#63(L) 12/3/65

Memorandum 65-77

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

Accompanying this memo, on yellow paper, are two copies of a tentative recommendation relating to the revision of the Evidence Code. Please mark your suggested revisions on one copy and return it to the staff at the December meeting.

Most of the tentative recommendation has been reviewed by the Commission at previous meetings. But there is some new and revised material designed to carry the decisions made by the Commission at the November meeting. Page 2 is new, and page 6 is substantially revised. The amendment and comment to Section 403 are new (pages 8 and 9), and the comment to Section 646 is substantially revised.

To facilitate drafting and reference, we moved the added language in Section 776 to the end of the section. It is likely that the Comment to the amendment will be published immediately following the original Comment. (This is the form in which the West Publishing Company treated the Comments to the 1965 amendments to the Governmental Claims Act.) The discussion of subdivision (e) in this comment, therefore, will appear in logical order. The comment to Section 776 has been substantially revised.

The amendments to Sections 1093 and 1127 of the Penal Code and the accompanying comments are new.

Respectfully submitted,

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Assistant Executive Secretary

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 welcomed suggestions relating to the Evidence Code and 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 or admission 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 or admission in a criminal case to be held out of the presence of the jury unless the defendant expressly waives his right to the out-of-court hearing and such waiver is made a matter of record.

2. Section 403 requires the judge to instruct the jury to disregard conditionally admissible evidence whenever he is requested to do so by a party or whenever he determines that a jury could not reasonably find that the condition exists on which admissibility depends. In many situations, the jury's duty to disregard conditionally admissible evidence is so clear that an instruction to that effect is unwarranted. For example, if a party offers a written admission purportedly signed by the adverse party and the adverse party offers evidence that the document is a forgery, there is no reasonable likelihood that the jury is going to consider the document as evidence of the matters stated therein if it believes that the document is spurious.

Accordingly, Section 403 should be revised to eliminate the requirement that an instruction must be given. The section should permit the judge to decide in each case whether or not an instruction is warranted.

3. 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. Conforming amendments should also be made in Penal Code Sections 1093 and 1127.

4. 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.

5. 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 of some merit, however, in litigation between an employer and an employee. An employee-witness who is called to testify against his employer by a co-employee may often be in sympathy with his co-worker's cause and adverse to his employer's. In such a case, the employer should have the right to ask the witness leading questions to the same extent that any other party can cross-examine an adverse witness.

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

6. 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, 403, 412, 413, 776, and 1201 of, and to add Sections 414 and 646 to, the Evidence Code, and to amend Sections 1093 and 1127 of the Penal 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 or admission in the presence of the jury. Cf. Jackson v. Denno, 378 U.S. 368 (1964).

SEC. 2. Section 403 of the Evidence Code is amended to read:

403. (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

(1) The relevance of the proffered evidence depends on the existence of the preliminary fact;

(2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;

(3) The preliminary fact is the authenticity of a writing; or

(4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.

(b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial.

(c) If the court admits the proffered evidence under this section, the court ~~:(1)~~ may ~~, and on request shall,~~ instruct the jury :

(1) To determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.

(2) ~~Shall instruct the jury~~ To disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.

Comment. In many cases the jury's duty to disregard conditionally admissible evidence is so clear that an instruction to this effect is unnecessary. Therefore, subdivision (c) has been amended to delete the requirement that such an instruction be given in certain cases. Under the amended subdivision, the court may refuse to give such an instruction when it is unnecessary to do so.

SEC. 3. 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. 4. 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. 5. Section 414 is added to the Evidence Code, to read:

414. Instructions and comments permissible under 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 Cal.2d 820, 823, 44 Cal. Rptr. 649, 402 P.2d 529 (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. 6. Section 646 is added to the Evidence Code, to read:

646. The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence.

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

Under the doctrine of res ipsa loquitur as developed by the California courts, an inference arises that an injury was negligently caused by the defendant if the plaintiff establishes three conditions:

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

The "inference," however, is "a special kind of inference" whose effect is "somewhat akin to that of a presumption"; for if the facts giving rise to the doctrine are established, the jury is required to find the defendant negligent unless he comes forward with evidence to overcome the inference. Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954).

As a presumption under the Evidence Code, the doctrine of res ipsa loquitur will have the same procedural effect that it formerly had as a "mandatory inference." If the jury finds the facts giving rise to the doctrine, it is required to find the defendant negligent unless he makes the requisite contrary showing. See EVIDENCE CODE § 600 and the Comment thereto.

Section 646 classifies res ipsa loquitur as a presumption affecting the burden of producing evidence. Thus, the presumptive effect of the doctrine vanishes if the defendant comes forward with evidence to overcome the

presumption. The jury must then weigh the inference of negligence against the contrary evidence and resolve the conflict. If the inference of negligence preponderates in convincing force, the jury should find that the defendant was negligent; but if the inference of negligence does not preponderate in convincing force, the jury should find that the defendant was not negligent. See EVIDENCE CODE § 604 and the Comment thereto.

Whether this classification of res ipsa loquitur changes existing California law is uncertain. It is clear that under the existing law, 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). And to this extent, it is clear that Section 646 effects no change. But the cases considering res ipsa loquitur suggest that the doctrine requires the adverse party to come forward with evidence not merely sufficient to support a finding in his favor but sufficient to balance the mandatory inference of negligence. Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954). If this means merely that the trier of fact is to follow its usual procedure in resolving conflicting inferences--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 Section 646 makes no substantive change in the law. 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 Section 646 modifies the existing law; for under Section 646 there is no legal requirement--either "mandatory inference" or presumption--that negligence be found after contrary evidence has been introduced.

At times the doctrine of res ipsa loquitur will coincide in a particular case with another presumption or with another rule of law that requires the defendant to discharge the burden of proof on the issue. See Prosser, Res Ipsa Loquitur in California, 37 CALIF. L. REV. 183 (1949). In such cases the defendant will have the burden of proof on issues where res ipsa loquitur appears to apply. 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. 7. Section 776 of the Evidence Code is amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEC. 8. Section 1201 of the Evidence Code is amended to read:

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

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

SEC. 9. Section 1093 of the Penal Code is amended to read:

1093. The jury having been impaneled and sworn, unless waived, the trial must proceed in the following order, unless otherwise directed by the court:

1. If the accusatory pleading be for a felony, the clerk must read it, and state the plea of the defendant to the jury, and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction. In all other cases this formality may be dispensed with.

2. The district attorney, or other counsel for the people, must open the cause and offer the evidence in support of the charge.

3. The defendant or his counsel may then open the defense, and offer his evidence in support thereof.

4. The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

5. When the evidence is concluded, unless the case is submitted on either side, or on both sides, without argument, the district attorney, or other counsel for the people, and counsel for the defendant, may argue the case to the court and jury; the district attorney, or other counsel for the people, opening the argument and having the right to close.

6. The judge may then charge the jury, and must do so on any points of law pertinent to the issue, if requested by either party; and he may state the testimony, and may ~~comment on the failure of the defendant to~~

~~explain-or-deny-by-his-testimony-any-evidence-or-facts-in-the-case against-him,-whether-the-defendant-testifies-or-not,-and-he-may~~ make such comment on the evidence and the testimony and credibility of any witness as in his opinion is necessary for the proper determination of the case and he may declare the law. At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as he may deem necessary for their guidance on hearing the case. The trial judge may cause copies of instructions so given to be delivered to the jurors at the time they are given.

Comment. The deleted language authorizes unconstitutional comment upon a criminal defendant's exercise of his right to refuse to testify against himself. See Griffin v. California, 381 U.S. 763 (1965); People v. Bostick, 62 Cal.2d 820, 44 Cal. Rptr. 649, 402 P.2d 529 (1965).

SEC. 10. Section 1127 of the Penal Code is amended to read:

1127. All instructions given shall be in writing, unless there is a phonographic reporter present and he takes them down, in which case they may be given orally; provided however, that in all misdemeanor cases oral instructions may be given pursuant to stipulation of the prosecuting attorney and counsel for the defendant. In charging the jury the court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case ~~and in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court~~ . The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses. Either party may present to the court any written charge on the law, but not with respect to matters of fact, and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused, the court must endorse and sign its decision and a statement showing which party requested it. If part be given and part refused, the court must distinguish, showing by the endorsement what part of the charge was given and what part refused.

Comment. The deleted language authorizes unconstitutional comment upon a criminal defendant's exercise of his right to refuse to testify against himself. See Griffin v. California, 381 U.S. 763 (1965); People v. Bostick, 62 Cal.2d 820, 44 Cal. Rptr. 649, 402 P.2d 529 (1965).