#34(L) 3/17/64

First Supplement to Memorandum 64-20

Subject: Study No. 34(L) - Uniform Rules of Evidence (Existing Provisions of Part IV of the Code of Civil Procedure)

Accompanying this memorandum is Part II of Professor Degnan's study relating to the disposition of existing code sections in Part IV of the Code of Civil Procedure. The code sections discussed in this portion of the study deal with the problems of burden of proof, burden of producing evidence and burden of pleading.

Professor Degnan first points out that these three burdens need not be, but often are, coincidental. A complaint for money due on a contract must allege that the amount is unpaid, but the plaintiff need not prove the allegation. The defendant bears the burden of producing evidence and the burden of proof on the issue.

The Legislature rarely has seen fit to deal with the allocation of these various burdens. A few statutes attempt to allocate the various burdens; but, on the whole, the judges make the allocations for a variety of reasons. Judges apparently take into consideration matters of policy, fairness and convenience, and probability in allocating the respective burdens in particular cases. At times, the initial burden assigned may be shifted in the course of the trial for other considerations that become evident during the trial.

There are several statutes in Part IV of the Code of Civil Procedure that purport to give guidance to the judges in making the various allocations. In regard to these statutes, Professor Degnan concludes and recommends:

It is futile to attempt to revise the sections in Part IV of the Code of Civil Procedure to incorporate any dependable guides to these respective burdens. Hence, the Commission may choose one of the following three alternatives:

1. Attempt to draft provisions relating to the burden of producing evidence and the burden of proof. This is not recommended because the standards for allocation are so vague.

2. Repeal the existing sections on the ground that they are useless as guides to judicial rulings.

3. (Apparently recommended) Preserve the existing sections with such improvements as can be made as a separate title relating to "Burden of Proof, Burden of Producing Evidence, and the Weight and Effect of Evidence."

If the third alternative is chosen, the Commission should also consider whether this title should be combined with the title on presumptions, since that title also deals with the burden of proof, the burden of producing evidence, and the weight and effect of evidence.

If this alternative is chosen, the consultant recommends that the sections be revised or repealed as follows:

C.C.P. § 1867. None but a material allegation need be proved.

Recommendation: Repeal. The section seems based on the premise that the burden of proof follows the burden of pleading, while the courts tend to assume that pleading allocation is governed by considerations of proof, at least in most cases.

§ 1868. Evidence must correspond with the substance of the material allegations and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

The first sentence should be retained. It is consistent with the definition of "relevant evidence" in Revised Rule 1(2) and is the only direct statement that we have requiring evidence to be relevant in order to be admissible. "Material allegations" are defined in C.C.P. § 463 as those essential to the claim or defense.

The remainder of the section should be repealed as Rule 45 governs inquiry into collateral issues and Rules 17-22 govern inquiry into the credibility of witnesses.

§ 1869. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

Recommendation: Professor Degnan indicates that the first sentence might be retained. However, it seems to duplicate Sections 1981 and 2061. He concludes that the sentence should be repealed and the other sections revised (see below).

The remainder of the section should be repealed. It is tautological in part and erroneous in part. Negative allegations must be proved in many cases.

§ 1981. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

Recommendation: Professor Degnan suggests that Section 1981 might be retained on the ground that it has not done any demonstrable harm. However, because of the ambiguity of the language used, it should be modified to read:

> The party holding the affirmative of the issue must produce evidence sufficient to avoid a peremptory finding against him on the disputed fact.

Another possibility would be to codify the factors that the courts take into account in assigning the burden of producing evidence. He suggests the following as a possibility:

> The burden of producing evidence is on that party which by statute or rule of law will lose on the particular issue if no evidence is presented. In the absence of a statute, courts

shall assign the burden of producing evidence to the parties, taking into account what is the most desirable result in the absence of evidence, considerations of fairness and convenience in access to evidence and in eliminating unnecessary proof, and the probabilities of particular results in issues of that nature.

Another alternative is to repeal Section 1981 entirely, leaving to the judges to allocate the burden of producing evidence without statutory guidance as they are doing now.

§ 2061(5). The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

5. That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt . . . .

Recommendation: Professor Degnan recommends a revision in form to tell the judge what he must instruct about and to remove language indicating the words he is to use in instructing. Professor Degnan suggests:

> 5. On which party bears the burden of proof on each issue, and on whether that burden is to prove by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt.

Another possibility, more closely resembling the existing language, is:

> 5. That the burden of proof rests upon the party to whom it is assigned by statute or rule of law, informing the jury which party that is; and when the evidence is contradictory, or if not contradicted might nevertheless be disbelieved by them, that before they find in favor of the party who bears the burden of proof they must be persuaded by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt, as the case may be. Unless a statute or rule of law specifically requires otherwise, the burden of proof requires proof by a preponderance of the evidence.

Respectfully submitted,

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#34(L)

3/16/64

A STUDY

relating to

EXISTING PROVISIONS OF PART IV OF THE

CODE OF CIVIL PROCEDURE

PART II

PART II

In the examination of Title I of Part IV it was repeatedly noticed that the Uniform Rules of Evidence as revised by the California Law Revision Commission, as well as in their original form deal almost exclusively with exclusionary rules. Part IV is far more comprehensive. It contains some sections which at least superficially regulate the burdens of producing evidence and of persuasion. It contains many which affect the weight to be given certain evidence and the manner in which the jury is to be instructed on consideration of the evidence.

Although Part IV is constructed on a very elaborate classification system, that system represents the analysis of evidence law of a century ago. Writers, courts and lawyers today use different classifications and different terminology. The purpose of this memorandum is to extract from Part IV of the Code of Civil Procedure the sections which relate not to admission or exclusion of evidence (the subject of the Uniform Rules) but to allocation of burdens and the weight and management of evidence.

Allocation of Burdens

In general, there are three types of "burden" which may be involved in problems of proof. One is that of pleading -- who has the obligation to inject the issue into the case? The second is that of adducing evidence on the issue -- who will suffer an adverse finding if the record is silent on the point? The third is that of persuasion -- if there is evidence in the record, who must persuade the finder of fact that the evidence sustains a finding that the issue should be resolved favorably to him?

Overwhelmingly, these three burdens devolve on a single litigant for

any given issue: in the main that litigant is the plaintiff in civil litigation, the prosecution in criminal cases. Analytically, however, they are separate questions, and for the purpose of examination of Part IV of the C.C.P. it is necessary to treat them as such. How they are separated can be illustrated by the prevailing and California rule that a complaint for money due upon a contract must include an allegation that the amount is unpaid. Hurley v. Ryan, 119 Cal. 71, 51 Pac. 20 (1897); Fancher v. Brunger, 94 Cal.App.2d 727, 211 P.2d 633 (1949). The defendant, however, bears the burden of producing evidence of payment (i.e., he will lose on that issue unless he produces some evidence), Sarraille v. Calmon, 142 Cal. 651, 76 Pac. 497 (1904); Stuart v. Lord, 138 Cal. 672, 72 Pac. 142 (1903), and he bears the burden of persuading the trier of fact that payment in fact was made. Whether the defendant must also plead payment or may produce his evidence of payment under a general denial of the plaintiff's allegation of non-payment is uncertain; cases go both ways. Pastene v. Pardini, 135 Cal. 431, 434, 67 Pac. 681, (1902) (must plead); Bank of Shasta v. Boyd, 99 Cal. 604, 606, 34 Pac. 337, (1893) (proof of payment admissible under a general denial). Something of the same contradiction has existed in defamation cases. There are cases which assume, if they do not expressly hold, that an allegation of falsity is required because it "is an essential ingredient of the wrong complained of." Glenn v. Gibson, 75 Cal.App.2d 649, 657, 171 P.2d 118, (1946). See 2 Chadbourn, Grossman & Van Alstyne, California Pleading § 996. But such holdings and dicta seem effectively repudiated by the Supreme Court in Lipman v. Brisbane Elementary School Dist., 55 Cal.2d 224, 233, 11 Cal. Reptr. 97, , 359 P.2d 465, (1961):

> The burden of proof with respect to the issue of truth or falsity is on the defendant. (citations) As a general rule, the burden of pleading a particular matter and the burden of proving it correspond (citations) and section 461 of the Code of Civil Procedure provides in

> part that "the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances." It follows that a plaintiff need not allege the statements are false. . . .Holdings to the contrary (citations) are disapproved.

It should be observed in this context that C.C.P. § 461 is one of the very few instances in which the legislature seems deliberately to face the problem of allocation of burdens. Another found in the C.C.P. is § 1983, which provides, in substance, that when a person is charged with exercising a right restricted to citizens when he was not a citizen or eligible to become one, the prosecution must charge that he was not a citizen and that he did the act, but upon proof that he did the act, the burden of proving citizenship or eligibility for it falls upon the defendant. The statute was held unconstitutional as applied in Morrison v. California, 291 U.S. 82 (1934); the purpose of the present reference is only to emphasize how seldom the legislature expressly determines the point.

There are a few instances outside the C.C.P. in which the legislature has talked expressly in terms of burden of proof. Civ. C. § 1615 provides "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." Labor C. § 3708 provides that an employer subject to the workmen's compensation law who does not "secure" compensation is subject to a common law action in which the employer is "presumed" negligent and the "burden of proof is upon the employer to rebut the presumption of negligence." There is a vague reference to burden of proof, again in connection with a presumption, in Pen. C. § 496a (receiving stolen property). Finally, the sales and use tax provisions of the Rev. & Tax. C., in §§ 6091 and 6291, provide that the "burden of proving" that a sale of tangible personal property is not a sale at retail is upon the person making the sale.

The legislature may affect burdens in another way, however. This can be illustrated by reference to C.C.P. § 457, which allows the plaintiff in

a contract action to allege in the most conclusory of terms the performance of all conditions precedent. Only if the allegation is directly controverted need the plaintiff produce any evidence on the point. In short, the burden of pleading is on the defendant but the burden of proof is on the plaintiff. (Compare the provision of Federal Rule of Civil Procedure 9(c): "A denial of performance or occurrence shall be made specifically and with particularity.")

In criminal cases there has been less tendency to tinker with the allocation of the burdens; traditionally the prosecution bore nearly all, and it continues to do so today. One exception is insanity. Seemingly without legislative aid, the courts evolved the view that sanity is conclusively presumed unless the defendant presents some counter evidence. People v. Harris, 169 Cal. 53, 68, 145 Pac. 520, (1914), seemed to crystallize this view:

> But the law presumes all men are sane; not some degree of sanity but that they have full mental capacity to commit any crime or degree of crime which the facts in the case establish. Express or affirmative proof of the sanity of a defendant is not required to be made by the prosecution. The presumption which the law raises is the full equivalent of proof of it as a fact, and, until the contrary is shown, the prosecution, by the presumption, has proven the sanity of the defendant beyond a reasonable doubt. The presumption is conclusive in the absence of any evidence on the part of the defendant contravening it. If none is introduced by him the presumption prevails, and the burden on the prosecution of proving beyond a reasonable doubt the capacity of the defendant to commit the crime charged which the facts and circumstances otherwise show beyond such doubt was committed by him, is sustained. The rule prevailing in this state, and in the majority of jurisdictions elsewhere, requiring the defendant where insanity is interposed as a defense by him to prove it by a preponderance of the evidence does not affect the rule that the burden of proving sanity is on the prosecution. That burden is always on it and it is met in the first instance by the presumption which the law raises of sanity and which must prevail until it is overcome. The rule casting upon the defendant the burden of establishing his insanity by a preponderance of the evidence does not shift this burden of proof from the prosecution to him but only shifts the burden of introducing evidence and declares the amount or quantum of evidence which he

> must produce to overthrow the presumption and show his insanity.

This hopeless contradiction in language is doubtless in part attributable to the unique California view that presumptions are evidence and are to be treated as such. But it is simply impossible for the prosecution to have a burden of proving beyond a reasonbable doubt while the defendant must establish the fact of insanity by a preponderance of the evidence. The Harris case is noticed as anomolous in Louisell & Hazard, Insanity as a Defense: The Bifurcated Trial, 49 Calif. L. Rev. 805, 808 n. 11 (1961), a Study made at the request of the California Law Revision Commission.

What might be said in defense of at least part of the Harris rule is that most defendants are sane. It would be wasteful in the extreme to require the prosecution to establish sanity in 100 cases because in 5 of them there might be a contested issue. This is the kind of thing that is resolved in civil cases by the pleadings. But when Harris was decided the only pleading of a criminal defendant was, in substance, "not guilty." The prosecution had to produce enough evidence to make a prima facie case. Since that time the legislature has added to Pen. C. § 1016 the plea of not guilty by reason of insanity. The last paragraph of that section incorporates some of the doctrine of the Harris case:

> A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial.

This takes care of the waste problem; unless the defendant injects the issue of sanity by a plea, the prosecution need offer no evidence. But there must be other reasons for continuing the remainder of the Harris doctrine. The courts have continued it. In In re Dennis, 51 Cal.2d 666, 673, 335 P.2d 657, (1959), the Supreme Court repeated, as it had

in intervening cases, the formula that the rebuttable presumption of sanity carries the prosecution's burden of proving sanity until the defendant produces enough evidence to persuade by a preponderance that he was insane. The precise ruling of the Dennis case, however, was that Dennis had produced enough to overcome the presumption as a matter of law.

It seems clear that it would be entirely possible to put upon defendant the obligation of pleading insanity but thereafter require the prosecution both to produce evidence and to persuade beyond a reasonable doubt. See Leland v. Oregon, 343 U.S. 790, (1952). This seems not to have been done. But the consequence of abandoning the rule that presumptions are in themselves evidence will embarrass still further the contradictions of the present law that the prosecution must prove sanity, but may do it by use of the presumption, while the defendant must prove insanity, by a preponderance of the evidence. Will the prosecution be able to meet its burden, whatever that may be, without the aid of the rule that the presumption of sanity is itself sufficient evidence to prove the case?

Another common example of adjusting the burden of pleading in criminal cases are those which require notice by defendant of intention to prove an alibi. A number of states already have such statutes and the Law Revision Commission has recommended adoption of such a statute for California. See California Law Revision Commission, Recommendation and Study relating to Notice of Alibi in Criminal Actions (October 1960). Even more clearly than is the case with insanity, alibi is not a "defense" in the usual sense of the term. If the accused was not at the place where the act was committed, and at the time it was committed, he did not commit it. Evidence that he was elsewhere at the time is logically receivable under the general denial. But the pleading function of giving notice that a certain factual issue will be contradicted is performed by giving a notice in advance so that the prosecution may prepare to meet the evidence. Some statutes, including the

one recommended by the California Law Revision Commission, go further than a mere notice that an alibi will be proved and require disclosure of at least the names and addresses of witnesses (other than the defendant himself) who will provide the evidence that the defendant was elsewhere. This couples a discovery function with a pleading function but there is nothing in the Recommendation which would in any way affect the burden of producing evidence -- the prosecution would fail to make a prima facie case if it failed to produce evidence that defendant did the act charged, which necessarily includes a showing that he was at the place, at the time. Nor does the Recommendation suggest that the defendant bears any burden of persuasion about where he was when the offense was committed; presumably the prosecution must still prove this beyond a reasonable doubt.

Thus it appears that in the main, but not invariably, the allocation of burdens is established at the outset of the case. As to a given element -- e.g., negligence -- the plaintiff usually must plead, produce evidence and persuade. As to another -- e.g., contributory negligence -- the defendant must plead, produce evidence and persuade. This presents two questions. How is the initial allocation made? When will subsequent developments in the case persuade courts that the initial allocation -- pleading -- be readjusted to thrust some aspects of the subsequent burdens upon the defendant?

HOW IS THE INITIAL ALLOCATION MADE?

The general statutory provisions which govern initial allocation are few and very general. They are found in Part II (Civil Actions), Title 6 (Pleadings in Civil Actions) of the Code of Civil Procedure and in the Penal Code. The principal sections are:

> C.C.P. § 426. The complaint must contain:
> 1. . . . .
> 2. A statement of the facts constituting the cause of action, in ordinary and concise language;
> 3. . . . .

C.C.P. § 437. The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.
2. A statement of any new matter constituting a defense or counterclaim.
3. . . . .

The pleading provisions of the Penal Code are even less precise:

Pen. C. § 950. The accusatory pleading must contain:

1. . . . .
2. A statement of the public offense or offenses charged therein.

Sections 951 and 952 elaborate on this slightly, permitting criminal pleadings to be stated in the most conclusory of forms. The responsive pleadings in criminal cases raise even fewer possibilities for factual allegations. Pen. C. § 1016 identifies three issues which may be raised in the criminal law counterpart of the answer; (1) former judgment of conviction or acquittal, (2) once in jeopardy, and (3) not guilty by reason of insanity.

It is apparent that what elements constitute a cause of action or a public offense are to be sought in considerations which are almost entirely non-procedural in nature. Substantive law determines. Attempts to be more precise in stating allocations have not been very effective. As shown above, legislatures are not alert to the problem and seldom advert to it. The Federal Rules of Civil Precedure make an attempt, in Rule 8(c), to provide a catalog of affirmative defenses but end with the general phrase "and any other matter constituting an avoidance or affirmative defense." On the whole, judges make these decisions. And they make them for a variety of reasons. The grounds are sometimes simply logic -- such as that an "essential" element of libel is falsity and that hence the plaintiff must allege it. See Glenn v. Gibson, supra p. 3. Sometimes the judges purport to get guidance from the statutes even though the legislators put none there. Part IV of the C.C.P. contains some such sections. These are:

C.C.P. § 1867. None but a material allegation need be proved.

C.C.P. § 1868. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

C.C.P. § 1869. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

C.C.P. § 1981. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

Before discussing these sections, it should be noted somewhat parenthetically that pleadings can remove as well as create issues. An allegation not denied "must, for the purpose of the action, be taken as true." C.C.P. § 462. And an allegation expressly admitted makes inadmissible testimony which would otherwise be proper for proof of the alleged fact. Fuentes v. Tucker, 31 Cal. 2d 1, 187 P.2d 752 (1947).

It is evident that language of the kind employed in these sections is simply a restatement of the question. The pleading statutes set forth do little to tell where the pleading burden will be, and the sections immediately above from Part IV evidently assume that the pleading rules of the C.C.P. and other Codes, especially the Penal Code, have somehow established the content of the pleadings and allocated between the parties the burden of proving allegations. Thus it is that "Each party must prove his own affirmative allegations," (C.C.P. § 1869, first sentence); since he holds the "affirmative of the issue," he "must produce the evidence to prove it" and "therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side." C.C.P. § 1981. "Burden of proof" in this context appears to relate to the burden of producing evidence, for the test is phrased in terms of total absence of evidence, not the persuasion power of the evidence received. "Burden" in the third sense in which it is employed in this Study, that of persuading, is (in the absence of intervention of a presumption or prima facie evidence, discussed infra at pp.) regulated within the Code by:

> C.C.P. § 2061. The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to

be conclusive. They are, however, to be instructed by the court on all proper occasions:

. . . .

(5) That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt;

Case law provides for some types of cases a standard of persuasion which is higher than a preponderance but less than beyond a reasonable doubt. McBaine, California Evidence Manual § 1431 (2d ed. 1960) provides a short list of the types of issues to which the clear and convincing standard applies.

Thayer denied that we have a "right to look to the law of evidence for a solution of such questions" of allocation. Preliminary Treatise on Evicence at the Common Law, 371 (1898). On the whole, however, it is only in writings on evidence law that any guidance is offered. The authors seem in agreement that there is no single guide to questions of allocation. Neither logic ("essential part of the cause of action") nor grammar will provide the answer. The writers are substantially in accord in saying that three general considerations control: (1) policy, (2) fairness and convenience, and (3) probabilities. See Clark, Code Pleading, 606-612 (2d ed. 1947); McCormick, Evidence §318 (1954); Witkin, Evidence, § 56 (1958). An excellent short treatment of this subject is found in Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stanford L. Rev. 5, 10-16 (1959).

Policy. Cleary points out that freedom of a plaintiff from contributory negligence is an "essential element" of the plaintiff's right to recover under the common law rule. Whether it is a "defense" which is allocated to defendant for pleading, producing evidence and persuading, depends not on how essential it is but upon how the court views it. Modern courts are not friendly to the rule of complete bar to recovery because of contributory negligence, however slight, and have as a consequence allotted the burdens of pleading, proving and persuading to the defendant. In other words, unless we are affirmatively persuaded that contributory negligence exists, we prefer to act as though it did not because the consequences of its existence are so drastic.

Fairness and convenience. Superior access to proof may also be a reason for assigning the initial burden to the defendant. We may at least surmise that this is operative in many circumstances. An example Cleary uses is payment of a debt sued upon. California law is (as discussed above) somewhat divided upon this issue at the pleading stage; some cases indicate that plaintiff must plead non-payment to state a cause of action. But it is clear enough that the burden of producing evidence and the burden of persuading rest upon the defendant, and that he must plead payment to produce such evidence.

Another example which may be given, although Professor Cleary does not employ it, is a bailee's liability for non-return of bailed goods. George v. Bekins Van & Storage Co., 33 Cal. 2d 834, 205 P.2d 1037 (1949), finally resolved for California a question which had been much discussed both in California and elsewhere. Goods of the plaintiff in the possession of the defendant were destroyed by fire. It was at least as probable as not that the fire was caused by negligence of defendant's employees; the evidence, that is, would have supported either finding. The question thus turned on

burden of proof. With the aid of the Uniform Warehouse Receipt Act, the court held that the burden of proof of freedom from negligence was upon Bekins as bailee. It is significant that the court held that the burden was on defendant without regard to the form of the pleading of the plaintiff; even if plaintiff proceeded on a theory of negligence rather than breach of contract, the defendant had to persuade the finder of fact of freedom from negligence.

The court has repeated the same formula in cases not subject to the Warehouse Receipts Act (Civ. Code. § 1858). See Gardner v. Jonathan Club, 35 Cal. 2d 343, 348, 217 P.2d 961, (1950):

> If a bailor alleges and proves the deposit of property with the bailee, a demand therefore, and the failure of the bailee to redeliver, the burden of proof rests upon the bailee to explain his failure. (citations) If he fails to prove that the loss did not result from the aforementioned cause, he is liable for that loss. . . .

Very analagous to the allocation of burden of proof because of greater access to evidence is one of the reasons underlying the doctrine of res ipsa loquitor. It functions more as a presumption, however, and is discussed in that context below.

It might be suggested that much of the precedent on burdens of pleading, going forward and persuading, crystallized before the inauguration of free discovery. Now that pre-trial examination of witnesses and parties, interrogatories to parties and opportunity to inspect are readily available, the significance of access to evidence may be less than it previously was. Discovery is not an entire answer, however; it may do something to our reasons for allotting burdens of pleading and going forward with evidence, but it does little to serve the function achieved by transferring burden of persuasion.

Probability. Under this heading Professor Cleary, as well as the other writers named, suggests that one reason for determining that one party

rather than the other should have the respective burdens is that one result is, in the large, more likely than the other. Thus he suggests (12 Stanford L. Rev. at 13) that one reason for the rule that defendant must plead, prove and persuade that a debt sued upon has been paid is that people are not prone to sue upon paid debts. Absent any evidence on the point of payment, the odds are that the debt, if one was owed, has not been paid. This justifies placing the burden of producing evidence on the defendant. Even when evidence is produced, it is best to resolve the issue against the defendant unless the trier of fact is persuaded that payment was made.

This approach is a rawly statistical evaluation of the problem. It depends upon conjectures about justice. If one assumes that of every 100 debts sued upon, 80 have not been paid, there is reason to think that the best overall justice will be achieved by acting as if none have been paid. All plaintiffs will prevail on the issue in the absence of any evidence, or where the finder is unpersuaded on the issue. But it is better to have 100 win, although only 80 should have won, than to have 100 lose, of whom only 20 should have lost.

Again the analogy to res ipsa loquitor should be noted. Flour barrels usually, although not always, roll out of lofts only because the one in possession has been negligent.

An aspect of probability which Professor Cleary does not mention is procedural economy. If, using the hypothesis above, 80% of all debts sued upon have not been paid, it is wasteful to the parties and to the courts to require 100 plaintiffs to prove non-payment when in only 20 of those cases is there any question about the matter. One method of avoiding the waste is to put the burden of pleading payment upon the defendant. This helps identify those cases in which there is an issue about payment. It does not necessarily follow that the burdens of producing and persuading

should also be placed upon the defendant, as is illustrated by the practice previously discussed (p. 3 supra) of requiring the defendant to specify that conditions precedent have not been performed before plaintiff, suing on a contract, is required to produce evidence on the subject.

If it be accepted that allocation of the burdens of pleading, proving and persuading is controlled by the considerations discussed above, it seems futile to attempt to revise the sections quoted from Part IV of the C.C.P. to incorporate any dependable guides. One reason is that the sections governing pleading seem not to be within the legislative authorization to study and make recommendations relating to the law of evidence. Another reason is that attempts to codify standards so vague are apt to result in misleading rather than useful sections.

Thus, there are several choices. One is to attempt to codify, the success of which is very dubious. The opposite would be to repeal, on the ground that the existing sections are useless as guides to judicial ruling. An intermediate approach would be to preserve the existing sections, with such improvements as can be made, in a separate Title relating to Burden of Proof, Burden of Producing Evidence and the Weight and Effect of Evidence.

Considering the individual sections on allocation, then it would appear that C.C.P. § 1867:

> None but a material allegation need be proved.

should be repealed. At best it is but a truism. Material allegations are defined in C.C.P. § 463:

> A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

Very little attention has been paid by the courts to either of these sections. The Supreme Court once said that § 1867 implies "of course, that material

allegations must be proved." Hurley v. Ryan, 137 Cal. 461, 462, 70 Pac. 292, (1902). This was at a time when courts were seriously holding that there was a difference between necessary allegations and material allegations. Hurley relied upon Melone v. Ruffino, 129 Cal. 514, 519, 62 Pac. 93, (1900), which held that in a suit upon an obligation to pay money an averment of non-payment

> is necessary to make the complaint perfect upon its face. But it is a non sequitur to say that because such negative averment is necessary in the complaint therefore it is necessary for the plaintiff to prove it. The question is not one of pleading, but of evidence; not what must be alleged, but where the burden of proof lies. The general rule is that a party is not called upon to prove his negative averments, although they may be necessary to his pleading.

This case did not cite the C.C.P. for its authority. It relied instead upon the opinion of Chief Justice Field in Green v. Palmer, 15 Cal. 411 (1860), in which Field deplored the failure of the bar to understand the very simple rules of the Practice Act, which he said, had been taken in part from the New York code. And he quoted extensively, from a manual "written by one of the commissioners engaged in framing the New York code, some rules of pleading, with the observations of the writer thereon, as expressive of our views as to what should be stated in the pleadings under our Practice Act." (The anonymous commissioner was his brother, David Dudley Field.) One of those rules is that certain negative allegations are necessary but are not to be proved by the pleader. 15 Cal. at 415.

In the light of this history, there seems to be a confusion of terms between C.C.P. § 463, defining material allegations, and C.C.P. § 1867. "Material" in the former seems to include both what must be proved and what the brothers Field thought was only necessary to be pleaded, but not proved by the pleader. David Dudley Field's test of what was material was as follows:

> The following question will determine, in every case, whether an allegation be material, "Can it be made the subject of a material issue?" In other words, "If it be denied, will the failure to prove it decide the case in whole or in part?" If it will not, then the fact alleged is not material; it is not one of those which constitute the cause of action, defense, or reply. 15 Cal. at 415.

The basic defect seems to be a failure to distinguish between what is a material fact and what is essential to a pleading. Other cases, without reference to the Code, have made the distinction: "the matter alleged may be material in the case, but immaterial in the complaint, and a plaintiff cannot by pleading such at the outset call upon the defendant to answer it." See Hibernia Savings and Loan Soc. v. Dickinson, 167 Cal. 616, 619, 140 Pac. 265, (1914) (plaintiff could not by anticipating a defense in the complaint require the defendant to respond to that point with a denial).

The essential conflict seems to be that the Code proceeds as if pleading governed proving, while the courts (as well as the writers) tend to assume today that pleading allocation is governed by considerations of proof, at least in most cases. See Allen v. Home Ins. Co., 133 Cal. 29, 30, 65 Pac. 138 (1901).

> It was in the contract between the insurer and the insured, that the premises were insured while occupied as a dwelling-house. It was essential for plaintiff to prove that the fire occurred while the premises were occupied as such dwelling-house. If it was essential to prove such fact, it was essential to allege it. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged.

Most recently this was reiterated in Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 233, 11 Cal. Rptr. 97, , 359 P.2d 465, (1961), although the court there had the aid of a statute which seems specifically to assign the burden of pleading. "As a general rule, the burden of pleading a particular matter and the burden of proving it correspond."

Another healthy indication of the judicial attitude is in the bailment

cases. At one time they held that whether plaintiff had to prove that the bailed goods were destroyed through the bailee's negligence depended upon whether the plaintiff had pleaded negligence. Thus in Wilson v. Crown Transfer & Storage Co., 201 Cal. 701, 706, 258 Pac. 596, (1927):

> There appears to be a marked line of distinction made by the decision between two classes of cases wherein this question has arisen. Where the plaintiff alleges that the goods were lost by fire due to negligence of the defendant, then the burden of proving these allegations is upon the plaintiff, but when the plaintiff's pleadings contain no such allegation, but the defendant, seeking to justify its refusal to return the goods, sets up their destruction by fire and alleges that the fire was not due to its fault or negligence, then the burden is upon the defendant to prove the allegation of its affirmative defense and show that it was free from negligence as to the cause of the fire.

This distinction was rejected in George v. Bekins Van & Storage Co., 33 Cal. 2d 834, 205 P.2d 1037 (1949), holding that the burden was on defendant without regard to the form of the complaint. And Gardner v. Jonathon Club, 35 Cal. 2d 343, 217 P.2d 961 (1950), indicates that a sufficient complaint in a bailment case would consist of allegations of bailment, demand for redelivery and failure to redeliver.

In sum, because the courts have changed the pleading rules, it would seem wise to repeal §1867. The rule today is in fact the converse of that section. If there were to be a statute, it should read: "A party must plead only those material facts which he is obliged to prove." But that would be a pleading statute, not an evidence statute.

The first sentence of §1868 should be retained. It reads:

> Evidence must correspond with the substance of the material allegations and be relevant to the question in dispute.

This is consistent with the definition of "material allegations" as defined in C.C.P. § 463, supra, as those essential to the claim or defense. It also conforms to Revised URE 1(2): "'Relevant evidence' means evidence having any tendency in reason to prove or disprove any disputed fact."

(It should be noted that the Uniform Rule used the term "material" rather than "disputed.")

The remainder of § 1868 should be repealed. It reads:

> Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

The discretion of the court to permit inquiry into collateral issues is governed by Revised URE 45. Rules 17-22 govern inquiry into credibility of witnesses.

The first sentence of §1869 might be retained. It reads:

> Each party must prove his own affirmative allegations.

If the discussion above at pp. 17-18 be accepted as a correct understanding of present California law, a party must plead only that which he has to prove. If that be correct, it is merely inversion to say that he must prove only that which he has properly alleged, and any surplusage of pleading on his part should be ignored. But even the inversion is useful, and it is the unstated assumption of Revised URE 1(5):

> "Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a peremptory finding against him as to the existence or nonexistence of a disputed fact.

(Again, the Uniform Rules used the expression "material issue of fact," thus conforming to the Code usage.) It should be noted, however, that the Rules as such do not purport to govern the allocation of the burden of

producing evidence in the large. This is left to legislative action, or to judicial action based upon the considerations of policy, convenience and probability discussed above. The only visible purpose of URE 1(5) is to define the term for the purpose of Rule 8, which permits the judge to allocate the burden of producing (and of persuading as well) on preliminary questions of fact concerning admissibility. If, as recommended earlier, Rule 1 be enlarged and made into a general definitions section for all of the new Part IV of the C.C.P., it would serve a much broader purpose.

The remainder of §1869 should be repealed. It reads:

> Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

As indicated above, negative allegations were things like non-payment of a debt sued upon. This is the example the older cases constantly use. To retain or to re-enact the language is to attempt to preserve a pleading practice the courts have in recent years condemned, and to perpetuate the notion that there is such a thing as an allegation which is necessary but not material. Apart from the difficult concept of the necessary but immaterial allegation, the sentence has two things wrong with it. One is that it is tautological; you must prove that which the law requires you to prove. The other is that it tends to mislead; most negative allegations must be proved. For example, want of probable cause in a malicious prosecution

action, Griswold v. Griswold, 143 Cal. 617, 77 Pac. 672 (1904). What would be more accurate as a proposition is that if imposing the burden on one party would put him under the obligation to prove a negative, there is good reason in this alone to put the burden of pleading and proving on the other party. See McCormick, Evidence 675 (1954). But this would not be a good statute because it would have to be combined with the other considerations of policy, convenience and probability discussed above.

The case for repeal of all save the first sentence of §1869 seems clear. The case for retaining the first sentence is less clear, however. The requirement that a party "prove" his own affirmative allegations might mean that he must produce evidence or suffer a directed verdict or nonsuit, thus bearing the "burden of proof" in that sense of the term. But this is precisely what is stated in § 1981:

> The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

The first sentence of § 1869 might also mean that the party holding the affirmative must prove his allegations in the second sense of burden of proof, that is persuade the finder of fact by a preponderance, by clear and convincing evidence, or beyond a reasonable doubt. But this is the subject covered by § 2061, which provides that the jury must be instructed:

> 5. That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made

according to the preponderance of the evidence; that in criminal cases guilt must be established beyond reasonable doubt.

It is not that the Code Commissioners used "proved" as synonymous with either burden of producing evidence or burden of persuasion; they used it to comprehend both terms. There was little wrong with this at the time. The law of presumptions had not yet gone through Thayer's analysis. It was almost an invariable rule that the party who had the burden in the first instance of producing evidence on his allegations had in the end the obligation to persuade the fact-finder that his allegation was true. This will not do today, and on the whole, it seems better to repeal all of § 1869, including the first sentence.

But this still leaves the difficulty of what to do about §§ 1981 and 2061(5). The definition of the terms "burden of proof" and "burden of producing evidence" in Revised URE 1(4) and (5) does no more than define for the purpose of the Rules, which are unconcerned with the general problems of allocation. Several possibilities present themselves. Perhaps the easiest is to retain § 1981 in its present form, on the ground that it has not done any demonstrable harm. Indeed, the courts seldom mention the section. But because of the dual meaning of burden of proof, it should be changed to read:

> The party holding the affirmative of the issue must produce [~~the~~] evidence sufficient to avoid a peremptory finding against him on the disputed fact. [~~to-prove-it;-therefore,-the-burden-of-proof-lies-on-the-party-who-would-be-defeated-if-no-evidence-were-given~~

on either side.]

The new language is taken from Revised URE 1(5).

The second possibility would be an attempt to codify the factors which the courts take into account in assinging the burden of producing evidence. The following is an attempt to state those considerations in general terms

> The burden of producing evidence is on that party which by statute or rule of law will lose on the particular issue if no evidence is presented. In the absence of a statute, courts shall assign the burden of producing evidence to the parties, taking into account what is the most desirable result in the absence of evidence, considerations of fairness and convenience in access to evidence and in eliminating unnecessary proof, and the probabilities of particular results in issues of that nature.

The third possibility is to repeal the section entirely, trusting to the judges to continue to do what they are doing now.

In all probability, the Code Commissioners thought that in adopting § 1869 they were regulating both burden of producing and burden of persuading. If so, they would have viewed § 2061(5) not as an allocation of the burden of proof, but as a statement of what the jury is to be instructed upon. Pen. C. § 1096 would have supplied the "reasonable doubt" standard for criminal cases.

Section 2061(5) requires revision if it is to be retained at all. It might be changed in form to tell the judge what he is to instruct about,

rather than as at present the words he is to use in instructing them. It might read:

> On which party bears the burden of proof on each issue, and on whether that burden is to prove by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt.

An attempt to state what the form might take is as follows:

> That the burden of proof rests upon the party to whom it is assigned by statute or rule of law, informing the jury which party that is; and when the evidence is contradictory, or if not contradicted might nevertheless be disbelieved by them, that before they find in favor of the party who bears the burden of proof they must be persuaded by a preponderance of the evidence, by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Unless a statute or rule of law specifically requires otherwise, the burden of proof requires proof by a preponderance of the evidence.

The underlined words are taken from Revised URE 1(4).