#63(L) 11/12/65

Memorandum 65-68

Subject: Study No. 63(L) - Evidence Code

Accompanying this memorandum are two copies of a tentative recommendation designed to carry out the decisions made by the Commission at the last meeting. Also attached as exhibits is some correspondence relating to Section 403.

Please review carefully the proposed section and the Comment relating to res ipsa loquitur. For comparison with the statutory statement of the rule, we set forth here the standard approved in Ybarra v. Spangard, 25 Cal.2d 486, 489, as quoted in the recent case of Shahinian v. McCormick, 59 Cal.2d 554, 559 (1963):

> The doctrine of res ipsa loquitur has three conditions: "(1) the 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." (Prosser, Torts, P.295.)

The Southern California Law Review article describes the three conditions of res ipsa loquitur as follows:

> (1) [T]hat the injury must have been caused by the use of an instrumentality in the exclusive control and possession of the defendant; (2) that the injury would not have occurred, ordinarily, unless the defendant had been negligent with respect to the instrumentality; (3) that the injury must have occurred irrespective of any voluntary contribution on the part of the party injured . . . .

At the last meeting the Commission concluded that no revision in Section 403 should be made. The attached correspondence raises the question whether this conclusion is the correct one.

Justice Kaus' letter agrees that all authentication problems--including problems of authenticating hearsay--should be resolved by the judge on the

basis of "evidence sufficient to sustain a finding" unless the adverse party makes the contention that someone else made the statement and the content of the statement is such that it is relevant to the issues of the case regardless of who made it.

Commissioner Ball's letter takes the position that the jury, not the judge, should decide disputed fact questions relating to whether proferred evidence fits within a hearsay exception.

In essence, the position taken by the Evidence Code is that if the preliminary question is whether evidence offered on the merits actually exists as claimed--did the claimed writer actually write the letter, did the party actually make the statement, did the witness actually make the inconsistent prior statement--and the witness on the stand is willing to testify of his personal knowledge that the evidence exists, contentions that the evidence does not exist--that the witness is lying or mistaken--must be resolved by the trier of fact. But if the question is whether the evidence, if it exists, is excludable under the hearsay rule, the question is to be resolved by the judge. Evidence offered on the merits must be admitted if the preliminary fact question turns on whether the witness' testimony on the merits is true. We consider that a witness is testifying on the merits when he says that a party made an admission, that a witness made an inconsistent statement, or that a dying person made a dying declaration. Contentions that others made the statements are merely ways of claiming that the witness' testimony is untrue.

To the extent that authority can be found, the position taken by the Evidence Code is that taken in existing law prior to the enactment of the Evidence Code. The clearest California case involved a prior statement of a witness: "Whether the [prior inconsistent] statements made to Glassman and

Hubbell were made by Meley, or by some other man, was a question for the jury. Both witnesses testified that they were made by him." Schneider v. Market Street Ry., 134 Cal. 482, 492 (1901).

Nu Car Carriers v. Traynor, 125 F.2d 47 (1942), cited in the last memorandum on this subject, involved a similar issue. The defendant sought to introduce a copy of a statement allegedly signed by the plaintiff that stated, in essence, that the defendant's driver was not responsible for the accident. That someone had made such a statement could hardly have been disputed, for such a statement was in writing and was being offered into evidence. Plaintiff's position was, however, that he had never made such a statement, that the statement proffered must be a forgery that was made by someone else. (Apparently the objection was not stated in so may words: plaintiff contended that he did not make it, but since the statement had obviously been made, implicit in the plaintiff's contention was that the statement must have been made by someone else.) Again, the court held that the defendant was entitled to go to the jury upon his theory that the plaintiff had made the statement.

It is worth exploring how the Evidence Code will work as now drafted and how it would work if revised along the lines suggested. In considering the following examples, you should bear in mind how preliminary fact questions are resolved. On Section 403 issues--relevancy, personal knowledge, authentication--the judge hears evidence from one side only. He does not permit the adverse party to try the preliminary fact issue before him. All the judge does is require that the proponent present sufficient evidence to warrant a finding that the preliminary fact exists. On Section 405 issues, the judge hears evidence on both sides and resolves the conflicts in the evidence.

Where hearsay is involved, the proponent of the evidence has the burden of proof to show that the conditions of admissibility have been met. The objector does not have the burden of proving the evidence inadmissible; for the general rule is that hearsay is inadmissible and the proponent must show that his evidence is within an exception.

1. Now, suppose P and D have an intersection collision, and P sues for his injuries. D offers witness W to testify that W was present during a discussion of the matter between P and D about an hour afterward, and that P said to D, "It wasn't your fault, you had the green light." P objects on the ground that no such statement was made.

Should the judge exclude the evidence unless he is persuaded that W is telling the truth, or should the judge let the evidence go to the jury?

Comment: Apparently, we are all agreed that this decision should be made by the jury. The judge properly should tell the objector that he is not permitted to dispute W's testimony as to authenticity on the admissibility question.

2. Suppose the same case as in #1. P contends on his objection that he never made the alleged statement, that he doesn't know if it was made or not, but if it was it is certainly inadmissible hearsay because he never made it.

Should the judge now exclude the evidence unless he is persuaded that W is telling the truth, or should the judge let the evidence go to the jury?

Comment: If P's objection is sufficient to require the judge to decide the admissibility question of whether the statement is an admission by P or inadmissible hearsay by some unidentified declarant, it is P's contention alone that takes the credibility of D's witness

away from the jury. P does not have to prove his contention--he merely has to make it; for the burden of proof--to persuade the judge--now falls on the proponent of the evidence. Yet the fact of which he must persuade the judge is exactly the same fact upon which he originally had the burden of producing sufficient evidence to warrant a finding. It is not some fact foreign to the merits of the case such as whether the declarant was excited when he made the statement or thought he was dying.

Hence, the substantive question here is whether the opponent by adding to his claim that W's testimony is untrue the additional claim that some other version is true (a version he does not have to prove) should be able to raise the proponent's burden from one of producing evidence to one of proof (or disproof of the opponent's version).

3. Suppose the same case, but P's objection is that X, not P, made the statement. Should this change the procedure and ruling?

4. Suppose the same case, but P's objection is that the alleged conversation never took place. Should this change the procedure and ruling?

Comment: Under the Evidence Code as now drafted, the judge's rulings on admissibility would be made in the same way in each case. He would inform P that there can be no contest of authenticity on the admissibility question. If W testifies that P made the statement, the statement must be admitted. It doesn't matter on what theory P contends W's testimony is untrue, whether it is that the conversation never took place, or if it did that no such statement was made, or if some statement of that sort was made it must have been by someone else, or that X made the statement.

Under the suggested change, P's contentions do not raise additional facts that D must prove--such as excitement of the declarant, etc.--they merely shift the decision making authority from the jury to the judge; for D must now persuade the judge the P actually made the alleged statement.

5. Suppose the same intersection accident, and suppose that W testified as to P's alleged admission. Now, P offers witness Z to testify that some three weeks after the accident he had a conversation with W during which W said that P had accused D during their post-accident discussion of running a red light and causing the collision. D objects and contends that Z's alleged conversation with W never took place.

Should the judge require P to prove to the judge's satisfaction that W actually made the statement?

Comment: Apparently we are all agreed that the judge should not resolve this conflict.

6. Suppose the facts in #5, but D's objection is based on the contention that, although the conversation took place, W never made any statement of the sort claimed.

What ruling now?

Comment: Apparently, we are all agreed that the judge should not resolve this conflict.

7. Suppose the facts in #5, but D's objection is based on the contention that if any such statement as alleged by Z was made, it was not made by W and, hence, is inadmissible hearsay.

What ruling now? Should this contention suffice to require P to prove to the judge's satisfaction that W actually made the statement?

Comment: If we assume for discussion that the judge must now be satisfied that Z is telling the truth before he may admit the statement under Section 1235 should P be able to contend that he doesn't want to use the statement for hearsay but only for impeachment. He doesn't want the jury to consider the statement for the truth of its content but only for the purpose of determining whether W is a reliable witness. Under existing law P is able to get to the jury on that theory. Nothing in the Evidence Code affirmatively prohibits application of that theory here. If the judge should decide that P is entitled to go to the jury on the impeachment theory only, he then should instruct the jury that it cannot consider the statement for the truth of its content and that it must disregard the statement if the jury doesn't believe that W made it. For the only theory on which the jury is permitted to consider the statement is upon the theory that W made the statement.

Under the Evidence Code, there is no need for distinguishing between the use of the statement as hearsay and the use of the statement as impeachment. The authentication question is decided in the same way in either event and the jury must be instructed to disregard the statement if it does not believe W made the statement in either event. But the additional instruction that the statement cannot be considered as hearsay (for its truth) because the judge didn't believe Z in unnecessary. It is only upon the theory that W made the statement that the jury can consider the statement at all--and upon that theory the jury is entitled to consider the statement for the truth of its content.

Should there be any distinction between authentication of written hearsay and authentication of oral hearsay? Should 403(a)(4) be modified without any change in (a)(3)? Suppose these cases:

8. P and D have an intersection accident. At the trial, D offers a written statement that he claims P signed concerning the accident. The document states that D was proceeding at a lawful rate of speed and pursuant to the traffic signal. P objects on the ground that he did not sign such a statement. Implicit in the objection is that the statement is a forgery--that someone else made the statement and signed P's name. If the document is a forgery, of course, it is inadmissible hearsay if offered to prove the truth of its content; and the content of the statement is relevant to the matter in litigation regardless of who made the statement.

What should the judge do? Should he now require D to prove to his satisfaction that P actually signed the document? Or should he prohibit P from contesting the authenticity issue on the question of admissibility?

Comment: This, in essence, is Nu Car Carriers v. Traynor. The nature of the contention on authenticity, however, is such that it seems highly unlikely that the jury will give any credence to the document if it believes that it is a forgery. In such a case, although the protective instruction under Section 403(c) could technically be given, it seems unlikely that it is needed.

I am not sure whether Justice Kaus would let this go to the jury or would have the judge resolve it. I think perhaps he would let it go to the jury.

9. Suppose the case in #8, except that the writing offered by D is a crumpled, unfinished, and unsigned letter.

D's witness W, a domestic servant of P, is offered to testify that she saw P write the letter, crumple it and throw it in a waste basket from which she retrieved it. D offers to produce a handwriting expert who will testify that the letter is in P's handwriting. P objects on the ground that the letter is spurious and a forgery. He offers to testify that he did not write it, and his own handwriting expert is offered to testify that the letter is not in P's writing.

What should the judge do? Should he now require D to prove to his satisfaction that P actually wrote the document? Or should he prohibit P from contesting the authenticity issue on the question of admissibility? Does D have a right to get to the jury with the evidence of the admission, and if the judge lets D get to the jury (under any theory) with the evidence, is P then entitled to an instruction to disregard the statements in the letter unless the jury believes that P actually made them. (The statements do, of course, relate to the subject of the litigation regardless of who made them.)

Comment: We think this case is indistinguishable from the previous. Moreover, we do not think that there is any substantive distinction to be drawn between this case and the oral admission cases. Both involve a contention by the proponent and eyewitness testimony that the party made the statement. Both involve an objection that involves either explicitly or implicitly the contention that the statement was made by someone else. We suggest that both must be resolved the same way, and that if some adjustment is to be made in (a)(4), some similar adjustment must be made in (a)(3).

10. Suppose the same case as in #9, but the proffered letter is typewritten and P's contention is that W is mistaken, that P did not write the

letter, and that P's houseguest X did. X will so testify, explaining that he based his statements on speculation and rumor.

What should the judge do with the objection? Should he withhold the evidence from the jury unless he is persuaded that P actually wrote the letter? Or should he let the letter go to the jury and permit P to contest its authenticity there?

Comment: We do not see how this can be distinguished from the oral admissions cases. It seems on all fours with Case 3. The statement was concededly made, but P contends that X made it, not P. The statement is admissible as an admission only upon the theory that P made it. If X made it, the statement is inadmissible hearsay. Perhaps, however, even if the judge does not believe W, D is entitled to have the statement considered for impeachment purposes only under the theory spelled out under #7.

11. We won't go through the written inconsistent statements exercises. We think they present the same issues.

* * * * *

We think the Evidence Code is sound theoretically. We also think that it is easier to administer practically. Changing the rule would require the judge to make subtle distinctions on admissibility standards depending on the form of contentions made in conjunction with objections (contentions which need never be proved). The contentions need not be explicit. Implicit in any contention that a statement, if made, "was not made by me" is the contention that the statement is inadmissible hearsay because it was made by someone else. See examples 2, 7, 8, 9.

Under the Evidence Code, the judge need remember only that all authentication questions are 403 questions. It does not matter what form the contention

as to lack of authenticity takes--if the proponent produces sufficient evidence to sustain .. a finding, the question of authenticity goes to the jury. It does not matter if it is hearsay, a writing, or an oral statement. It does not matter if there are other questions involving the same evidence that must be decided by the judge--such as best evidence rule, privilege, excitement of declarant, sense of doom, etc.--authentication questions are still for the jury.

Boyle v. Wiseman was mentioned in the original memorandum because the question was the authenticity of an original document containing an admission. The judges were criticized by Professor Morgan for letting the fact that a best evidence issue (secondary evidence was offered) was presented that had to be decided by the judge obscure the fact that the authentication issue should not have been decided by the judge--despite the fact that it was an admission that was sought to be proved.

During the interim, we went over this section carefully with the Assembly Committee on Judiciary. They believed that it states a sound scheme. Commissioner Ball's letter indicates that he would go further and submit all disputed preliminary fact questions to the jury.

The position taken in the Evidence Code represents a sound middle ground. Evidence offered on the merits does not become inadmissible merely because the judge does not believe the witness testifying to it. Implicitly, this is what is involved in the proposed change. W's testimony on the merits that P has conceded nonliability becomes inadmissible merely because the judge doesn't believe W's testimony that P made the statement--it doesn't matter that the judge doesn't believe P's contention either, for P does not have the burden of proof.

Commissioner McDonough's letter mentions deleting ", and on request shall," from 403(c)(1). The foregoing examples indicate that this may be a wise revision, for telling the jury to disregard a writing it believes to be a forgery seems unnecessary. To be complete in this regard, however, the "Shall" in 403(c)(2) should be amended to "May".

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Memo 65-68 EXHIBIT I

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

Memo 65-68

EXHIBIT I

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.

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State of California
State Building, Los Angeles

Otto M. Kaus
Justice

November 1, 1965

Professor John R. McDonough
Stanford, California

Page 2.

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 our 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 Epstein: "It is a simple rule. It is a harsh rule only if and insofar 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.)

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 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.

Memo 65-68

EXHIBIT II

JOSEPH A. BALL
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October 25, 1965

Honorable Otto M. Kaus
District Court of Appeal
State Building
Los Angeles, California 90012

Dear Otto:

In the course of the discussion of your letter before the Law Revision Commission, I ventured a discussion on the concepts of relevancy and admissiblity as follows:

Relevancy must be determined by the court and if the evidence is excluded on this ground, the jury never hears it. Admissiblity is also determined by the court, but if admissibility depends upon existence of a preliminary fact, the court has the duty to determine if in the record there is such preliminary fact. The judge does not pass on the credibility of witnesses in determining admissibility. Before a dying declaration can be admitted, the proponent of the statement must undertake the burden of proving that the declarant was at the time of the relevant declaration "under a sense of impending death". If a witness testifies to facts, which if believed by the trier of fact would require a conclusion that the declarant was under a sense of impending death, the court must (not may) admit the declaration even though the opponent presents compelling evidence that declarant was not "under a sense of impending death". The trier of fact alone passes on credibility of witnesses. The judge alone determines problems of admissiblity and relevance.

For example: Suppose a witness has testified that a declarant, now dead, said, "I am about to die . . . get me a priest. . . I want to tell everything before I die. . ." and then proceeded to make a dying declaration within the definition. The inference of "sense of impending death" is compelled if this witness is telling the truth. But also assume

that a police officer testifies at the same hearing that he was present at the time and the decedent was unconscious and said nothing. If the police officer is believed, the declarant was not under a sense of impending death and the declaration is valueless.

Question: Does the judge pass upon the credibility of the two witnesses and determine admissibility of this evidence? I submit that the judge must admit the above hearsay declaration upon the foundation as shown to be considered by the trier of fact even though the judge believes the police officer and disbelieves the foundation witness. I submit that the judge cannot determine credibility when he determines relevance (§403) or admissibility (§405).

If the witness has testified to a foundation fact, the judge is restricted to determine quantum and not quality of evidence. He must determine if any evidence is in the record from which a reasonable man could find that the decedent was at the time of the declaration under a sense of impending death. And if the jury disbelieves the foundation witness and believes the opponent's police officer witness, as in the above example, the jury must be instructed to disregard the hearsay statement.

Sincerely yours,

JOSEPH A. BALL

JAB:jw

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

REVISION OF THE EVIDENCE CODE

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, in order to provide lawyers and judges with ample opportunity to become familiar with its provisions before they were required to apply it in court.

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 solicited and welcomed suggestions relating to the Evidence Code, and it has carefully considered each suggestion it has received. In the light of the matters that have been brought to the Commission's attention, the Commission recommends the following revisions of the Evidence Code:

1. Section 402(b) now permits a hearing on the admissibility of a confession in a criminal case to be heard in the presence of the jury if the defendant does not object. 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. To meet any objections based on Jackson v. Denno, the section should be revised to require the preliminary hearing on the admissibility of a confession 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. Section 413 recodifies the provision of Article I, Section 13, of the California Constitution that permits the court and counsel to comment upon a party's failure or refusal to deny or explain by his testimony the evidence in the case against him. Section 412 expresses an analogous rule that applies when a party produces weaker evidence when it is within his power to produce stronger. In Griffin v. California, 381 U.S. 763 (1965), the United States Supreme Court held that such comment is in violation of a criminal defendant's rights under the 14th Amendment to the United States Constitution when the defendant's failure or refusal to testify is in the exercise of his privilege to refuse to testify against himself.

In order that no one might be misled by the provisions of Sections 412 and 413, they should be modified to indicate that there is a constitutional limitation on the rules expressed.

3. The Evidence Code does not purport to codify all of the many common law presumptions that are found in California law. The Evidence Code contains statutory presumptions that were formerly found in the Code of Civil Procedure and a few common law presumptions that were identified closely with the statutory presumptions in the Code of Civil Procedure.

The Commission has determined that the Evidence Code should clarify the way in which its provisions on presumptions will apply to the doctrine of res ipsa loquitur because of the frequency with which that doctrine arises in the cases.

The doctrine of res ipsa loquitur is a presumption within the meaning of Evidence Code Section 600. Under existing California law, when the facts giving rise to the doctrine of res ipsa loquitur have been established, "the law requires" (Section 600) a finding of negligence unless the adverse party

makes a requisite contrary showing. Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954). Under existing California law, too, the doctrine of res ipsa loquitur does not shift the burden of proof. Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63 (1953). Accordingly, under existing California law the doctrine of res ipsa loquitur seems to function as an Evidence Code presumption affecting the burden of producing evidence. See EVIDENCE CODE § 604.

The cases considering res ipsa loquitur suggest, however, that the doctrine requires the adverse party to come forward with evidence not merely sufficient to sustain a finding but sufficient to balance the inference of negligence. Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63 (1953). If this merely means that the trier of fact is to follow its usual procedure in balancing conflicting evidence--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 res ipsa loquitur in the California cases functions exactly like an Evidence Code presumption affecting the burden of producing evidence. If this means, however, that the trier of fact must in some manner weigh the convincing force of the adverse party's evidence against the legal requirement that negligence be found, then the doctrine of res ipsa loquitur represents an isolated application of the former rule 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 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. As under

existing law, the finding of negligence is required when the facts giving rise to the doctrine have been established unless the defendant comes forward with contrary evidence. If the defendant comes forward with contrary evidence, the trier of fact must then 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.

4. 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 party-employer 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 desirable, however, in litigation between an employer and an employee. In such litigation, the employee-witness who is called by his co-employee is frequently an adverse witness to the employer, and 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 to testify under Section 776 by a co-employee.

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

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

An act to amend Sections 402, 412, 413, 776, and 1201 of, and to add Sections 414 and 646 to, the Evidence 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 of the jury ~~if any party so requests~~ unless the defendant expressly waives this requirement and his waiver is made a matter of record .

(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 in the presence of the jury. Cf. Jackson v. Denno, 378 U.S. 368 (1964).

SEC. 2. Section 412 of the Evidence Code is amended to read:

412. Subject to Section 414, if weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisifactory evidence, the evidence offered should be viewed with distrust.

Comment. See the Comment to Section 414.

SEC. 3. Section 413 of the Evidence Code is amended to read:

413. Subject to Section 414, in determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

Comment. See the Comment to Section 414.

SEC. 4. Section 414 is 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, 381 U.S. 763 (1965) (unconstitutional to permit 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 constitutional right to refuse to testify against himself). See also People v. Bostick, 62 Adv. Cal. 869 (1965)(The "comment of the prosecutor and the trial court's instruction herein [both relating to criminal defendant's failure to testify] each constituted error.").

SEC. 5. Section 646 is added to the Evidence Code, to read:

646. A person is presumed to have negligently caused injury to the person or property of another when:

(a) The injury was caused by an agency or instrumentality within the exclusive control of such person;

(b) The injury occurred in a manner that does not ordinarily occur in the absence of someone's negligence; and

(c) The injury would have occurred irrespective of any voluntary action or contribution on the part of the person who sustained the injury.

Comment. Section 646 codifies the doctrine of res ipsa loquitur as that doctrine has been developed in the California cases. The section follows the formulation of the doctrine that was approved in Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687 (1944) and has been followed in numerous cases since Ybarra was decided; however, some of the language has been drawn from Carpenter, Res Ipsa Loquitur: A Rejoinder to Professor Prosser, 10 60. CAL. L. REV. 467, 472 (1937).

Because Section 646 codifies the doctrine as a presumption, the establishment of its elements by a plaintiff requires the trier of fact to find the defendant negligent unless the defendant comes forward with evidence of his care. In this respect, Section 646 follows existing California law. See Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954). And Section 646 also follows existing law in that it does not shift the burden of proof to the defendant. See Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63 (1953). The defendant merely must come forward with evidence of his care. If he does so, the trier of fact decides the case just as it does any other case with conflicting evidence. If the trier of fact is

persuaded that the inference of negligence preponderates in convincing force, then it must find for the plaintiff. But if the inference of negligence does not preponderate in convincing force--if the evidence of the defendant's care at least balances the inference of negligence--then the trier of fact must find for the defendant. Cf. Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63 (1953).

At times the doctrine 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. Nevertheless, the only effect to be given the doctrine of res ipsa loquitur itself is that prescribed by this section.

The fact that a plaintiff may not be able to establish all of the facts giving rise to the presumption does not necessarily mean that he has not produced sufficient evidence of negligence to avoid a nonsuit. The rigorous 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 evidence that does not establish all of the elements of res ipsa loquitur. See Prosser, Res Ipsa Loquitur in California, 37 CALIF. L. REV. 183 (1949).

SEC. 6. 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 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. Paragraph (2) of this subdivision 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 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 is the personal representative, heir, successor, or assignee of a person identified with the same 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.

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.

Section 776 is based on the premise that ordinarily a person who is closely identified with a party should be examined in the same manner as a party. As a general rule such a person will be adverse to anyone who is suing the party with whose interest he is identified.

Subdivision (b) has been amended because the premise upon which Section 776 is based does not 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 is adverse to the employee-party and in sympathy with the employer-party. The reverse is likely to be the case. The amendment to Section 776 will permit the employer in such a situation to use leading questions in his cross-examination of the witness unless, as provided in Section 767, the adverse party is able to persuade the court that the interests of justice otherwise require.

SEC. 7. 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.