#65(L) 10/6/65

Memorandum 65-57

Subject: Study No. 65(L) - Evidence Code

Attached to this memorandum are the following materials:

Exhibit I (pink) -- letter from Commissioner Keatinge

Exhibit II (yellow) -- letter from Justice Kaus

Exhibit III (green) -- extract from Memorandum 64-29

Exhibit IV (blue) -- letter from Frank J. Kanne, Jr.

The foregoing materials present the following policy questions:

1. Should the Evidence Code be amended in the light of the suggestions made?

2. Are the required amendments of sufficient gravity to warrant the amendment of the Code at a special session in 1966?

The second policy decision cannot be made until the amendments to be made, if any, have been agreed upon. Hence, we proceed to the suggestions that have been made concerning particular matters in the Evidence Code.

Section 311

Commissioner Keatinge's letter (pink) suggests that the caption should be changed. The complaint made is that the caption refers only to foreign law while the section itself relates to the situation when any kind of out-of-state law cannot be determined.

We have no power to amend the caption inasmuch as the caption is not part of the law. We can write to the private publishers, however, and suggest an amendment of the caption that appears in their publications. The private publishers have used our captions in preparing their editions of the Evidence Code.

We used the term "foreign" in the caption to denote all out-of-state jurisdictions. The question is whether this is misleading--or sufficiently so to warrant modification of the lead line. If amendment is desired, we suggest that West and Bancroft-Whitney be requested to change the caption as follows:

Procedure when ~~foreign~~ out-of-state law cannot be determined.

Section 320

The comment under this section refers to Code of Civil Procedure sections that were added by the Cobey-Song Evidence Act as "(added in this recommendation)". The suggestion is made that these references be changed.

Again, since these comments are not statutes, they cannot be amended. The most that can be done is to suggest to the private publishers that a different explanatory phrase be substituted. The substitute phrase could be placed in brackets to denote that the change was made editorially. The substitute version could be:

"(added in this recommendation [Chapter 299, statutes of 1965])"

Section 402

The question is whether subdivision (b) is consistent with the law as declared in Jackson v. Denno, 378 U.S. 368 (1964). Subdivision (b) permits a judge to hear and determine the question of the admissibility of evidence out of the presence of the jury; but when the question is the admissibility of a confession in a criminal action, subdivision (b) requires that the court hear and determine admissibility out of the presence of the jury if any party so requests. The suggestion is made that Jackson v. Denno may require all hearings on the admissibility of a confession to be heard out of the presence of the jury where its voluntary nature has been challenged by the defense.

It is, of course, possible that Jackson v. Denno may be relied on in the future as the basis for a requirement that all preliminary hearings on confessions be held out of the presence of the jury. But the issue wasn't presented by that case, and any amendment of the Evidence Code along the lines suggested would have to be based on speculation as to where the Supreme Court is going next.

All that the court disapproved in Jackson v. Denno was the New York practice of submitting all disputed factual issues on the admissibility of a confession to the jury without a preliminary determination by the judge that the confession was actually voluntary. The basis for the holding was the majority view (Black, Clark, Harlan, and Stewart dissented) that the criminal defendant has a constitutional right to a determination of the issue of voluntariness by a body that does not have, at the same time, the job of determining the truth or falsity of the confession. It is "the defendant's constitutional right . . . to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." 378 U.S. at 376-377. The dissenters argued in favor of jury determination of the issue, i.e., that the Constitution does not forbid jury determination of the issue.

There is some language in the opinion that suggests that it is prejudicial to a defendant to present the evidence on voluntariness before the jury that must ultimately decide guilt or innocence. But there is no indication that the evidence cannot be presented before the jury if the defendant does not object. That issue was not discussed by the court, and any conclusion as to what the answer will be when the issue is presented would be speculation.

As a matter of fact, although existing California law seems to require a preliminary showing of voluntariness as a foundation for the admission of a confession (People v. Miller, 135 Cal. 69 (1901); cf. People v. Atchley, 53 Cal.2d 160, 170 (1959)), the defendant apparently waives his objection to lack

of foundation by failing to object:

> Where the trial judge has reason to believe that the confession may have been involuntary, it is his duty to inquire even in the absence of an objection by counsel. (People v. Rodriguez, 58 Cal. App.2d 415.) Where there is no reason for the court to suspect that the confession was not freely given, and where counsel offers no objection on that ground, the testimony is admissible. (People v. White, 43 Cal.2d 740; People v. Walters, 189 Cal. App.2d 334, 336.) [People v. Kaminsky, 204 Cal. App.2d 300, 302 (1962).]

We know of no authority for the proposition that the U. S. Constitution requires a different rule. If it is not unconstitutional to require the defendant to object in order to keep the confession itself from being presented to the jury, it does not seem unconstitutional to require the defendant to make a request in order to keep the preliminary hearing on its admissibility out of the presence of the jury.

We included subdivision (b) in Section 402 because we were advised that trial judges require a preliminary showing of voluntariness as a foundation for the admission of all confessions in criminal cases. In the vast majority of cases, this preliminary showing is undisputed. It would greatly disrupt the trial of cases if all of these undisputed showings had to be made out of the presence of the jury. We, therefore, drafted subdivision (b) to grant the defendant a right to an in camera hearing on voluntariness in any case where he wishes to seriously dispute the prosecution's showing--or in any other case if he so desires. We contemplated that a defendant might want the jury to hear the evidence in some cases so that he could "try" the police and prosecuting officials for their brutality in extracting the confession and thus gain the sympathy of the jury.

We might amend subdivision (b) to provide that any objection to the admissibility of a confession or admission shall be deemed to be a request to

hold the preliminary hearing in private. We might, instead, amend it to require the court to advise the defendant of his right to a private hearing whenever such an objection is made.

We cannot revise the comment, for we have no procedure for doing so. The comment is the report of the legislative committees that recommended the section in its present form. The report has been issued, and it is not subject to amendment as a statute would be.

Section 403

Justice Kaus has touched upon one of the most subtle and difficult problems in the Evidence Code. The decision made by the Commission on the problem was not made inadvertently; it was made after thorough consideration. The problem involves both subdivision (a)(4) and subdivision (c)(1). Subdivision (a)(4) will be discussed first.

Justice Kaus suggests that authentication of oral hearsay declarations should be treated as a competency problem, not a relevancy problem. The example he gives of the dispute as to whether the alleged statement was that of the defendant, and therefore an admission, or was that of a bystander, and therefore inadmissible hearsay, has its parallels in Nu Car Carriers v. Traynor, 125 F.2d 47 (1942) and in Boyle v. Wiseman, 11 Exch. 360, 156 Eng. Repr. 870 (1855). The cited cases were complicated, however, by the fact that the admissions involved were in writing and secondary evidence of their content was offered.

In Nu Car Carriers v. Traynor, the plaintiff recovered a judgment against Nu Car for personal injuries sustained in a collision between his car and a truck belonging to Nu Car. At the trial, Nu Car sought to introduce a copy of a statement allegedly signed by the plaintiff exonerating Nu Car's driver from any responsibility for the accident. The driver testified that he saw the defendant sign the original, and evidence of the making of the copy and its accuracy

was introduced. The trial judge excluded the copy, apparently because he did not believe the driver's testimony that such a statement had been made by the plaintiff. The Court of Appeals reversed, apparently believing that the trial court should not have resolved the question of the authenticity of the original admission.

In contrast, Boyle v. Wiseman was an action for a libel originally published in a French newspaper and later in two English newspapers. The plaintiff sought to prove the French publication by giving secondary evidence of a letter written by the defendant to a French priest admitting the publication of the libel. The French priest refused to give up the letter or to attend the trial. As the plaintiff's witness began to relate the contents of the letter, the defendant produced a document that he offered to prove was the original letter (thereby barring secondary evidence under the best evidence rule). Plaintiff's witness said that if the defendant's document was the original letter, it had been altered. The trial judge ruled that at that point in the trial the defendant could not contest the authenticity of the original. The defendant did not do so later in the trial and plaintiff recovered judgment.

This decision was reversed, the judges deciding that on the question of the authenticity of the original admission, the judge was bound to hear the evidence on both sides and decide whether defendant's document was in fact the original.

Professor Morgan says of these cases:

> It is difficult to see how the pronouncements of Baron Parke [in Boyle v. Wiseman] can be upheld without unwarranted interference with the right of trial by jury. Surely if two documents were produced, the plaintiff claiming one to be the original and the defendant the other, the dispute must be settled by the jury. If the plaintiff has lost his document so that he is unable to produce it, does that make the question of the authenticity of the defendant's document for the judge? If both sides grant that there was an original and one presents a document which the other disputes, by what line of reasoning can either be deprived of the right to have the jury determine whether the

> presented document is the original: If the creation of the original is in dispute, why should that dispute be put beyond the function of the jury by the circumstance that the party can prove the content of the original only by secondary evidence? It is submitted that there is no policy of the law designed to protect the opponent from being harmed by the limited capacity of a jury to value evidence or to protect him from the danger of suppression of evidence of higher quality that justifies the courts in depriving the proponent of a jury trial on the issue of the existence or identity of the original. The decision of the District of Columbia Court of Appeals should be followed. [59 HARV. L. REV. at 490-491 (1946).]

All of the foregoing cases involved the authentication of written admissions. But the problem with oral admissions is the same--it is difficult to see how the judge can treat the authentication of such statements as a question of competency without unduly interfering with the right of trial by jury. Moreover, it is difficult to see why any distinction should be made between authenticating writings (subdivision (a)(3)) and authenticating oral statements (subdivision (a)(4)). Suppose these cases:

P and D collide at an intersection. P later sues D and offers in evidence a statement purportedly written by D stating that D was driving too fast and was intoxicated. P's witness, W, testifies that he saw D write the statement; but D denies making the statement. The question is whether P should be able to present the statement to the jury upon the basis of W's testimony or whether the judge should finally decide whether D made the statement. Should the judge, because he believes D's denial, be able to prevent the statement from being presented to the jury? Subdivision (a)(3) and our rules relating to authentication of documents indicate that the judge should admit the statement on the basis of W's testimony and should permit the parties to contest its authenticity before the jury. Suppose, however, that the judge believes W's testimony and lets the statement in. D wants to present evidence that he did not make the statement and to have the jury instructed to disregard the statement if it finds he did not

make it. If the question is treated as one of competency, Section 405 (b)(2) prohibits the judge from giving any such instruction. This, we submit, is unjust; and D should not be foreclosed by the judge's decision on admissibility from contesting the authenticity of the writing before the jury.

Suppose a similar case: P and D collide at an intersection. P seeks to prove that at a later time D said to W that D was intoxicated. D objects on the ground that he never made the statement and that W's testimony is false. Again, should the judge have the power to resolve W's credibility and keep the alleged statement from the jury? Or, should the judge finally decide that the admission is authentic, admit the statement, and preclude a contest over its authenticity before the jury. Again, we submit that this is too great an interference with the right of trial by jury.

The foregoing cases are fairly simple and present the basic issue: should there be a different standard for the authentication of oral hearsay statements or even for all hearsay statements than there is for the authentication of writings generally? We submit that there is no justification for the creation of two differing authentication rules--especially if the difference is to be based merely on the form of the statement, whether it is oral or in writing.

Justice Kaus's examples present a slightly more difficult problem, but the problem is the same nonetheless--it is the problem of authentication.

Suppose after the intersection accident between P and D, P offers a letter allegedly signed by D admitting that D was intoxicated. D claims the letter is a forgery and that X actually wrote the letter. [In principle, this is the example in Justice Kaus's letter.] The question then is whether P should be able to get a jury determination of the authenticity of the letter or whether the judge should finally resolve the question of authenticity. Again, we think

that this is the sort of question the jury should resolve. P should not be precluded from presenting his case to the jury, nor should D be prevented from contesting the issue of authenticity before the jury.

Suppose, then, that the admission in the preceding example was oral and that P's witness, W, claims that D made the statement while D claims that X made the statement. The question is clearly one of relevancy, for the fact that X was drunk is irrelevant. The statement is relevant only if D in fact made the statement. Here, authenticity should again be determined under the 403 standard.

The only difference between the preceding example and Justice Kaus's example is that D's statement above describes his own conduct while D's statement in Justice Kaus's example describes his agent's conduct. But the problem is still one of authenticity.

The difficulty arises because of the theory under which admissions are admitted. Admissions are not admitted because they are considered reliable. On the contrary, the fact that they are self-serving when made is irrelevant. "But when offered <u>against</u> the party they have . . . the same logical status as a <u>witness' self-contradiction</u>. Just as a witness' testimony is discredited when it appears that on some other occasion he has made a statement inconsistent with that testimony, so also the party-opponent is discredited when it appears that on some other occasion he has made a statement inconsistent with his present claim against him." 4 WIGMORE, EVIDENCE § 1048, p. 3. Thus, the relevancy of an admission--its discredit to the party--is derived from the fact that it was the party who made the statement. Where the statement relates to the party's own conduct, as in the examples above, this is clear. A stranger's admission of intoxication is irrelevant to D's liability; but D's admission of

intoxication is. Hence, these statements are admitted upon the normal authentication showing--sufficient evidence to sustain a finding that the alleged party made the statement.

When the statement is such as that described in Judge Kaus's letter--describing the observed conduct of D's agent--the problem becomes complex because the statement now is relevant both because D made the statement and because its subject matter is such that it would be relevant even if X made it. But its relevancy from the latter standpoint is not the reason the statement is admissible--it is inadmissible hearsay even though relevant if X made the statement. Thus, we are confronted with the familiar situation where the evidence has a dual relevancy and where it is admissible for one purpose but inadmissible for the other. Hence, a limiting instruction must be given. P is entitled to have the jury determine whether D has admitted liability; but D is entitled to have any statement made by X kept from the jury. The only way to solve the dilemma is to let the evidence in and instruct the jury in accordance with subdivision (c).

Is the analysis any different if the dying declaration exception is considered? Suppose this case:

P sues D for the wrongful death of X who was killed by a hit-run driver. P calls witness W-1 who is willing to testify that while X was dying (that X knew he was dying is conceded by all parties) he stated that D's car, with D driving, struck him. D produces witness W-2 who testifies that he was at the scene slightly before W-1 arrived, that he remained in attendance until X died, and that X made no statement of any sort concerning the cause of his death. P also shows some evidence of W-2's bias in favor of D. Should the judge withhold the dying declaration from the jury unless he is persuaded that X made the

statement? We submit that the judge should admit the statement and let the jury determine whether X made it or not. The jury is not going to consider it if P's evidence going to W-2's credibility persuades them that X never made such a statement. If the judge lets the evidence in because he believes P's witnesses; we submit that D should be able to contest the authenticity issue before the jury.

In the example provided by Justice Kaus, the problem becomes complex because there is a dispute as to who made the statement. Again, we think this problem should be solved by the limiting instruction. We do not believe that the authentication problem should be thrown into Section 405 instead of Section 403 whenever oral hearsay is involved.

As said before, the Commission thoroughly considered this problem when the Evidence Code was in preparation, and the solution arrived at is one upon which reasonable minds can differ (as is obvious from Justice Kaus's letter). Even Professor Morgan is not consistent: in the passage quoted above he chastised the English court for taking from the jury the question of the authenticity of a written admission; yet in other writings he has advocated the view that the judge, not the jury, should decide the question of the authenticity of an alleged admission. We believe, however, that the solution we have is correct. There may be difficult problems of application when a particular statement has dual relevancy; but any other rule would prevent a party with sufficient evidence to obtain a jury verdict in his favor from presenting that evidence to the jury merely because the judge does not believe the evidence.

Section 413

Commissioner Keatinge's letter points out that Griffin v. California, 14 L.ed.2d 106 (1965), held that it is unconstitutional to comment on a defendant's failure or refusal to explain the evidence against him when such

failure or refusal is based on the exercise of his Fifth Amendment right to refuse to testify against himself.

Section 413 does not reflect the qualification that Griffin imposed on its provisions. However, the section does not purport to deal with the privilege against self incrimination or the incidents of that privilege--it merely declares a general rule that is, of course, subject to any limitations imposed by the constitutions of this state and the United States.

It would be possible to amend the section to declare that its provisions are inapplicable whenever a constitutional privilege is invoked. But that course of action would seem to anticipate a decision that the Supreme Court declined to make in the Griffin case. The majority opinion concludes with a footnote reading as follows:

> We reserve decision on whether an accused can require, as in Bruno v. United States, 308 U.S. 287, that the jury be instructed that his silence must be disregarded.

Section 413 provides that the trier of fact, in determining what inferences may be drawn from the evidence in the case, may consider the party's failure to explain or deny such evidence when he would be in a position to do so. To amend Section 413 would seem to deny the trier of fact the right to do so, while the Supreme Court merely held that comment is prohibited.

Constitutional limitations on statutory rules of evidence are inherent and need not be expressed. We do not think that it is feasible to attempt to keep the Code abreast of the latest decisions erecting new constitutional barriers to the admission of evidence. The Commission so concluded, also, when it abandoned its effort to state the particularities of the privilege against self-incrimination. We think the same decision should be made here.

We believe that Section 412 (party having power to produce better evidence) and Section 413 (party's failure to explain or deny evidence against

him) represent sound policy and should be given application to the full extent constitutionally permissible. Section 3 of the Evidence Code provides:

> 3. If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

We do not believe any amendment of the Evidence Code is necessary in view of Section 3 of the Evidence Code. Sections 412 and 413, like the other provisions of the Evidence Code, are subject to any constitutional principles heretofore or hereafter declared by the California or the United States Supreme Courts. Nevertheless, if some amendment of the Evidence Code is believed necessary, we suggest that a new Section 414 be added to the Evidence Code to read:

> 414. Instructions given and comments made pursuant to Section 412 or 413 are subject to any limitations provided by the Constitution of the United States or the State of California.
>
> Comment. Section 414 recognizes that the Constitution of the United States or the State of California may impose limitations on the types of instructions that may be given and the comments that may be made under Sections 412 and 413. See Griffin v. California, 14 L.ed.2d 106 (1965)(unconstitutional to comment on a criminal defendant's failure or refusal to explain the evidence against him when such failure or refusal is based on the exercise of his Fifth Amendment right to refuse to testify against himself).

We see no need to place this matter on the special call for the 1966 budget session. Everyone is aware of the Griffin case. We will, however, write to West Publishing Company and to Bancroft-Whitney Publishing Company and suggest that the Griffin case be noted under Sections 412 and 413.

Section 776

You will recall that attorneys for certain railroads pointed out a change in the law that Section 776 makes insofar as employer-employee litigation is concerned. Existing law permits an employer whose employee is called under Section 2055 to cross-examine that employee. Section 776 requires the employer to examine the employee as if under redirect examination unless, under Section 767, the court finds that special circumstances require that the employer be permitted to cross-examine.

The railroads would like to restore the existing rule in cases where an employee is suing an employer and the party-employee calls a fellow-employee for examination under Section 776. Language that would accomplish this is:

> (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 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. The limitations in this paragraph do not apply when the party who called the witness for examination under this section is also a person identified with the same party with whom the witness is identified, or the personal representative, heir, successor, or assignee of such a person.

Privileges

Exhibit IV is a letter that was forwarded to the Commission by Senator Cobey. The letter was presented to the Commission near the end of the 1965 legislative session, and the Commission asked to see it again when possible amendments to be made at the 1966 special session were to be considered.

The letter suggests a new privilege for social workers involved in adoption proceedings.

Section 1201

Lawrence Baker pointed out that the present wording of Section 1201 is not entirely clear. The version of the section that appeared in the tentative recommendation was much clearer. The question is whether the section should be amended to conform to its previous version. The amendment would be as follows:

> 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 hearsay evidence of such statement consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.

Presumptions

Conversations with a variety of persons indicate that there is considerable concern over the status of res ipsa loquitur under the new Evidence Code. We have attached an extract from Memorandum 64-29 (on green) that analyzes the doctrine as it exists under present California law.

That memorandum points out that the doctrine meets the definition of a presumption under Section 600, for if the facts giving rise to the doctrine are found, the jury is instructed that it must find negligence unless the defendant comes forward with something.

The memorandum concludes, too, that under existing law the doctrine is a presumption that does not affect the burden of proof, but does affect the burden of producing evidence. The defendant does not need to persuade the jury of his carefulness. The jury is told that the defendant is entitled to a verdict if his proof balances the inferences arising from the plaintiff's evidence, but the plaintiff is entitled to a verdict if the inferences arising from his evidence preponderate in convincing force.

Because of the uncertainty concerning the status of the doctrine under the Evidence Code, the Commission should consider whether the doctrine should be codified as a presumption. If the Commission concludes that res ipsa loquitur should be codified, it must then decide whether to classify it as a presumption affecting the burden of producing evidence (as it appears to be under existing law) or as a presumption affecting the burden of proof.

In resolving the classification problem, the Commission should consider whether there is any policy to be served in weighting the scales of justice on the side of the plaintiff in this kind of case. Of course, public policy is in favor of compensating persons injured by the negligence of another; but that policy cannot be considered for it assumes the existence of the very fact in issue in the law suit--whether the defendant was negligent and responsible for the injury. But does the presumption serve also to enhance the protection the law provides for the patient while he is under anesthesia? The law places upon a bailee the burden of proving that goods lost or damaged while in his custody were lost or damaged without negligence on his part. Do the considerations that warrant the placement of the burden of proof on the defendant in bailor-bailee cases warrant a similar placement of the burden of proof in res ipsa loquitur cases?

The question is a difficult one, and various jurisdictions have come to different conclusions upon it. Some hold that res ipsa shifts the burden of proof; others, like California, hold that it does not. See Weiss v. Axler, 328 P.2d 88 (Colo. 1958); anno. 92 A.L.R. 653.

Amendment of Code in 1966

If the Commission decides that the Code should be amended in the light of the suggestions made, it should then decide whether the amendments are of

sufficient gravity to warrant their consideration at a special session of the Legislature in 1966. The Code will take effect on January 1, 1967, and the effect of postponing any proposed amendments to the general session of 1967 will be that the Code will exist in unamended form for approximately 9 months. Placing the Evidence Code on the call for a special session, therefore, will be for the purpose of avoiding application of the Evidence Code in its unamended form for that 9-month period. The policy question, then, is whether this 9-month delay is so serious as to warrant the placing of the Evidence Code on the special session call and opening it up for amendments which may be proposed by everyone, not merely the Commission.

One problem in attempting to identify defects in the Code has been that interested persons and organizations are only now beginning to examine the code to determine whether defects exist. A copy of the new code was sent to each person on our mailing list for this topic with a request that they advise us of any defects. No response has been received as a result of this request.

The law enforcement attorneys and the county counsels, meeting at the time of the Bar Convention, appointed committees to review the code from the standpoint of its application to criminal actions and to civil actions. We mentioned to them that we would like to be advised of any defects that have been discovered and were advised that it will be some time before the committees will have completed their study.

The Conference of Judges and the State Bar Committee on Evidence have not, so far as we are aware, identified any defects. At least, they have not notified us of any defects in the new code although we have requested them to do so.

On the other hand, there is considerable concern among some groups concerning particular provisions of the Evidence Code. For example, a representative of the insurance industry expressed considerable concern about the repeal of the Dead Man Statute, but he did not oppose the enactment of the Evidence Code nor raise this objection at the 1965 session because he was persuaded that the Evidence Code was a generally desirable enactment. Whether he would attempt to secure inclusion of a Dead Man Statute in the code if it were put on the special call is not clear. Others have expressed concern about some of the hearsay exceptions. Generally, we feel that they will be satisfied with the code if they have an opportunity to see it work in practice.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXHIBIT 1 Memo 65-57

LAW OFFICES OF
KEATINGE & STERLING
SUITE 120 ROWAN BUILDING
458 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013
626-6241 AREA CODE 213

September 27, 1965

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear John:

In your memorandum of September 2, 1965, you asked that we comment on any matters called to our attention during the Conference of Judges regarding the Evidence Code which might require change or correction. I pass along the following comments for your consideration:

1. §311. Procedure when foreign law cannot be determined - This caption should be changed, as it insufficiently indicates that the procedure provided in §311 can be used when sister state law or that of a public entity in a sister state cannot be determined.

2. §320. Power of court to regulate order of proof - The comment under this section makes reference to certain code sections in the Code of Civil Procedure as "(added in this recommendation)"; this wording is obviously incorrect and should be changed.

3. §402(b) - A serious question was raised by several of the judges present that §402(b) as presently worded may not comply with Jackson v. Denno; in other words, it was their position that in a criminal action the court must hear and determine the question of the admissibility of a confession out of the presence and hearing of the jury in every case where its free and voluntary nature has been challenged by the defense. At the very least, it seems to me that the comment should be strengthened to indicate that counsel for the defendant should be advised of the defendant's rights

in this connection out of the presence of the jury so that he may make, if he so wishes, an affirmative election to waive what the Supreme Court believes to be a constitutional right; in light of Jackson v. Denno, I think there is serious doubt whether or not it is incumbent upon counsel for the defendant to make the request or that his failure to make the request will operate as a waiver sufficient to satisfy the constitutional requirement.

4. §413 - This section as presently worded is, of course, unconstitutional in view of the Supreme Court decision in the Griffin case. Judge Dozier feels that comment upon the whole case is still in order under Griffin, and cites in support thereof the recent DCA case of DeLeon (I do not have the citation). I am not at all sure even this type of comment is any longer permissible under Griffin, but I think the matter should have immediate study.

With very best personal regards, I remain

Sincerely,

Richard H. Keatinge

RHK:bj

cc: Mr. John R. McDonough

EXHIBIT II

Memo 65-57

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

Section 646.

We have several times indicated that we would submit a report to you on the doctrine of res ipsa loquitur. We have classified the doctrine as a presumption affecting the burden of producing evidence because this is how the California courts have classified it.

First, is the doctrine of res ipsa loquitur a presumption as defined in Section 600? A presumption is a rule of law which requires the presumed fact to be assumed when another fact or groups of facts is proved or otherwise established in the action. In Burr v. Sherwin Williams Company, 42 Cal.2d 682, 268 Pac.2d 1041 (1954), the Supreme Court held:

> A few decisions have criticized instructions to the effect that res ipsa loquitur imposes a mandatory burden upon the defendant to rebut the inference of negligence and have apparently proceeded on the theory that the doctrine creates an inference which is enough to avoid a nonsuit but which the trier of fact may accept or reject as it sees fit, even though the defendant offers no evidence. . . . This view, which is inconsistent with most of the California decisions, is very difficult to apply, and there are substantial reasons why we should hold that in every type of res ipsa loquitur case the defendant should have the burden of meeting the inference of negligence.
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> * * * * *
>
> It is our conclusion that in all res ipsa loquitur situations the defendant must present evidence sufficient to meet or balance the inference of negligence, and that the jurors should be instructed that, if the defendant fails to do so, they should find for the plaintiff. [42 Cal.2d at 690-691.]

Thus, under the holding of the Burr case, the finding of the facts giving rise to the res ipsa loquitur doctrine requires the jury to find the defendant negligent unless he comes forward with some contrary evidence. The trier of fact is not permitted to accept or reject the inference of negligence as it sees fit when the defendant offers no evidence. Therefore, res ipsa loquitur is, in the words of Section 600, a rule of law which requires the defendant to be found negligent when the facts giving rise to the doctrine are found or otherwise established in the action. The doctrine of res ipsa loquitur, therefore, is a rule of law that is described by Section 600 as a presumption.

What kind of presumption is it? It is clear from the holdings in the Burr case and others such as Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63 (1953), that the doctrine of res ipsa loquitur does not shift the burden of proof to the defendant to prove that he was not negligent. In this respect, the doctrine differs from the presumption of the negligence of a bailee. The presumption, then, is not a presumption affecting the burden of proof as described in Section 605.

In the Hardin case the court said that the doctrine "does not mean that the burden of proof shifts from plaintiff to defendant. The defendant has merely the burden of going forward with the evidence, that is, the burden of producing evidence sufficient to meet the inference of negligence by offsetting or balancing it." 41 Cal.2d at 437. This looks superficially like a Traynor presumption, which we have not described in our statutes. However, it must be remembered that "the doctrine, of course, does not apply at all unless it appears that there is a probability of negligence . . . ." 42 Cal.2d at 691. Hence, there is always an inference of negligence as well as the presumption. If the presumption is treated as a Thayer presumption--a presumption affecting the burden of producing evidence--the presumption totally disappears if the defendant produces any evidence of his lack of negligence. The case is then resolved upon the inferences remaining. So far as the inferences are concerned, the defendant is entitled to a verdict if his proof balances the inferences arising from the plaintiff's proof. The plaintiff is entitled to a verdict if the inferences arising from his proof preponderate in convincing force. This is what the jury is instructed under the Hardin and Burr decisions. Therefore, the doctrine of res ipsa loquitur fits precisely our definition of a presumption affecting

the burden of producing evidence.

If res ipsa loquitur is a presumption, why do the California courts characterize it is an inference? Despite the fact that the doctrine of res ipsa loquitur requires the jury to find the defendant negligent, and despite the fact that the Code of Civil Procedure defines an inference as "a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect", the California courts persist in characterizing the doctrine of res ipsa loquitur as an inference, not a presumption. Hardin v. San José City Lines, Inc., 41 Cal.2d 432, 436 (1953). The characterization, of course, is exactly contrary to the code definitions. The reason for the characterization flows from the California doctrine that a presumption is evidence. Because of this doctrine, presumptions and inferences are treated differently when the party against whom the presumption or inference is operating moves for a directed verdict or a judgment notwithstanding the verdict. Under California law, if the plaintiff relies on an inference, the defendant's evidence is reviewed on the defendant's motion for a directed verdict, and if the defendant's evidence is sufficiently strong, the defendant may be granted a directed verdict. On the other hand, where the plaintiff is relying on a presumption instead of an inference, the defendant's evidence can never dispell the presumption, and a directed verdict for the defendant is improper. A directed verdict for the defendant would be proper only if the plaintiff's evidence tended to dispell the presumption. Professor Chadbourn discusses these matters at pages 23-34 of his study. A graphic illustration of the principles expounded by Professor Chadbourn is found in Leonard v. Watsonville Community Hospital, 47 Cal.2d 509, 305 P.2d 36 (1956). A clamp was left

in plaintiff's abdomen during an operation. Defendant E assisted in the operation. At the close of the plaintiff's case a nonsuit was granted as to E. The Supreme Court held that the doctrine of res ipsa loquitur applied, but the doctrine was dispelled as a matter of law by the testimony of the witnesses called by the plaintiff under Code of Civil Procedure Section 2055. For purposes of the motion, these witnesses were regarded as the defendant's witnesses. The Supreme Court said:

> Cases involving the use of evidence adduced under section 2055 to dispel a presumption must be distinguished from those involving inferences. Generally speaking, it may be said that a presumption is dispelled as a matter of law only when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of such party's own witnesses. . . . Accordingly, it is the general rule that a presumption favorable to a plaintiff cannot be so dispelled by the testimony of a defendant given pursuant to section 2055 because a defendant called under that section is not treated as the plaintiff's witness. . . . On the other hand, as we have seen, an inference can be dispelled as a matter of law by evidence produced by either party. [47 Cal.2d at 517-518.]

If res ipsa loquitur is regarded as a Thayer presumption, the result of the Leonard case will not be changed. The testimony of the witnesses called under 2055 contrary to the presumed fact would cause the presumption to disappear completely from the case. All that would be left would be the inference of negligence arising from res ipsa loquitur and the opposing testimony of the defendants. The court, then, would resolve the case exactly as if inferences only were involved. Thus, the court would resolve the case exactly as it did in the Leopard case.

Professor Chadbourn points out in his study the distinction between inferences and presumptions that the California courts have developed for purposes of ruling on a motion for a directed verdict or nonsuit by the party against whom the presumption or inference operates is irrational and should be

abandoned. Professor Chadbourn states that the Thayer theory of presumptions would remove this irrational difference. We concur. We believe we have eliminated the irrational aspects of California presumption law. We believe, too, that the classification of res ipsa loquitur as a Thayer presumption will continue existing California law in effect without change.

FRANK J. KANNE, JR.
ATTORNEY AT LAW
SUITE 603
615 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90017
TELEPHONE MADISON 6-1841

April 9, 1965

Senator Cobey
State Senate Building
Sacramento, California

Re: Senate Bill No. 110

Dear Senator Cobey:

I have just had an opportunity to examine your Senate Bill No. 110 to establish an Evidence Code. I am Chief Legal Counsel for the Children's Home Society of California and am a member of the Board of Trustees of the Catholic Welfare Bureau of the Archdiocese of Los Angeles.

Both organizations are social welfare agencies licensed by the State Department of Social Welfare. The Children's Home Society, as you no doubt know, is primarily engaged in the field of adoption. The Catholic Welfare Bureau is a general casework agency which has been licensed to place refugee children from foreign countries.

Over the years we have been presented, on numerous occasions, with the matter of confidentiality of the files of social work agencies and particularly in regard to adoption or child custody proceedings.

Civil Code, Section 226a provides that all Superior Court hearings in adoption proceedings shall be held in private, and the court shall exclude all persons, except the officers of the court, the parties, their witnesses, counsel, and representatives of the agents present to perform their official duties under the laws governing adoptions.

Civil Code, Section 227 reads in part:

> "The petition, relinquishment, agreement, order and any power of attorney and deposition must be filed in the office of the County Clerk and shall not be open to inspection by any other than the parties to the action and their attorneys and the State Department of Social Welfare, except upon the authority of the Judge of the Superior Court."

In discussing this section in the case of Hubbard v. Superior Court 189 Cal. App. 2nd 741, the District Court of Appeal pointed out that the Legislature had expressed a firm state policy that the statutory cloture of adoption files is never to be broken save in exceptional circumstances for good cause approaching the necessitous.

The reasoning behind Section 227 applies equally to the adoption files in the hands of a licensed social work agency and also to other communications made to social workers.

We have never felt satisfied that the law properly protected the information contained in social work files or in the minds of social workers.

The purpose of this letter is to inquire whether there has been any consideration given in the proposed Evidence Code to the creation of a properly defined privilege for social workers or or at least for adoption workers. If there has been any discussion on this subject, I would appreciate copies of the notes. If there has been none, I think it is a matter that should be discussed.

Thank you for your attention.

Very truly yours,

FJK/b

FRANK J. KAMER, JR.