, can only confuse.

Or take the authenticity of a writing: staying in the contract field, assume that P produces an order for goods and has evidence sufficient to sustain a finding that D signed it. D produces evidence that the signature is a forgery. Assuming that there is no other basis for holding D to the contract, here again the instructions on the substantive law will cover the evidentiary point. The court will simply tell the jury that if D signed the order he is bound to the deal and that if he did not, he wins the lawsuit. Why tell them to disregard the writing?

Assume a situation under 403 (a) (4): the issue is the state of mind of X. There is evidence that X said: "I am scared of Y." There is also evidence to the effect that the statement was made by Z, not by X. Why is it necessary to tell the jury to disregard the statement if they find it was made by Z? If they have enough sense to be on a jury, they have enough sense to realize that ordinarily if Z says that he is scared of Y, this statement throws no light on Y's state of mind. (Of course if the fact that Z fears Y should, by any chance, be probative of Y's state of mind - as might be the case, for example, if the alleged fear was caused by an attack by Y on Z and X - it should not be disregarded at all.)

As I said before I can conceive of special instructions being useful in a case under 403 (a) (2). I have seen witnesses get on the stand, purportedly testifying to their own observations. After a thorough going-over on cross-examination it appears pretty obvious that the witness himself observed very little and got most of his information from others. On redirect counsel manages to rehabilitate him a bit. When he leaves the stand he leaves a distinct impression that he saw a little bit less than he described on direct and redirect and perhaps a little bit

District Court of Appeal
State of California
State Building, Los Angeles

Otto M. Kaus
Justice

more than his answers on cross-examination imply. Here I can see an occasion for the court instructing the jury that they must disregard everything the witness said unless he personally observed it, because, of course, even the hearsay is probative, but not admissible.

To sum it all up: There are enough cases which are reversed because of an erroneous instruction to which, as a matter of fact, the jury never paid the slightest attention. It seems to be rather foolish to force trial courts to give additional instructions which, in truth, are nothing but instructions on substantive law stated in evidentiary language.

My next criticism is rule 403 (a) (4) itself. I believe that it is too broad, that in most situations the identity of a hearsay declarant is a preliminary fact which should be determined by the judge under section 405 and that the Commission was misled by the example it cites to prove its theory.

This example involved the so-called "state of mind" exception to the hearsay rule. Here, of course, if it is the state of mind of X that is in issue, the relevance of the declaration does depend, in most cases at least, on the identity of the declarant. If you are trying to prove that Joe loves Sue, it sheds no light on the issue if it was Bill who declared his affection.

But when you deal with other exceptions to the hearsay rule, the identity of the declarant usually does not involve a relevancy problem.

Take an example: X, D's chauffeur, has an intersection collision with P which is watched by D and A from the sidewalk. Sometime after the accident D and A walk away from the intersection and W testifies that he heard D say: "That fool X ran the red light." D maintains that it was A who made that

statement. Here the evidence is relevant whoever made the statement but, absent some other exception to the hearsay rule, admissible only if the declarant was D. The question of admissibility is one of legal competency only.

Take an example under section 1242: The prosecution claims that D shot both X and Y. After the shooting in which X was mortally wounded and Y only superficially, one of the two, but the issue is which one, tells the police that D was the assailant. Assuming that it is satisfactorily proved that X was "under a sense of immediate impending death" but Y was not, the admissibility of the declaration depends on the identity of the declarant, but it is probative whoever made it. Furthermore, if the admissibility is determined by the jury, they will hear the evidence which raises a Jackson v. Denno problem.

It is easy to multiply examples and I resist the temptation. After all my criticism has no validity unless it was the intention of the Commission to have the jury decide preliminary questions involving relevancy and the judge those involving legal competency. Absent constitutional problems, there is no absolutely compelling reason why at least some preliminary questions involving competency should not be decided by the jury. We do this today - in a modified fashion - in the case of confessions, dying declarations and even spontaneous exclamations. (People v. Keelin, 136 Cal. App. 2d 860.) However, I do believe that it was the intention of the Commission to confine the jury to preliminary questions involving relevancy. This is made clear to me by the official comment following section 403. What I am pointing out therefore is not so much a mistake in policy, as an inconsistency.

District Court of Appeal
State of California
State Building, Los Angeles

Otto M. Kaus
Justice

 September 28, 1965

It was good seeing you again at Sacramento. Please come and see me if you are down here.

Sincerely,

OMK/gvf

cc: Professor John H. DeMoully
Stanford University
Stanford, California

Joseph A. Ball
Attorney at Law
120 Linden Avenue
Long Beach, California 90802

Herman F. Selvin
Attorney at Law
523 West Sixth Street
Los Angeles, California 90014

Richard H. Keatinge
Attorney at Law
458 South Spring Street
Los Angeles, California 90013

October 19, 1965

Honorable Otto M. Kaus
District Court of Appeal
State Building
Los Angeles, California

Dear Otto:

Thank you very much for your recent letter commenting on Sections 400-406 of the Evidence Code.

I had not responded sooner pending discussion of the points you raise at our October meeting, held last weekend. We had before us at that time not only your letter but also the staff memorandum enclosed.

We concluded that you had made two main points in your letter: First, that it would be unfortunate if the instructions referred to in Section 403 (c) were requested and made in situations where they would be quite unnecessary under the circumstances; Second, that the Comment to Section 403 is misleading insofar as it may be read to suggest that all evidence excluded thereunder is irrelevant to the case. We agree with you on both points.

We are considering repealing or modifying subsection (c) of Section 403. We continue to think that such an instruction would be appropriate if given and that the adverse party is entitled to ask that it be given. But we are convinced that it is undesirable to draw attention explicitly to these truths

and to appear to compel the trial judge to grant the request in those cases where the instructions would be superfluous and misleading.

We cannot, unfortunately, rewrite the Comment. That it was made by us and adopted by the legislative committees is an historical fact -- a bell that cannot be "unrung." If we do revise Section 403 as suggested above, we can write and publish and suggest that the legislative committees adopt a comment explaining that revision which would, inter alia, eliminate the somewhat confusing use of the term "relevance" in our original comment on Section 403.

All of this proceeds on the theory that you are not challenging the basic classification made in Sections 403 and 405 -- i.e., that you are not suggesting that the judge decide questions the Evidence Code gives to the jury, or vice versa. To be sure that this is so, and to obtain any further enlightenment for the Commission on this difficult subject that you may be able to provide, Messrs. Ball and Keatinge will endeavor to discuss this matter with you at a mutually convenient time prior to our next meeting.

We appreciate your interest in our work and your helpful comments. We would welcome any further comments which you might be willing to send us.

With kindest personal regards, I am

Sincerely yours,

John R. McDonough

JRM:mh
Enclosure

District Court of Appeal
State of California
State Building, Los Angeles

Otto M. Kaus
Justice

November 1, 1965

Professor John R. McDonough
California Law Revision Commission
School of Law
Stanford University
Stanford, California

Dear John:

Thank you for your prompt reply of October 19. Let me get right down to business:

Re section 403 (c) (1): I think you are perfectly right and the best solution is simply to delete the words "and on request shall" from the section. One can only hope that not too many judges will feel encouraged to avail themselves of the permission which will remain in the statute. As I shall try to elaborate below, it is a fairly good rule of thumb that whenever a judge feels he should tell the jury that it must, under certain circumstances, disregard evidence which the judge has admitted, he has not done his job somewhere along the line.

Re section 403 (a) (4): I most definitely feel that it is not only the comment that is wrong, but the section itself. To me the comment was merely a clue to the process of reasoning which, I thought, misled the Commission. I did not know it was done with premeditation and deliberation. I definitely contend that the rule should be that where the legal competency, as distinguished from relevancy, of a hearsay declaration depends on the identity of the speaker, then, if there is a dispute concerning the identity, it must be resolved by the judge.

As I told you in my last letter, I don't suppose the world will come to an end if the law is otherwise, but the trial of jury cases will be even more complicated than it already is, nor does the right to trial by jury demand the solution of the Code and, if it does, the Code is not consistent.

District Court of Appeal
State of California
State Building, Los Angeles

Otto M. Kaus
Justice

November 1, 1965

Professor John R. McDonough
Stanford, California

I have read the staff memo with great interest and it sounds most persuasive, particularly the bit about me having a reasonable mind, but I think that everything but that part can be refuted.

1. First of all - and this is really, I believe, the vital distinction between my approach and that of the staff memo, I think there is a fundamental misunderstanding in the memo concerning the function of "authentication."

I think I mentioned last time that in my opinion section 403 (a) (3) is illusory, because evidence of authenticity of a writing really is only evidence which makes a piece of paper relevant and relevancy is covered by section 403 (a) (1). This is expressly recognized by the first sentences of the comment to section 1400.

But relevancy is not all there is to admissibility, if a technical rule, such as hearsay, privilege or the Best Evidence Rule is in the way.

With respect to all such technical rules, the approach of the Code is perfectly orthodox and out of dozens of possibilities the heretics have chosen a small corner of the hearsay rule to get their foot in the door.

Thus if the technical rule in question is the attorney-client privilege and a letter from X to his attorney is authenticated to be such, it is not automatically admissible if a question of fact arises whether the attorney's advice was sought to commit a crime or a fraud (section 956). If such a question arises, it must be decided with finality by the court under section 405. If the decision is against the proponent of the letter, it is out and

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stays out, if it is in his favor, the opponent is not entitled to an instruction to disregard it, even if incidentally there may be a good deal of evidence in the case, pro and con, concerning the client's purpose in seeing the lawyer. This is all expressly recognized by section 405 (b) (2). Why have a different rule if the preliminary question is the identity of a speaker, rather than the purpose of a client?

Of course, where the identity of the speaker affects relevancy only, or if the only dispute is whether a hearsay declaration, competent if made, was in fact made, there will be nothing for the judge to decide. That is true of the example put in the comment to section 403 (a) (4) and is also true of the example starting near the bottom of page 10 of the staff memo. In that example the only question is whether or not a concededly dying person identified his assailant. There being no question as to the admissibility of the statement if it was made, I agree that the problem is for the jury. These cases differ markedly from the ones I am talking about, where the declaration is relevant, whoever made it, but admissible only if the declarant was a particular person.

I realize that this analysis makes it possible for a party to determine with a little cunning whether the admissibility of a statement will or will not be for the court. Assume that D is involved in a traffic accident at an intersection, having got there on Wilshire Boulevard. Assume it is his recollection that after the accident a bystander said: "The light for Wilshire traffic was red."

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Assume that P offers evidence that the statement was made by D. If D wants to fight it out on the factual conflict as he sees it, the question of admissibility would be for the judge, on the other hand he could simply deny having made the statement without offering evidence that someone else made it and it would then be up to the jury to consider whether D did or did not make the statement. But what is so extraordinary about that? A defendant in a criminal case, willing to perjure himself, has the choice of offering evidence that a confession was coerced or claiming that he never confessed.

2. With all due respect the staff memo puts the cart before the horse where it appeals to the right to jury trial. The rules of evidence as we know them today and trial by jury as it eventually developed were not invented by one genius in one day. About 100 years or so ago the courts began to be aware of the fact that if we are going to have restrictive rules of evidence the applicability of which depends on the disputed facts, then trial by jury with all disputed facts submitted to the jury, becomes, though not an impossibility, at least hopelessly impractical and destructive of many of the purposes for which the restrictive rules were created in the first place. That is of course particularly true in the field of privileges, but certainly to some extent true even when it comes to hearsay. If at least one of the reasons for the hearsay rule was that an uneducated jury cannot properly evaluate unsworn and unexamined hearsay, surely a residue of that rule must be the thought that once the jury has heard the hearsay, it will not be able to dismiss it from its mind, even though it makes a fact finding that makes the hearsay inadmissible. That, I submit

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is precisely the idea of Jackson v. Denno, so if we are going to wave any constitutional flags, I think I am on the side of the angels, rather than the staff.

But I do not think that a constitutional problem is involved. The question is not whether the parties are entitled to a right to trial by jury but whether such a right encompasses having the jury pass on preliminary questions of fact on which the admissibility of the evidence for technical reasons depends. With very few exceptions in this state - such as the present California "humane" rule on confessions, dying declarations and excited utterances, it has always been the rule that such questions are not for the jury and what gets me is that the Code recognizes this even to the extent of changing the California law with respect to the exceptions just mentioned, but in that one little area of identity of hearsay declarants comes up with a brand new heresy. This is like a drunk giving up booze for dope.

While it is not necessary for my present purpose to so insist, I submit that the rule that preliminary questions of fact - unless they go to the relevancy only - are for the judge even applies where the preliminary question is identical with one of the ultimate questions in the lawsuit. See State v. Lee, 127 La. 1077, where the whole question was whether the defendant at the counsel table was Lee who had concededly done the killing and the trial judge would not permit Mrs. Lee to testify that the defendant was not her husband - wives were incompetent in those days - because on conflicting evidence he believed that she was married to the fellow in the courtroom. He was upheld and most writers think he was correct. (See 50 Harv.L.Rev. 392, 408.)

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3. The Boyle v. Wiseman; Nu Car v. Traynor dichotomy and Morgan's views about it have nothing whatsoever to do with this problem. When the proponent tries to introduce secondary evidence of a document, because of its loss without his fault, and the opponent takes the position that either the document never existed or that he has the original in the courtroom and its contents are different from the contents of the document of which proponent offers to give secondary evidence, there are two distinct isolated problems: 1. was the original lost without fraud on the part of the proponent; and 2. did the original ever exist and, if it did, what was in it?

The answer to the first problem involves the application of a technical rule of evidence, the second problem is clearly for the jury. If we are going to follow the orthodox rule any dispute as to the first problem must be resolved by the judge. Even though there is evidence - and it may be evidence which he believes - that the original never existed, for the purpose of this ruling he must assume that it did. While this sounds technical, it is precisely the position taken by Professor Morgan, by the Model Code of Evidence (§ 602 - see comment) and by Uniform Rule 70 (2). I cannot find anything to correspond in the Code, although Professor Chadbourn recommended adoption of U.R.E. 70 (2). (See 6 Cal.L.Rev., Commission Report 160-61.) I therefore assume that section 405 applies to the preliminary question of whether or not the original has been destroyed, even though there be a question of fact whether it ever existed. For Morgan's rationale of this rule see 40 Harvard Law Review, 420. Anyhow, nobody is fighting nobody on this question and I don't know why the staff memo brought it up.

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4. Accidents of form will often decide whether you have a problem of relevancy only, or one of technical admissibility. Thus if D is charged with drunk driving and the question is whether or not after the accident it was D, or X, his passenger who said: "I am loaded" the problem is simply one of relevancy. On the other hand, if the problem is whether it was D or X who wrote the unsigned statement: "Before the accident D had had 10 highballs", the statement is relevant whoever made it but admissible only if it was D.

5. I had originally intended to go through the various examples in the staff memo one by one, but I think I would bore you to tears if I did. I can take the example on page seven and make my point: This is a situation where after the accident a statement purportedly written by D to the effect that D was driving too fast and was drunk, is in the courtroom. Before this statement can be admitted various matters must be proved: 1. That it was made by someone having personal knowledge, section 403 (a)(2); and 2. that that someone is D (section 1220). If it was a person who spoke from personal knowledge the statement is clearly relevant and only a prima facie case is necessary to get it into evidence, as far as relevancy is concerned; but if there is a dispute whether that person is D, I say, but the Code is to the contrary, this dispute must be resolved by the court. Otherwise the jury will inevitably hear the statement, even if it is later on instructed to disregard it unless it is satisfied that the writer was D. The rule should be, that if the court finds that D did not write the statement, it is out for all purposes. The fact that there is prima facie evidence of authentication by D is beside the point, since authentication only goes to relevancy.

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Why get so excited about this? A lawyer who has a notarized statement from a purported eyewitness in his briefcase, but is unable to produce the witness in court, has an authenticated relevant statement which will not get into evidence, unless a hearsay exception applies. There is no reason why this statement should go to the jury if the proponent can make out a weak prima facie case that it was against the witness' pecuniary interest to make it, if the evidence to the contrary is overwhelming and believed by the trial judge. The Code is in accord, because the preliminary question here is not identity but interest. All the language of the staff memo about depriving someone of the right to jury trial is every bit as applicable to the example put.

On the other hand if the statement is admitted into evidence because the court finds that D made it, there is nothing to preclude D from trying to convince the jury that he did not make it, because naturally such evidence would detract from the weight of the statement. To be sure, the jury might still attach some probative value to it - that depends on many other factors - but this is not a very unique situation. Under the Code if the court finds a confession to have been voluntary, in spite of conflicting evidence, the defendant may still present his evidence of coercion to the jury to affect the weight of the confession (§ 406) but he is not entitled to an instruction that it should be disregarded (§ 405 (b) (2).) Why no second crack here, if the staff memo thinks it is so vital in case of a written admission of speed after an automobile accident?

Throughout the staff memo the rhetorical question is raised "why should D be prevented from contesting the authenticity before the jury?" As I have tried to show, if on a dispute as to the identity

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of the maker the statement is admitted, there is nothing to prevent the opponent from disputing the authenticity to affect the weight. He is simply not entitled to an instruction that the jury should disregard it altogether if its finding of authorship is different from the judge's. This is true with respect to all other preliminary questions of fact and there is no reason for a different approach here (§ 405 (b) (2).)

If the statement is not admitted, there is of course nothing to present to the jury concerning its authorship. It is then the proponent who will complain that authenticity should be decided by the jury. In order to persuade me that this is a sufficient reason for departing from the orthodox rule of section 405, you would have to demonstrate that when the dispute concerns the authenticity of a hearsay declaration that one particular question of fact is so utterly different from any other question of fact which may arise with respect to preliminary questions, that it deserves different treatment it is simply part of the game that evidence, admissible under a technical rule if a preliminary fact exists, is not heard by the jury if the judge is not persuaded of the existence of that fact. The best that can be said in defense of this rule has already been said by McGuire and Maguire: "It is a simple rule. It is a harsh rule only at times as judges are harsher than jurors. And of course it cuts both ways. The particular case [State v. Lee] shows it applied adversely to a criminal defendant. It might equally have been used to bar vital testimony by the same woman for the prosecution. Obviously it applies indifferently to both sides of civil litigations. It tends to the consistent preservation and application of exclusionary evidential principles." (40 Harv. L. Rev., p. 413.)

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I have already arranged to have lunch with Joe Ball and Dick Keatinge to discuss this. After I started to write this letter to you, I got one from Joe Ball. Now I know how Moses felt when he saw the Jews dancing around the golden calf. Joe thinks, if I understand him correctly, that even preliminary questions under section 405 must be submitted to the jury if a question of credibility of witnesses arises. I met him briefly after receiving his letter and he means it. Thus, I assume, he would submit the question whether a confession is admissible, because alleged to be coerced, as a jury question if the defendant and the police officer differ in their versions. I think the Code is clearly to the contrary, but I am not sure whether Joe thinks the Code is wrong or whether he interprets it differently than I do. Anyhow, as of this moment, he and I are about as far apart on this entire problem as we can be, since he does not believe in the correctness of the assumptions on which my whole argument was based. I have, however, tried to lobby with Dick Keatinge to equal the fix.

Throughout this letter I have said that the area I am talking about is the only one where the Code departs from orthodoxy. Just for the record, this may be an overstatement. Obviously sections 1222 and 1223 admitting authorized admissions and co-conspirators statements are at least prima facie heretical, since the evidence is to be admitted after admission of evidence sufficient "to sustain a finding". Before I get too hot under the collar about it, I want to do a little more thinking, but cannot resist the temptation to point out that as far as co-conspirators statements are concerned, Chadbourn's recommendations concerning proof of the preliminary

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fact were not accepted by the Commission. (See Tentative Recommendation etc., 6 Cal.L. Revision, etc., 490, footnote 32, last two sentences.)

With kindest regards.

Sincerely,

Otto M. Kaus

OMK/gvf

cc: John H. DeMoully,
Executive Secretary

Richard H. Keatinge,
Vice Chairman

Joseph A. Ball, Esq.
Herman F. Selvin, Esq.

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

RECOMMENDATION

relating to

THE EVIDENCE CODE

Number 1 - Evidence Code Revisions

September 1966

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

LETTER OF TRANSMITTAL

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Evidence Code was enacted in 1965 upon recommendation of the California Law Revision Commission.

Resolution Chapter 130 of the Statutes of 1965 directed the Commission to continue its study of the Evidence Code. Pursuant to this directive, the Commission has undertaken two projects:

(1) A study to determine whether any substantive, technical, or clarifying changes should be made in the Evidence Code.

(2) A study of the other California codes to determine what changes are needed in view of the enactment of the Evidence Code.

This recommendation is concerned with the changes that are needed in the Evidence Code. A series of separate recommendations will deal with the changes needed in other codes.

Respectfully submitted,

RICHARD H. KEATINGE,
Chairman

RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

THE EVIDENCE CODE

Number 1 - Evidence Code Revisions

In 1965, upon the recommendation of the Law Revision Commission, the Legislature enacted a new California Evidence Code. The effective date of the new code was postponed until January 1967 to give lawyers and judges an opportunity to become familiar with its provisions before they were required to apply them.

The Commission contemplated that, as lawyers and judges became familiar with the provisions of the Evidence Code, they would find some of its provisions in need of clarification or revision. The Commission has received and considered a number of suggestions relating to the new code. In the light of this consideration, the Commission recommends the following revisions of the Evidence Code:

1. Section 402(b) now permits a hearing on the admissibility of a confession or admission in a criminal case to be held in the presence of the jury if the defendant does not object. It has been suggested that, in the light of the considerations identified in Jackson v. Denno, 378 U.S. 368 (1964), the provisions of Section 402(b) may not adequately protect the rights of the accused and that otherwise valid convictions might be reversed if the defendant did not actually waive his right to a hearing beyond the presence and hearing of the jury. To obviate this possibility, Section 402(b) should be revised to require the preliminary hearing on the admissibility of a confession or admission in a criminal

case to be held out of the presence of the jury unless the defendant expressly waives his right to the out-of-court hearing and such waiver is made a matter of record.

2. 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, 381 U.S. 763 (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 recommendatgion 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 situtation would merely state an obvious truism.

3. The Evidence Code divides rebuttable presumptions into two classifications and explains the manner in which each class affects the

factfinding process. See EVIDENCE CODE §§ 600-607. Although several specific presumptions are listed and classified in the Evidence Code, the code does not codify most of the presumptions found in California law. It contains only some of the statutory presumptions that were formerly found in the Code of Civil Procedure and a few common law presumptions that were identified closely with those statutory presumptions. As they arise in the cases, other presumptions must be classified by the courts in accordance with the classification scheme established by the code.

Thus, the Evidence Code does not contain any provisions specifically mentioning either the doctrine of res ipsa loquitur or the presumption of negligence that arises from proof of a violation of law. Because of the frequency with which the decision of cases requires the application of these rules, however, the code should deal explicitly with them in the manner recommended below.

4. Prior to the effective date of the Evidence Code, the California courts held that the doctrine of res ipsa loquitur was an inference, not a presumption. But it was "a special kind of inference" whose effect was "somewhat akin to that of a presumption," for if the facts giving rise to the doctrine were established, the jury was required to find the defendant negligent unless he produced evidence to rebut the inference. Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954).

Since the effective date of the Evidence Code (January 1, 1967), it seems clear that the doctrine has been a presumption, for the effect of the doctrine as stated in the Sherwin Williams case is precisely the effect of a presumption under the Evidence Code when there has been no

evidence introduced to overcome the presumed fact. See EVIDENCE CODE §§ 600, 604, 606 and the Comments thereto.

It is uncertain, however, whether the doctrine is a presumption affecting the burden of proof or a presumption affecting the burden of producing evidence. And, in the absence of a decision, it is impossible to determine how the Evidence Code may have modified the prior law in this respect.

Prior to the effective date of the Evidence Code, the doctrine of res ipsa loquitur did not shift the burden of proof. Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63 (1953). The cases considering res ipsa loquitur stated, however, that the doctrine required the adverse party to come forward with evidence not merely sufficient to support a finding that he was not negligent but sufficient to balance the inference of negligence. See, e.g., Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 437, 260 P.2d 63 (1953). If such statements merely meant that the trier of fact was to follow its usual procedure in balancing conflicting evidence--i.e., the party with the burden of proof wins on the issue if the inference of negligence arising from the evidence in his favor preponderates in convincing force, but the adverse party wins if it does not--then res ipsa loquitur in the California cases has been what the Evidence Code describes as a presumption affecting the burden of producing evidence. If such statements meant, however, that the trier of fact must in some manner weigh the convincing force of the adverse party's evidence of his freedom from negligence against the legal requirement that negligence be found, then the doctrine of res ipsa loquitur represented a specific application of the former rule (repudiated by the Evidence Code)

that a presumption is "evidence" to be weighed against the conflicting evidence. See the Comment to EVIDENCE CODE § 600.

The doctrine of res ipsa loquitur, therefore, should be classified as a presumption affecting the burden of producing evidence to eliminate any uncertainties concerning the manner in which it will function under the Evidence Code. Such a classification will also eliminate any possible vestiges of the "presumption is evidence" doctrine that may now inhere in it. The result will be that, as under prior law, the finding of negligence is required when the facts giving rise to the doctrine have been established unless the adverse party comes forward with contrary evidence. If contrary evidence is produced, the trier of fact will then be required to weigh the conflicting evidence--deciding for the party relying on the doctrine if the inference of negligence preponderates in convincing force, and deciding for the adverse party if it does not.

This classification accords with the purpose of the doctrine. Like other presumptions affecting the burden of producing evidence, it is based on an underlying logical inference; and "evidence of the nonexistence of the presumed fact is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence." Comment to EVIDENCE CODE § 603.

The requirement of the prior law that, upon request, an instruction be given on the effect of res ipsa loquitur is not inconsistent with the Evidence Code and should be retained. See Bischoff v. Newby's Tire Service, 166 Cal. App.2d 563, 333 P.2d 44 (1958); 36 CAL. JUR.2d, Negligence, § 340, p. 79 (1957).

5. Under existing law, a presumption of negligence arises from proof of the violation of a statute, ordinance, or regulation. Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958); Tossman v. Newman, 37 Cal.2d 522, 233 P.2d 1 (1951). Although some cases state that the violation must be one for which a criminal sanction is provided, cases may be found where the presumption has been invoked despite the lack of a criminal sanction for the violation. See Cary v. Los Angeles Ry., 157 Cal. 599, 108 Pac. 682 (1910)(dictum); Forbes v. Los Angeles Ry., 69 Cal. App.2d 794, 160 P.2d 83 (1945). Cf. Clinkscales v. Carver, 22 Cal.2d 72, 136 P.2d 777 (1943). In addition to the violation, the party relying on the presumption must show that he is one of the class of persons for whose benefit the statute, ordinance, or regulation was adopted, that the accident was of the nature the enactment was designed to prevent, and that the violation was the proximate cause of the damage or injury. See Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954); Nunneley v. Edgar, Hotel, 36 Cal.2d 493, 225 P.2d 497 (1950).

Recent cases seem to indicate that the presumption is now treated as one that affects the burden of proof. In the Alarid case, the court stated that the correct test for determining whether the presumption has been overcome "is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." 50 Cal.2d 617, 624, 327 P.2d 897 (1958). It has been held, however, that the presumption does not shift the burden of proof to the adverse party. Jolly v. Clemens, 28 Cal. App.2d 55, 82 P.2d 51 (1938).

The presumption should be classified as a presumption affecting the burden of proof in order to further the public policies expressed in the various statutes, ordinances, and regulations to which it applies.

6. Section 776 permits a party to call the employee of . . an adverse party and examine that employee as if under cross-examination. Essentially, this merely means that the examiner may use leading questions in his examination (EVIDENCE CODE § 767), for the rule forbidding the impeachment of one's own witness has not been continued in the Evidence Code (EVIDENCE CODE § 785). If the employer-party then chooses to cross-examine the employee, the examination must be conducted as if it were a redirect examination, i.e., the employer is ordinarily forbidden to use leading questions.

Under Code of Civil Procedure Section 2055, which Section 776 has superseded, the employer's examination of an employee examined by the adverse party under its provisions could be conducted like a cross-examination. As a general rule, this provision of Section 2055 was undesirable, for it permitted an employer to lead an employee-witness even though the interests of the employer and employee were virtually identical. This provision of Section 2055 was of some merit, however, in litigation between an employer and an employee. An employee-witness who is called to testify against the employer by a co-employee may often be in sympathy with his co-worker's cause rather than his employer's. In such a case, the employer should have the right to ask the witness leading questions to the same extent that any other party can cross-examine an adverse witness.

Accordingly, Section 776 should be amended to restore to an employer-party the right to use leading questions in examining an employee-witness who is called by a co-employee to testify under Section 776.

7. The lawyer-client, physician-patient, and psychotherapist-patient privileges all protect "information transmitted" between the parties. EVIDENCE CODE §§ 952, 992, 1012. In addition, the physician-patient and psychotherapist-patient privileges protect "information obtained by an examination of the patient." EVIDENCE CODE §§ 992, 1012. It has been suggested that the quoted language may not protect a professional opinion or diagnosis that has been formed on the basis of the protected communications. If these sections were construed to leave such opinions and diagnoses unprotected, the privileges would be virtually destroyed. Therefore, Sections 952, 992, and 1012 should be amended to make it clear that such opinions and diagnoses are protected by these privileges.

8. Section 1017 of the Evidence Code provides that the psychotherapist-patient privilege is inapplicable if the psychotherapist is appointed by order of a court. As an exception to this general rule, Section 1017 provides in effect that the privilege applies if the court appointment was made upon request of the lawyer for the defendant in a criminal case in order to provide the lawyer with information needed to advise the defendant whether to enter a plea based on insanity or to present a defense based on his mental or emotional condition.

It should make no substantive difference whether an insanity plea was made before or after the request for appointment. If the defense of insanity is presented, there is no psychotherapist privilege. EVIDENCE CODE § 1016. If the defense of insanity is not presented, the defendant is in the same position that he would be in if no plea of insanity were ever made, and he should have available to him any privileges that would have been applicable if no such plea had been made. Accordingly, Section 1017 should be amended so that the exception for a court-appointed psychotherapist is not applicable where the appointment was made upon request of the lawyer for a criminal defendant in order to provide the lawyer with information needed to advise the defendant whether to withdraw a plea based on insanity.

9. Section 1152 provides that offers to compromise claims for loss or damage, and statements made in the course of negotiations for the settlement of claims for loss or damage, are inadmissible. The language of the section is so worded that it could be construed to refer to negotiations for past injuries only. The section, therefore, should be clarified to make clear that it refers to negotiations for loss or damage yet to be sustained as well as to negotiations for loss or damage previously sustained.

10. Section 1201 provides for the admission of "multiple hearsay." The section should be revised to clarify its meaning.

11. Section 1600 recodifies a presumption formerly found in Code of Civil Procedure Section 1951, but it does not classify the presumption as affecting either the burden of producing evidence or the burden of proof.

The presumption should be classified as a presumption affecting the burden of proof. This classification is consistent with the prior case law (see Thomas v. Peterson, 213 Cal. 672, 3 P.2d 306 (1931); DuBois v. Larke, 175 Cal. App.2d 737, 346 P.2d 830 (1959); Osterberg v. Osterberg, 68 Cal. App.2d 254, 156 P.2d 46 (1945)) and tends to support the record title to property by requiring the record title to be sustained unless the party attacking that title can actually prove its invalidity.

12. Section 1602 recodifies the provisions of former Section 1927.5 of the Code of Civil Procedure. It prescribes the evidentiary effect of certain recitals in patents for mineral lands within California. The section should be relocated in the Public Resources Code so that it will appear among other statutory provisions relating to specific evidentiary problems involving mining claims.

The section states that a recital in a patent of the date of the lo-

cation of the claim upon which the patent is based is "prima facie evidence" of that date. The purpose for the enactment of the section is not clear, but it seems probable that the section was merely designed to provide a hearsay exception because the California Supreme Court had previously stated that such recitals were inadmissible to prove the date of location. See Champion Mining Co. v. Consolidated Wyoming Gold Mining Co., 75 Cal. 78, 81-83 (1888). The section should be revised to express this original purpose. It is inappropriate to give presumptive effect to such recitals because they frequently are based on the self-serving statements of the patentee.

13. Section 1603 recodifies former Code of Civil Procedure Section 1928. Prior to the enactment of Code of Civil Procedure Section 1928 in 1872, the recitals in a sheriff's deed, made pursuant to legal process, could not be used as evidence of the judgment, the execution, and the sale upon which the deed was based. The existence of the prior proceedings were required to be proved with independent evidence. Hihn v. Peck, 30 Cal. 280, 287-288 (1866); Heyman v. Babcock, 30 Cal. 367, 370 (1866). The enactment of the predecessor of Evidence Code Section 1603 had two effects. First, it obviated the need for such independent proof. See, e.g., Oakes v. Fernandez, 108 Cal. App.2d 168, 238 P.2d 641 (1951); Wagnor v. Blume, 71 Cal. App.2d 94, 161 P.2d 1001 (1945). See also BASYE, CLEARING LAND TITLES § 41 (1953). Second, it also obviated the need for proof of a chain of title prior to the execution of the deed. Krug v. Warden, 57 Cal. App. 563, 207 Pac. 696 (1922).

The presumption stated in Section 1603 should be classified as a presumption affecting the burden of proof to carry out the purpose of the original section and further its purpose of supporting the record chain

of title.

14. Section 1605 is a recodification of former Code of Civil Procedure Section 1927.5. That section originally appeared as Section 5 of Chapter 281 of the Statutes of 1865-66, and it was codified as part of the Code of Civil Procedure in 1955.

Chapter 281 of the Statutes of 1865-66 required the California Secretary of State to cause copies to be made of all of the original Spanish title papers relating to land claims in this state derived from the Spanish and Mexican governments that were on file in the office of the United States Surveyor-General for California. These copies, authenticated by the Surveyor-General and the Keeper of Archives in his office, were then required to be recorded in the offices of the county recorders of the concerned counties.

Section 5 of the 1865-66 statute provided that the recorded copies would be admissible "as prima facie evidence" without proving the execution of the originals. It is apparent that the original purpose of the section was to provide an exception to the best evidence rule--which would have required production of the original or an excuse for its non-production before the recorded copy could be admitted--and an exception to the rule, now expressed in Evidence Code Section 1401(b), requiring the authentication of the original document as a condition of the admissibility of the copy. Section 1605, therefore, should be revised to reflect this original purpose.

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to amend Sections 402, 776, 952, 992, 1012, 1017, 1152, 1201, 1600, 1603, and 1605, to add Sections 646 and 669 to, and to repeal Section 1602 of, the Evidence Code, and to add Section 2325 to the Public Resources Code, relating to evidence.

The people of the State of California do enact as follows:

SECTION 1. Section 402 of the Evidence Code is amended to read:

402. (a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury ~~if any party so requests~~ unless the defendant otherwise requests, the request is made a matter of record, and the court consents to such request .

(c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

Comment. This amendment to Section 402 is designed to provide a criminal defendant with more adequate protection against the possible prejudice that may result from holding a hearing on the admissibility of a confession or admission in the presence of the jury. Cf. Jackson v. Denno, 378 U.S. 368 (1964).

SEC. 2. Section 646 is added to the Evidence Code, to read:

646. The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. If the facts that give rise to the presumption are found or otherwise established in the action and the party against whom the presumption operates introduces evidence which would support a finding that he was not negligent, the court may, and on request shall, instruct the jury as to any inference that it may draw from the facts so found or established.

Comment. Section 646 is designed to clarify the manner in which the doctrine of res ipsa loquitur functions under the provisions of the Evidence Code relating to presumptions.

The doctrine of res ipsa loquitur, as developed by the California courts, is applicable in actions to recover damages for negligence when the plaintiff establishes three conditions:

> (1) [T]he accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. [Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687 (1944).]

Section 646 provides that the doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. Therefore, when the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find the defendant negligent unless he comes forward with evidence that would support a finding that he exercised due care. EVIDENCE CODE § 604. Under the California cases such evidence must show either a specific cause for the accident for which the defendant

was not responsible or that the defendant exercised due care in all respects wherein his failure to do so could have caused the accident. See, e.g., Dierman v. Providence Hospital, 31 Cal.2d 290, 295, 188 P.2d 12 (1947). If evidence is produced that would support a finding that the defendant exercised due care, the presumptive effect of the doctrine vanishes. However, the jury may still be able to draw an inference of negligence from the facts that gave rise to the presumption. See EVIDENCE CODE § 604 and the Comment thereto. In rare cases, the defendant may produce such conclusive evidence that the inference of negligence is dispelled as a matter of law. See, e.g., Leonard v. Watsonville Community Hospital, 47 Cal.2d 509, 305 P.2d 36 (1956). But, except in such a case, the facts giving rise to the doctrine will support an inference of negligence even after its presumptive effect has disappeared.

To assist the jury in the performance of its fact-finding function, the court may instruct that the facts that give rise to res ipsa loquitur are themselves circumstantial evidence of the defendant's negligence from which the jury can infer that he failed to exercise due care. Section 646 requires the court to give such an instruction when a party so requests. Whether the jury should draw the inference will depend on whether the jury believes that the probative force of the circumstantial and other evidence of the defendant's negligence exceeds the probative force of the contrary evidence and, therefore, that it is more likely than not that the defendant was negligent.

At times the doctrine of res ipsa loquitur will coincide in a particular case with another presumption or with another rule of law that requires the defendant to discharge the burden of proof on the issue.

See Prosser, Res Ipsa Loquitur in California, 37 CALIF. L. REV. 183 (1949). In such cases the defendant will have the burden of proof on issues where res ipsa loquitur appears to apply. But because of the allocation of the burden of proof to the defendant, the doctrine of res ipsa loquitur will serve no function in the disposition of the case. However, the facts that would give rise to the doctrine may nevertheless be used as circumstantial evidence tending to rebut the evidence produced by the party with the burden of proof.

For example, a bailee who has received undamaged goods and returns damaged goods has the burden of proving that the damage was not caused by his negligence. See discussion in Redfoot v. J. T. Jenkins Co., 138 Cal. App.2d 108, 112, 291 P.2d 134 (1955). Where the defendant is a bailee, proof of the elements of res ipsa loquitur in regard to an accident damaging the bailed goods while they were in the defendant's possession places the burden of proof on the defendant, not merely the burden of producing evidence. When the defendant has produced evidence of his exercise of care in regard to the bailed goods, the facts that would give rise to the doctrine of res ipsa loquitur may be weighed against the evidence produced by the defendant in determining whether it is more likely than not that the goods were damaged without fault on the part of the bailee. But because of the stronger force of the presumption of the bailee's negligence that arises from the same facts that support res ipsa loquitur, the presumption of negligence arising from res ipsa loquitur cannot have any effect on the proceeding.

Effect of the failure of the plaintiff to establish all the preliminary facts that give rise to the presumption. The fact that the plaintiff fails to establish all of the facts giving rise to the res ipsa presumption does not necessarily mean that he has not produced sufficient evidence of negligence to sustain a jury finding in his favor. The requirements of res ipsa loquitur are merely those that must be met to give rise to a compelled conclusion (or presumption) of negligence in the absence of contrary evidence. An inference of negligence may well be warranted from all of the evidence in the case even though the plaintiff fails to establish all the elements of res ipsa loquitur. See Prosser, Res Ipsa Loquitur: A Reply to Professor Carpenter, 10 SO. CALIF. L. REV. 459 (1937). In appropriate cases, therefore, the jury may be instructed that even though it does not find that the facts that give rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more likely than not that the defendant was negligent. Such an instruction would be appropriate, for example, in a case where there was evidence of the defendant's negligence apart from the evidence going to the elements of the res ipsa loquitur doctrine.

Examples of operation of res ipsa loquitur presumption

The doctrine of res ipsa loquitur may be applicable to a case under four varying sets of circumstances. First, the facts giving rise to the doctrine may be established as a matter of law by the pleadings, by stipulation, by pretrial order, or by some other means, and there may be no evidence sufficient to sustain a finding that the defendant was not negligent. Second, the facts giving rise to the doctrine may be established as a matter of law but there may be evidence sufficient to sustain a finding of some cause for the accident other than the defendant's negligence or evidence of the defendant's exercise of due care. Third, the defendant may introduce evidence tending to show the nonexistence of the essential conditions of the doctrine but without introducing evidence to rebut the presumption. Fourth, the defendant may introduce evidence to contest both the conditions of the doctrine and the conclusion that his negligence caused the accident. Set forth below is an explanation of the manner in which Section 646 functions in each of these situations.

(1) Basic facts established as a matter of law; no rebuttal evidence. If the basic facts that give rise to the presumption are established as a matter of law (by the pleadings, by stipulation, by pretrial order, etc.), the presumption requires that the jury find the defendant was negligent unless and until there is evidence introduced sufficient to sustain a finding either that the accident resulted from some cause other than the defendant's negligence or that he exercised due care in all possible respects wherein he might have been negligent. When the defendant fails to introduce evidence sufficient to sustain a finding either that he was not negligent or that the accident resulted from some specific cause unrelated to his negligence, the court must simply instruct the jury that it is required to find that the defendant was negligent.

For example, if a plaintiff automobile passenger sues the driver for injuries sustained in an accident, the defendant may determine not to contest the fact that the accident was of a type that ordinarily does not occur unless the driver was negligent. Moreover, the defendant may introduce no evidence that he exercised due care in the driving of the automobile. Instead, the defendant may rest his defense solely on the ground that the plaintiff was a guest and not a paying passenger. In this case, the court should instruct the jury that it must assume that the defendant was negligent. Cf. Phillips v. Noble, 50 Cal.2d 163, 323 P.2d 385 (1958); Fiske v. Wilkie, 67 Cal. App.2d 440, 154 P.2d 725 (1945).

(2) Basic facts established as matter of law; evidence introduced to rebut presumption. Where the facts giving rise to the doctrine are established as a matter of law but the defendant has introduced evidence either of his due care or of a cause for the accident other than his negligence, the presumptive effect of the doctrine vanishes. In most cases, however, the basic facts will still support an inference that the defendant's negligence caused the accident. In this situation the court may instruct the jury that it may infer from the established facts that negligence on the part of the defendant was a proximate cause of the accident. The court is required to give such an instruction when requested. The instruction should make it clear, however, that the jury should draw the inference only if it believes after weighing the circumstantial evidence of negligence together with all of the other evidence in the case that it is more likely than not that the accident was caused by the defendant's negligence.

(3) Basic facts contested; no rebuttal evidence. The defendant may attack only the elements of the doctrine. His purpose in doing so would

be to prevent the application of the doctrine. In this situation, the court cannot determine whether the doctrine is applicable or not, because the basic facts that give rise to the doctrine must be determined by the jury. Therefore, the court must give an instruction on what has become known as conditional res ipsa loquitur.

Where the basic facts are contested by evidence, but there is no rebuttal evidence, the court should instruct the jury that it finds that the basic facts have been established by a preponderance of the evidence, then it must also find that the defendant was negligent.

(4) Basic facts contested; evidence introduced to rebut presumption. The defendant may introduce evidence that both attacks the basic facts that underlie the doctrine of res ipsa loquitur and tends to show that the accident was not caused by his failure to exercise due care. Because of the evidence contesting the presumed conclusion of negligence, the presumptive effect of the doctrine vanishes, and the greatest effect the doctrine can have in the case is to support an inference that the accident resulted from the defendant's negligence.

In this situation, the court should instruct the jury that if it finds that the basic facts have been established by a preponderance of the evidence, then it may infer from those facts that the accident was caused because the defendant was negligent. The jury should draw the inference, however, only if it believes after weighing all of the evidence that it is more likely than not that the defendant was negligent and the accident actually resulted from his negligence.

SEC. 3. Section 669 is added to the Evidence Code, to read:

669. (a) The failure of a person to exercise due care is presumed if:

(1) He violated a statute, ordinance, or regulation of a public entity;

(2) The violation proximately caused death or injury to person or property;

(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and

(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

(b) This presumption may be rebutted by proof that the person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

Comment. Section 669 codifies a common law presumption that is frequently applied in the California cases. See Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958). The presumption may be used to establish a plaintiff's contributory negligence as well as a defendant's negligence. Nevis v. Pacific Gas & Electric Co., 43 Cal.2d 626, 275 P.2d 761 (1954).

Effect of presumption

If the conditions listed in subdivision (a) are established, a presumption of negligence arises which may be rebutted by proof of the facts specified in subdivision (b). The presumption is one of simple negligence only, not gross negligence. Taylor v. Cockrell, 116 Cal. App. 596, 3 P.2d 16 (1931).

Section 669 appears in Article 4 (beginning with Section 660), Chapter 3, of Division 5 of the Evidence Code and, therefore, is a presumption affecting the burden of proof. EVID. CODE § 660. Thus, if it is established that a person violated a statute under the conditions specified in subdivision (a), the opponent of the presumption is required to prove to the trier of fact that it is more probable than not that the violation of the statute was reasonable and justifiable under the circumstances. See EVID. CODE § 606 and the comment thereto. Since the ultimate question is whether the opponent of the presumption was negligent rather than whether he violated the statute, proof of justification or excuse under subdivision (b) negates the existence of negligence and does not establish merely an excuse for negligent conduct. Therefore, if the presumption is rebutted by proof of justification or excuse under subdivision (b), the trier of fact is required to find that the violation of the statute was not negligent.

Violations by children. Section 669 applies to the violation of a statute, ordinance, or regulation by a child as well as by an adult. But

in the case of a violation by a child, the presumption may be rebutted by a showing that the child, in spite of the violation, exercised the care that children of his maturity, intelligence, and capacity ordinarily exercise under similar circumstances. Daun v. Truax, 56 Cal.2d 647, 16 Cal. Rptr. 351, 365 P.2d 407 (1961). However, if a child engages in an activity normally engaged in only by adults and requiring adult qualifications, the "reasonable" behavior he must show to establish justification or excuse under subdivision (b) must meet the standard of conduct established primarily for adults. Cf. Prichard v. Veterans Cab Co., 63 Cal.2d 727, 48 Cal. Rptr. 904, 408 P.2d 360 (1965)(minor driving an automobile).

Failure to establish conditions of presumption. Even though a party fails to establish a violation or that a proven violation meets all the requirements of subdivision (a), it is still possible for the party to recover by proving negligence apart from any statutory violation. Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497 (1950)(plaintiff permitted to recover even though her injury was not of the type to be prevented by statute).

Functions of judge and jury

If a case is tried without a jury, the judge is responsible for deciding both questions of law and questions of fact arising under Section 669. However, in a case tried by a jury, there is an allocation between the judge and jury of the responsibility for determining the existence or nonexistence of the elements underlying the presumption and the existence of excuse or justification.

Subdivision (a), paragraphs (3) and (4). Whether the death or injury involved in an action resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent (paragraph (3) of subdivision (a)) and whether the plaintiff was one of the class of persons

for whose protection the statute, ordinance, or regulation was adopted (paragraph (4) of subdivision (a)) are questions of law. Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497 (1950)(statute requiring parapet of particular height at roofline of vent shaft designed to protect against walking into shaft, not against falling into shaft while sitting on parapet). If a party were relying solely on the violation of a statute to establish the other party's negligence or contributory negligence, his opponent would be entitled to a directed verdict on the issue if the judge failed to find either of the above elements of the presumption. See Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497 (1950)(by implication).

Subdivision (a), paragraphs (1) and (2). Whether or not a party to an action has violated a statute (paragraph (1) of subdivision (a)) is generally a question of fact. However, if a party admits violating the statute or if the evidence of such violation is undisputed, it would be appropriate for the judge to instruct the jury that a violation of the statute, ordinance, or regulation has been established as a matter of law. Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958)(undisputed evidence of driving with faulty brakes).

The question of whether the violation of a statute has proximately caused or contributed to the plaintiff's death or injury (paragraph (2) of subdivision (a)) is normally a question for the jury. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279 (1947). However, the existence or nonexistence of proximate cause becomes a question of law to be decided by the judge if reasonable men can draw but one inference from the facts. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279 (1947). See also, Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958)(defendant's

admission establishes proximate cause); Moon v. Payne, 97 Cal. App.2d 717, 218 P.2d 550 (1950)(failure to obtain permit to burn weeds not proximate cause of child's burns).

Subdivision (b). Normally, the question of justification or excuse is a jury question. Fuentes v. Panella, 120 Cal. App.2d 175, 260 P.2d 853 (1953). The jury should be instructed on the issue of justification or excuse whether the excuse or justification appears from the circumstances surrounding the violation itself or appears from evidence offered specifically to show justification. Fuentes v. Panella, 120 Cal. App.2d 175, 260 P.2d 853 (1953)(instruction on justification proper in light of conflicting testimony concerning violation itself and surrounding circumstances). However, an instruction on the issue of excuse or justification should not be given if there is no evidence that would sustain a finding by the jury that the violation was excused. McCaughan v. Hansen Pacific Lumber Co., 176 Cal. App.2d 827, 833-834, 1 Cal. Rptr. 796, 800 (1959)(evidence went to contributory negligence, not to excuse); Fuentes v. Panella, 120 Cal. App.2d 175, 260 P.2d 853 (1953)(dictum).

SEC. 4. Section 776 of the Evidence Code is amended to read:

776. (a) A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness.

(b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but , subject to subdivision (e), the witness may be examined only as if under redirect examination by:

(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified.

(c) For the purpose of this section, parties represented by the same counsel are deemed to be a single party.

(d) For the purpose of this section, a person is identified with a party if he is:

(1) A person for whose immediate benefit the action is prosecuted or defended by the party.

(2) A director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person specified in paragraph (1), or any public employee of a public entity when such public entity is the party.

(3) A person who was in any of the relationships specified in paragraph (2) at the time of the act or omission giving rise to the cause of action.

(4) A person who was in any of the relationships specified in paragraph (2) at the time he obtained knowledge of the matter concerning which he is sought to be examined under this section.

(e) Paragraph (2) of subdivision (b) does not require counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified to examine the witness as if under redirect examination if the party who called the witness for examination under this section:

(1) Is also a person identified with the same party with whom the witness is identified.

(2) Is the personal representative, heir, successor, or assignee of a person identified with the same party with whom the witness is identified.

Comment. Section 776 permits a party calling as a witness an employee of (or someone similarly identified in interest with) an adverse party to examine the witness as if under cross-examination, i.e., to use leading questions in his examination. Section 776 requires the party whose employee was thus called and examined to examine the witness as if under redirect, i.e., to refrain from the use of leading questions. If a party is able to persuade the court that the usual rule prescribed by Section 776 is not in the interest of justice in a particular case, the court may enlarge or restrict the right to use leading questions as provided in Section 767.

These rules are based on the premise that ordinarily such a witness will have a feeling of identification in the lawsuit with his employer rather than with the other party to the action.

Subdivision (b) has been amended, and subdivision (e) has been added, because the premise upon which Section 776 is based does not necessarily apply when the party calling the witness is also closely identified with the adverse party; hence, the adverse party should be entitled to the usual rights of a cross-examiner when he examines the witness. For example, when an employee sues his employer and calls a co-employee as a witness, there is no reason to assume that the witness will be adverse to the employee-party and in sympathy with the employer-party. The reverse may be the case. The amendment to Section 776 will permit an employer, as a general rule, to use leading questions in his cross-examination of an employee-witness who has been called to testify under Section 776 by a co-employee. However, if the party calling the witness can satisfy the court that the witness is in fact identified in interest with the employer or for some other reason is amenable to suggestive questioning by the employer, the court may limit the employer's use of leading questions during his examination of the witness pursuant to Section 767. See J. & B. Motors, Inc. v. Margolis, 75 Ariz. 392, 257 P.2d 588, 38 A.L.R.2d 946 (1953).

SEC. 5. Section 952 of the Evidence Code is amended to read:

952. As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

Comment. The express inclusion of "a legal opinion" in the last clause will preclude a possible construction of this section that would leave the attorney's uncommunicated legal opinion--which includes his impressions and conclusions--unprotected by the privilege. Such a construction would virtually destroy the privilege.

SEC. 6. Section 992 of the Evidence Code is amended to read:

992. As used in this article, "confidential communication between patient and physician" means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes a diagnosis made and the advice given by the physician in the course of that relationship.

Comment. The express inclusion of "a diagnosis" in the last clause will preclude a possible construction of this section that would leave an uncommunicated diagnosis unprotected by the privilege. Such a construction would virtually destroy the privilege.

SEC. 7. Section 1012 of the Evidence Code is amended to read:

1012. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or examination or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose of the consultation or examination, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

Comment. The express inclusion of "a diagnosis" in the last clause will preclude a possible construction of this section that would leave an uncommunicated diagnosis unprotected by the privilege. Such a construction would virtually destroy the privilege.

SEC. 8. Section 1017 of the Evidence Code is amended to read:

1017. There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his mental or emotional condition.

Comment. The words "or withdraw" are added to Section 1017 to make clear that the psychotherapist-patient privilege applies in a case where the defendant in a criminal proceeding enters a plea based on insanity, submits to an examination by a court-appointed psychotherapist, and later withdraws the plea based on insanity prior to the trial on that issue. In such case, since the defendant does not tender an issue based on his mental or emotional condition at the trial, the privilege should remain applicable. Of course, if the defendant determines to go to trial on the plea based on insanity, the psychotherapist-patient privilege will not be applicable. See Section 1016.

It should be noted that violation of the constitutional right to counsel may require the exclusion of evidence that is not privileged under this article; and, even in cases where this constitutional right is not violated, the protection that this right affords may require certain procedural safeguards in the examination procedure and a limiting instruction if the psychotherapist's testimony is admitted. See In re Spencer, 63 Cal.2d 400, 46 Cal. Rptr. 753, 406 P.2d 33 (1965).

It is important to recognize that the attorney-client privilege may provide protection in some cases where an exception to the psychotherapist-patient privilege is applicable. See Section 952 and the Comment thereto. See also Sections 912(d) and 954 and the Comments thereto.

SEC. 9. Section 1152 of the Evidence Code is amended to read:

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act or service to another who has sustained or will sustain or claims ~~to have~~ that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it.

(b) This section does not affect the admissibility of evidence of:

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim; or

(2) A debtor's payment or promise to pay all or a part of his preexisting debt when such evidence is offered to prove the creation of a new duty on his part or a revival of his preexisting duty.

Comment. The amendment to Section 1152 is intended to clarify the meaning of the section without changing its substantive effect. The words "or will sustain" have been added to make it clear that the section applies to statements made in the course of negotiations concerning future loss or damage as well as past loss or damage. Such negotiations might occur as a result of an alleged anticipatory breach of contract or as an incident of an eminent domain proceeding.

SEC. 10. Section 1201 of the Evidence Code is amended to read:

1201. A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if ~~the~~ such hearsay evidence ~~of such statement~~ consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.

Comment. This amendment is designed to clarify the meaning of Section 1201 without changing its substantive effect.

SEC. 11. Section 1600 of the Evidence Code is amended to read:

1600. (a) The official record of a document purporting to establish or effect an interest in property is prima facie evidence of the existence and content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if:

~~(a)~~ (1) The record is in fact a record of an office of a public entity; and

~~(b)~~ (2) A statute authorized such a document to be recorded in that office.

(b) The presumption established by this section is a presumption affecting the burden of proof.

Comment. One effect of making the official record "prima facie evidence" is to create a rebuttable presumption. See EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."). The classification of this presumption as one affecting the burden of proof is consistent with the prior case law. See Thomas v. Peterson, 213 Cal. 672, 3 P.2d 306 (1931); DuBois v. Larke, 175 Cal. App.2d 737, 346 P.2d 830 (1959); Osterberg v. Osterberg, 68 Cal. App.2d 254, 156 P.2d 46 (1945). Such a classification tends to support the record title to property by requiring the record title be sustained unless the party attacking that title can actually prove its invalidity. See EVID. CODE § 606 and Comment thereto.

SEC. 12.. Section 1602 of the Evidence Code is repealed.

~~1602.--If a patent for mineral lands within this state issued or granted by the United States of America, contains a statement of the date of the location of a claim or claims upon which the granting or issuance of such patent is based, such statement is prima facie evidence of the date of such location.~~

Comment. Section 1602 of the Evidence Code is repealed because it is superseded by the addition of Section 2325 to the Public Resources Code.

SEC. 13. Section 1603 of the Evidence Code is amended to read:

1603. A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record, is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed. The presumption established by this section is a presumption affecting the burden of proof.

Comment. One effect of Section 1603 is to create a rebuttable presumption. See EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.").

Prior to the enactment of Code of Civil Procedure Section 1928 in 1872 (upon which Section 1603 of the Evidence Code is based), the recitals in a sheriff's deed, made pursuant to legal process, could not be used as evidence of the judgment, the execution, and the sale upon which the deed was based. The existence of the prior proceedings were required to be proved with independent evidence. Hihn v. Peck, 30 Cal. 280, 287-288 (1866); Heyman v. Babcock, 30 Cal. 367, 370 (1866). The enactment of the predecessor of Evidence Code Section 1603 had two effects. First, it obviated the need for such independent proof. See, e.g., Oakes v. Fernandez, 108 Cal. App.2d 168, 238 P.2d 641 (1951); Wagnor v. Blume, 71 Cal. App.2d 94, 161 P.2d 1001 (1945). See also BASYE, CLEARING LAND TITLES § 41 (1953). Second, it obviated the need for proof of a chain of title prior to the execution of the deed. Krug v. Warden, 57 Cal. App. 563, 207 Pac. 696 (1922).

The classification of the presumption in Section 1603 as a presumption affecting the burden of proof is consistent with the classification of the similar and overlapping presumptions contained in Evidence Code Sections 664 (official duty regularly performed) and 1600 (official record of document affecting property). Like the presumption in Section 1600, the presumption in Section 1603 serves the purpose of supporting the record chain of title.

SEC. 14. Section 1605 of the Evidence Code is amended to read:

1605. Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this state, derived from the Spanish or Mexican governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-66, are ~~receivable as prima facie evidence~~ admissible as evidence with like force and effect as the originals and without proving the execution of such originals.

Comment. Chapter 281 of the Statutes of 1865-66 required the California Secretary of State to cause copies to be made of all of the original Spanish title papers relating to land claims in this state derived from the Spanish and Mexican governments that were on file in the office of the United States Surveyor-General for California. These copies, authenticated by the Surveyor-General and the Keeper of Archives in his office, were then required to be recorded in the offices of the county recorders of the concerned counties.

Section 5 of the 1865-66 statute, which is now codified as Section 1605 of the Evidence Code, provided that the recorded copies would be admissible "as prima facie evidence" without proving the execution of the originals. It is apparent that the original purpose of the section was to provide an exception to the best evidence rule--which would have required production of the original or an excuse for its nonproduction before the recorded copy could be admitted--and an exception to the rule, now expressed in Evidence Code Section 1401(b), requiring the authentication of the original document as a condition of the admissibility of the copy. Section 1605, therefore, has been revised to reflect this original purpose.

SEC. 15. Section 2325 is added to the Public Resources Code, to read:

2325. If a patent for mineral lands within this state issued or granted by the United States of America, contains a statement of the date of the location of a claim or claims upon which the granting or issuance of such patent is based, such statement is admissible as evidence of the date of such location.

Comment. Section 2325 is based on Section 1602 of the Evidence Code, which merely restated the provisions of former Section 1927.5 of the Code of Civil Procedure. Although the purpose for the enactment (in 1905) of Section 1927.5 of the Code of Civil Procedure is somewhat obscure, it seems likely that the section was intended merely to provide a hearsay exception and thus overcome the force of the suggestion in Champion Mining Co. v. Consolidated Wyoming Gold Mining Co., 75 Cal. 78, 81-83 (1888) that the issuance of a patent would not be evidence of a location at any time prior to the date of the patent. As a recital of location date in a patent may be based on self-serving statements made in an ex parte proceeding, it is inappropriate to give such a recital presumptive effect.

Section 2325 is probably unnecessary, for the statements that are made admissible by the section are probably admissible anyway under the provisions of Evidence Code Section 1330 (statements in dispositive instruments). Section 2325, however, removes whatever doubt there may be concerning such admissibility. The section has been relocated in the Public Resources Code so that it will appear among other statutory provisions relating to specific evidentiary problems involving mining claims.