#63 2/9/66

Memorandum 66-13

Subject: Study 63(L) - Evidence Code

You will recall that the Commission directed the staff to send the letters of Mr. Justice Kaus and the staff memoranda relating to Section 403 of the Evidence Code to our research consultants and to other evidence law teachers for their comments and suggestions. Almost two months ago, we sent this material to Professor Degnan, Professor Chadbourn, and to all evidence teachers in California.

In response to this distribution, we received five letters. The letters are attached and are from Professors Chadbourn, Degnan, Sherry, Hermle (University of San Diego School of Law), and Harno (Hastings College of Law). All five state that no change should be made in Evidence Code Section 403. (It should be noted, however, that Professor Hermle and Professor Harno apparently do not have a very good understanding of the Evidence Code. Also, the first portion of Professor Degnan's letter discusses matters not pertinent to this problem.) Unless we receive some additional letters that support the view of Mr. Justice Kaus, we do not plan to bring this matter up for discussion again.

Two additional matters should be mentioned in connection with these letters:

1. Professor Chadbourn objects to our proposed revision of subdivision (c) of Section 403 (contained in our tentative recommendation which we have distributed for comments). We will take up his objection when we consider the other comments on the tentative recommendation, probably at the August 1966 meeting.

2. Professor Hermle indicates in his letter that he believes that when a confession is offered and the question is whether the accused has been warned of his constitutional rights, the question would be one that ultimately should be decided by the jury. This is not correct and I have advised Professor Hermle that my personal opinion is that such a decision is to be made by the judge after hearing all of the evidence on both sides and that the issue of admissibility is not to be submitted to the jury. The accused can, of course, submit evidence to the jury on the weight to be given to the confession. My opinion is supported by the recent decision of People v. McGee, 238 A.C.A. 249, 253, footnote 2.

The primary reason why we have prepared this memorandum for the February meeting is to provide the Commission with an opportunity to discuss the California Law Review Student Note on the Evidence Code scheme for dealing with presumptions (53 CAL. L. REV. 1439). The Chairman has sent each of you a copy of this excellent note. Please bring that copy to the meeting so that you will have it available when we discuss this matter.

The note is concerned with the Evidence Code provisions regarding rebuttable presumptions in civil cases. We indicate below the matters that are considered in the note and might be discussed at the February meeting.

1. The presumption-is-evidence doctrine. This doctrine is discussed on pages 1472-1487, and the writer concludes that the Evidence Code made an important and highly desirable change in eliminating the presumption-is-evidence doctrine. So far as jury instructions are concerned, he sees no problems arising because of the elimination of the doctrine. However, the writer suggests that the law relating to peremptory rulings against the party relying on a presumption should have been clarified in the Evidence Code.

The Evidence Code does not specify what circumstances justify granting peremptory rulings against the party relying on a presumption. This is because we did not attempt to cover the matter of nonsuit or directed verdicts in the Evidence Code.

The writer concludes that the law is clear on Thayer (burden of producing evidence) presumptions. However, he states that the law under the Evidence Code on Morgan (burden of proof) presumptions is not clear. See the discussion on pages 1474-1480, especially pages 1477-1479. He suggests that the Evidence Code should have clarified the law in this respect.

The staff does not believe we should insert in the Evidence Code any provisions relating to the conditions under which a nonsuit or directed verdict may be granted. However, if the Commission wishes to draft legislation on this matter, the staff suggests that the Commission examine pages 1477-1479 of the law review note and pages 1065-1070 of the Commission's research study on Burden of Producing Evidence, Burden of Proof, and Presumptions (copy attached). The staff has some difficulty in understanding the analysis in the law review note on this matter. We find the analysis of Professor Chadbourn much clearer.

If the Commission decides to include some provision on directed verdicts and nonsuits in the statutes, the staff believes that we should include the substance of the following rule: Where the party against whom a presumption affecting the burden of proof operates requests that the court direct a verdict in his favor or that his opponent be nonsuited, the court shall grant such motion only if, after considering all the evidence produced by the parties on the issue, the court determines that no reasonable person could conclude that the presumed fact exists.

2. Are two kinds of presumptions necessary? The writer concludes that two types of presumptions are not necessary and that the division of presumptions into classes has created serious administrative difficulties. He suggests that all presumptions be classified as presumptions affecting the burden of persuasion (Morgan presumptions) as distinguished from presumptions that only shift the burden of producing evidence. For his discussion, see pages 1450-1472.

We believe that the Evidence Code is sound in that it provides two types of presumptions and permits a particular presumption to be given such effect as is appropriate for that type of presumption. In fact, the Evidence Code would still be in the process of formulation were it not for this solution which enabled us to develop a scheme that everyone could accept, both those taking the Morgan view and those taking the Thayer view.

One reason for our creation of two types of presumptions was the fact that it was not possible to eliminate various presumptions in existing law that some of the members of the Commission did not consider appropriate as presumptions. Giving these presumptions a Thayer effect permitted us to reach an agreement on the statute.

3. Is the Evidence Code scheme for classifying presumptions adequate? The writer discusses the classification scheme provided by the Evidence Code at pages 1443-1450. He concludes that it will not be easy for the judges to classify presumptions, especially since they must often classify a presumption in the heat of a trial.

Under Evidence Code Sections 603 and 605, the test is whether a presumption was created to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied. The writer, we believe, demonstrates that this test is not clear enough to permit the easy classification of some presumptions.

You will recall that at one time the Commission considered a test that would have permitted the classification of presumptions on the basis of the factors listed in footnote 97 on page 1459, but this test was rejected because it provided too vague a standard.

Although the test provided by the Evidence Code can perhaps be improved, we believe that no test can be provided which will permit the classification of all presumptions without the necessity of having the classification accomplished by the California Supreme Court in at least some cases. To minimize this problem, which we agree is a real one, we suggest that the Commission consider undertaking to draft legislation to classify all the statutory presumptions we can discover. You will recall that, at one time, we did undertake to draft such legislation but we dropped the project when the other demands on our time made it impossible to complete the project. We believe that such an approach is the only one that will provide for the sure resolution of the doubt that exists as to the proper classification of presumptions that are not contained in the Evidence Code. Such a project would, of course, be a substantial undertaking, but we could perhaps draft a substantial bill in time for the 1967 legislative session if that is the Commission's desire. Perhaps any presumption that causes controversy could be dropped from the bill and the classification of such presumption could be left to the courts. Moreover, in drafting such a bill, we could rephrase some presumptions so that they would be statements as to which party has the burden of proof rather than presumptions. This would be desirable in the case of presumptions that relate to what are essentially matters of defense in criminal actions.

We believe that undertaking to draft such a bill is a much better procedure than abandoning our dual system of presumptions. One reason the

Evidence Code was enacted, I believe, is that there was no controversy over our presumption scheme. To adopt either the Morgan or the Thayer view would result in having the advocates of each view argue its merits before the appropriate legislative committees.

After such a bill has been drafted, it might be possible to develop a better test for the classification of presumptions that have not been classified by the bill.

4. The Section 667 presumption. Evidence Code Section 667 creates a presumption affecting the burden of proof. The section reads:

> 667. A person not heard from in seven years is presumed to be dead.

Footnote 34 in the law review note indicates that the writer apparently believes that the presumption provided by Section 667 should apply only in case of an "unexplained" absence for seven years. The presumption is taken without change from Code of Civil Procedure Section 1963. To adopt the view of the author of the note, the following sentence might be added to Section 667:

> This presumption does not arise if the person at the time he was last known to be alive was a fugitive from justice or because of other reasons it would be improbable that he would have been heard from even if alive.

We do not recommend this addition. Under our present code provision, the plaintiff is entitled to go to the jury on the issue upon showing that the person has not been heard from in seven years. The evidence that the person was a fugitive from justice at the time of his disappearance is evidence from which the jury may infer that the person is alive. Since it is very difficult to prove that a missing person is dead, the staff believes that the presumption should arise upon a showing that the person has not been heard from for seven years, that the burden of persuasion should then shift to the other party, that he should then be permitted to introduce evidence from which the trier of

fact could infer that the person is alive, and that the trier of fact should then decide the matter, giving a decision for the party against whom the presumption operates if the trier of fact concludes that it is more probable than not that the person is alive.

5. Mentioning presumptions to the jury. The writer approves the Evidence Code scheme on this. See pages 1487-1488.

6. Clear and convincing proof. The writer suggests that the court be required to direct a verdict against a party who has the burden of proof of a fact by clear and convincing proof but fails to produce enough evidence to support a finding of that fact by clear and convincing proof. See pages 1488-1489. We did not attempt to deal with instructions on burden of proof in such detail in the Evidence Code. Moreover, the author recommends a change in existing law that goes to directed verdicts generally, not just to directed verdicts in cases involving presumptions. If we undertake to draft provisions on directed verdicts, we should also consider other degrees of proof, such as "proof beyond a reasonable doubt," "proof sufficient to create a reasonable doubt."

7. Conflicting presumptions. The writer suggests that the Evidence Code should contain a provision on conflicting presumptions. See pages 1489-1490. The Commission concluded that such a provision was unnecessary. We eliminated some of the presumptions that resulted in a circumstance where conflicting presumptions were possible by providing that the presumptions relating to due care, sanity, and guilt of crime or wrongdoing were rules affecting the burden of proof rather than presumptions. It is difficult to conceive of a case where there can be conflicting presumptions under the Evidence Code; and, if such a case arises, it would appear to be better to permit the court to resolve it in light of the circumstances of the particular

case rather than to attempt to formulate a general rule to deal with the problem.

8. Prima facie evidence. Although the writer concludes that we have clarified the law relating to prima facie evidence, he believes that we should further clarify those particular statutory provisions that are designed to provide for the admission of hearsay evidence rather than to create a presumption. We did exactly that in the Evidence Code. If we undertake to classify the various statutory presumptions, we can revise those provisions that are designed merely to make hearsay evidence admissible to phrase them as hearsay exceptions. We doubt whether a general provision in the Evidence Code would clarify the matter.

9. Nonstatutory presumptions. The writer approves our recognition of the existence of nonstatutory presumptions and suggests no revisions in connection with this matter.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Law School of Harvard University

Cambridge 38, Mass.

December 30, 1965

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

Dear Joe:

I have been delayed in finding an opportunity to study the material you sent me on November 26. However, I have now read the various letters and memos, and should like to make a few comments.

First, let me say, of and concerning Joe Ball's letter of October 25, that it seems to me that Joe rejects the basic idea which underlies §§ 403 and 405 of the Evidence Code, namely that some preliminary questions are for the jury, whereas others (including the credibility of witnesses who testify concerning them) are for the court. Since I approve of the Code provisions, I, of course, disagree with Joe's view. That view, I may add, is not in accord with the traditional law on the subject (see McCormick, Evidence § 53). Moreover, various policy considerations militate against it (ibid).

As to the questions raised by Judge Kaus, let me, for convenience, tie my comments to Case # 8 , page 8, # 63(L) Memorandum 65-68 11/12/65. The case presents a competency problem under the hearsay exception for admissions. No relevancy problem arises. Under Code § 403 ultimate resolution of the preliminary question is committed to the jury. Nevertheless, under § 405 in competency problems involving other hearsay exceptions, resolution of the preliminary questions is committed to the judge. The central question is therefore whether there is good reason for such different treatment. I believe that the answer to this question should involve not so much considerations of doctrinal symmetry as practical factors. In other words, the desideratum should be to construct a system at the trial level which is simple, understandable,

workable, and, of course, fair to the parties. Judged in these terms, I think the Commission's deliberate decision to make matters covered by § 403(a)(3) and (4) jury questions is a wise decision, though, of course, I must concede that some doctrinal asymmetry is involved.

You will excuse me, I hope, for discussing this in such a conclusory (if not, pontifical) manner. More simply, what I'm trying to say is that I agree with memo 65-68, except as I'm now about to state.

It seems to me that § 403(c)(1) and § 403 (c)(2) are dealing with such different matters that, whereas "on request shall" should be eliminated from (1), "shall" in (2) should remain as is. My thought is that (2) is just a special instance of the general power of the judge to direct a verdict or finding when reasonable minds cannot differ, and it seems to me that this should be a matter of duty rather than discretion.. (1) is, of course, a different kind of animal.

Very best wishes to you, the staff and members of the Commission.

Sincerely yours,

James H. Chadbourn
Professor of Law

JHC:mar

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SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720

February 4, 1966

Mr. Joseph Harvey
California Law Revision
Commission
30 Crothers Hall
Stanford University
Stanford, California

Dear Joe:

I have delayed answering your letter of January 18th because I simply could not find sufficient time to give it the consideration it deserves. As your letter and the accompanying documents demonstrate, it is an uncommonly hard question on which men may readily differ in judgment. I will attempt to sketch out for you my thought on the correct analysis of the problem.

The first point that I must make is that some of the discussion about privilege and the case of Jackson v. Denno is not directly relevant. That is because in privilege law we are not concerned with credibility as the ultimate questions; indeed, we always assume that the answer to a question involving privilege would be relevant and might, at least, be found believable. The ultimate question is protection of a legislatively declared policy that secrecy, in given circumstances, is more important than truth. It is for this reason that we allow the factual questions which determine whether the privilege exists to be decided by the judge and the judge alone, even when he is required to resolve the question solely upon an appraisal of the credibility of testimony.

Jackson v. Denno situations illustrate how these two problems can blend into what seems like one. As is now clear, involuntary confessions are excluded for two distinct reasons: one is that we want to discourage application of pressure to obtain such statements, without regard to the truth or falsity of the statement, and the other is that involuntary statements are quite likely to be less reliable than those voluntarily made. So we are posing two separate questions which, unfortunately, sound very much alike. One is addressed to the judge, who must find whether the confession was "voluntary." If he finds that it was not, resolving the probably contradictory evidence on whether coercion was applied, he

must exclude. This is not so much a rule against passing the buck as it is a requirement that the judges find the facts when dealing with a rule which has as its purpose something other than assurance of truth, which the rule against police coercion is. The other question, which will be put to the jury on virtually the same evidence, does perhaps sound the same as the one decided by the judge. It is not, however; the jury decides whether the confession is reliable and credible, and it properly hears and appraises for that purpose, the very same testimony the judge has already passed upon. Just as the judge was not passing the buck when he allowed the jury to hear the same evidence of coercion, which he rejected in allowing the confession in, the jury is not "second-guessing" the judge if it decides to the contrary and disbelieves the confession. It is simply deciding, on the responsibility entrusted by law to it, a question which is uniquely jury in character.

The policy behind hearsay is almost totally one promoting credibility. It is therefore inevitable that the jury role will be larger and the role of the judge relatively less. I think that subsections 403(a)(3) and (4) appropriately recognize this difference. Once the judge has made the threshold determination that reasonable men could believe the evidence offered, and from it find the disputed fact, he has peformed his function. Beyond that point, the jury role of assessing credibility is controlling. To allow the judge to say that (to use your example) although reasonable men could believe the deed to be genuine subsection (a)(3) or that the acknowledgment of fault emanated from the defendant, but the jury will not be allowed to find because, on conflicting testimony, the judge does not in fact believe it, is to deny the jury its traditional domain of credibility.

Judge Kaus rightly observes that in some cases, such as the admission example, there is a danger that the jury will ignore the instruction and the protecting effect of the hearsay rule will be evaded. That is, the jury may conclude that if somebody said the Ford went through the red light, it probably did, and the jury may give effect to the statement even if it should, in its deliberations, conclude that it was not the defendant who uttered the statement. In many cases this is not a problem; often a statement will be probative only if it can be attributed to a certain person. But there are enough, and your example is one of them, where a statement may have some probative value even when it cannot surely be attributed to a declarant who qualifies under some hearsay exception--he is a party, or the statement is against his interest, or he was in a state of excitement, or the like. This real problem is one which we traditionally attempt to control by instructions, not by exclusions.

You will observe that some other questions about hearsay are traditionally decided by the judge--is the declarant a party, was the statement against his interest when made, or was he then in a state of excitement? To some extent these are questions of law, appropriate for

the judge rather than for the jury. To the extent that they are factual, they may involve circumstances--cases often determine whether a declarant was excited by asking whether an average person would have been excited by the circumstances. But sometimes the determing factor will be purely factual. The important and pervasive distinction, I think, is between those factors which bear upon the credibility of the declarant and those which involve jury appraisal of testimony of a witness now on the stand, under oath and subject to cross-examination. If the witness says, "I heard him [indicating defendant] say that he went through the red light," we have a pure jury question of credibility of a witness. To prove the existence of a state of excitement is another matter; the jurors do not see the declarant, and usually he was not then under oath or subject to cross-examination. To me, this not only warrants but calls for the distinction drawn by § 403 and § 405.

In conclusion, I admit that my final remark above is more application of judgment than cold analysis. To have analyzed the question correctly does not point unerringly to the correct answer in a matter as complicated as this. I concede Judge Kaus' criticism that treating the same question in two different ways invites confusion in the courtroom. I have already indicated that the danger that the jury will ignore the instruction and give weight to the evidence even if it does not make the requisite finding is real, not imaginary. On the other hand, Joe Ball's letter is not wrong in any sense that he misses the point; he sees the point quite clearly and speaks persuasively. I cannot make the case here (although I can in privilege cases) that the function of determing the existence of foundation for a given hearsay exception is ideally for the judge rather than for the jury. I canassert that our traditions and our case law distinguish between those factual questions which bear upon the reliability of an in court statement.

I have been discussing this as a judge-jury question, which it is. I don't think it is the kind of allocation that can be answered by looking to the constitution or to existing case law, although I do think your comments support the existing Code provisions. It is a question of judgment, within the range on which judgments may reasonably differ.

Sincerely,

Ronan E. Degnan
Professor of Law

RED:ma

cc: Judge Otto Kaus
Mr. Joseph Ball

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SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720

January 21, 1966

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

Dear John:

I have read and studied your letter together with the letters of Mr. Justice Kaus and the staff memoranda relating to Section 403 of the Evidence Code. In my judgment, the Commission's resolution of the issue raised by Mr. Justice Kaus is the only proper one. I find it somewhat difficult to define the principle upon which he bases his contentions but he appears to envision a role for the judge with respect to what may very well be substantive issues to such an extent that the function of the jury may become a very subordinate one indeed.

The Commission's position, of course, accords with McCormick's view that authenticity of a writing or statement is a matter of relevance and not a question of the application of a technical rule of evidence. In such a case the issue seems clearly to be one for resolution by the jury. The Harvey memorandum No. 65-68 makes a most convincing case for the practicality of the Commission's proposal in emphasizing that the trial judge need only bear in mind that Section 403 is important only in questions of authenticity.

If you have not encountered it, Judge Merrill's treatment of the problem in a conspiracy case accords with the Commission's position. See Carbo v. U.S., 341 F.2d 718, 735 (9th Cir. 1963).

Cordially yours,

Arthur H. Sherry
Professor of Law
and Criminology

AHS:deb

UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
ALCALA PARK
SAN DIEGO 10, CALIFORNIA

January 28, 1966

FACULTY

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

In your letter of January 17, 1966 you request my views on the rules prescribed by subdivisions (a) (3) and (a) (4) of Evidence Code Section 403.

In my opinion no revision in Section 403 of the Evidence Code should be made. In support of my opinion, I do not consider it essential to enter into a discussion of the pros and cons as to what preliminary facts should be decided by the judge exclusively and what facts he should leave for the final determination of the jury, because I consider the position taken by the Staff in Memorandum 65-68 sets forth my conclusions on the subject. I have thoroughly read several times the arguments set forth in Justice Kaus' letters and the Staff's answer thereto. I feel that I could add nothing of substance to the matters discussed in both Staff Memorandums enclosed in your letter.

One of my former students informs me that the point as to the final determination of the accused being informed of his rights under the Dorado decision has been raised in the San Diego Superior Court. I have read of no such question being raised in the Advance California Reports. Under the Evidence Code, it would appear that if the question raised is one of authentication, that is, a dispute as to whether or not the accused was warned of his rights, it is a 403 question. If the accused produces sufficient evidence to sustain a finding that he was not warned, the question goes to the jury.

Thank you for the opportunity to express my views on this matter.

Very truly yours,

Leo D. Hermle

LDH/rl

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

January 25, 1966

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

Dear Mr. DeMoully:

I have your letter of January 17 and have struggled with the materials you enclosed. I have come to the conclusion that the differences between the Commissioner's views, as stated in the Evidence Code and in the comments, and the views of Justice Kaus are, in the main, differences one finds in the reported decisions in this area of the law.

The Commission and Justice Kaus are in accord in starting from the premise that the court determines the preliminary fact bearing on the authenticity of proffered evidence. After that initial stage Justice Kaus expresses differences with the Evidence Code. In a substantial measure the differences arise over the relative powers and functions of the court and the jury.

The broad question is which view is to be preferred in advancing the clarity and integrity of the law of evidence. My inclination is to support the view that the court should have the power to decide this preliminary fact with finality. I am inclined to go a step further and approve a rule similar to the one set out in the Uniform Rules of Evidence, Rules 8 and 19, and particularly Rule 8, which places the responsibility on the court to pass on the preliminary question of the admissibility of evidence. You will note, though, the last sentence of Rule 8, which provides:

> "But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility."

When the preliminary fact question on which the admissibility of the evidence rests is likewise an ultimate disputed fact issue, we are confronted with a complicated problem. Justice Kaus has some support for his view. See, for example, Matz v. United States, 158 F. 2d. 190. I believe Rule 405 of the Evidence Code establishes a more acceptable procedure.

My only question is whether (b) (2) needs to be included. As I view this procedure, when the existence of a preliminary fact is disputed the court will indicate who has the burden of producing evidence and who has the burden of proof. The court, as indicated in (a) will then determine the existence or nonexistence of the preliminary fact and decide for or against the proffered evidence. If the court admits the proffered evidence, it should not permit the opponent to raise a preliminary dispute on the proponent's evidence, but should permit the party offering the evidence to produce evidence to support a verdict on the preliminary fact issue, and evidence to support the conditionally relevant fact. The burden of going forward with the evidence would then shift to the opponent, who would bring in the disputing evidence. Thus the dispute will in the end be for the jury, and not the court to resolve.

I have given you my views. My conclusion is that Evidence Code stands in no need of change. The Code, in my opinion is an outstanding achievement in law improvement.

Sincerely yours,

Albert J. Harno

AJH:jb

STATE OF CALIFORNIA

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

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

TENTATIVE RECOMMENDATION

relating to

REVISION OF THE EVIDENCE CODE

January 1, 1966

California Law Revision Commission
30 Crothers Hall
Stanford University
Stanford, California

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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 to give lawyers and judges an opportunity to become familiar with its provisions before they were required to apply them.

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

1. Evidence Code Section 402(b) now permits a hearing on the admissibility of a confession or admission in a criminal case to be held in the presence of the jury if the defendant does not object. It has been suggested that, in the light of the considerations identified in Jackson v. Denno, 378 U.S. 368 (1964), the provisions of Section 402(b) may not adequately protect the rights of the accused. To obviate this possibility, Section 402(b) should be revised to require the preliminary hearing on the admissibility of a confession or admission in a criminal case to be held out of the presence of the jury unless the defendant expressly waives his right to the out-of-court hearing and such waiver is made a matter of record.

2. Evidence Code Section 403 authorizes the judge to instruct the jury to disregard conditionally admissible evidence unless it finds that the condition exists and requires the judge to give the instruction whenever he is requested to do so by a party. In many situations, however, 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. Evidence Code Section 413 codifies 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. In Griffin v. California, 381 U.S. 763 (1965), the United States Supreme Court held that such comment violates a party's rights under the 14th Amendment of the United States Constitution when his failure or refusal to testify is in the exercise of his privilege to refuse to testify against himself. The rationale of the Griffin case may also apply to Evidence Code Section 412, which states a rule that is similar to that stated in Section 413.

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

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

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

5. Under existing California law, when the facts giving rise to the doctrine of res ipsa loquitur have been established, a finding of negligence is required 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 have stated, however, that the doctrine requires the adverse party to come forward with evidence not merely

sufficient to sustain a finding that he was not negligent but sufficient to balance the inference of negligence. See, e.g., Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 437, 260 P.2d 63 (1953). If such statements merely mean that the trier of fact is to follow its usual procedure in balancing conflicting evidence--i.e., the party with the burden of proof wins on the issue if the inference of negligence arising from the evidence in his favor preponderates in convincing force, but the adverse party wins if it does not--then res ipsa loquitur in the California cases does indeed function exactly like an Evidence Code presumption affecting the burden of producing evidence. If such statements mean, however, that the trier of fact must in some manner weigh the convincing force of the adverse party's evidence of his freedom from negligence against the legal requirement that negligence be found, then the doctrine of res ipsa loquitur represents a specific application of the former rule (repudiated by the Evidence Code) that a presumption is "evidence" to be weighed against the conflicting evidence. See the Comment to EVIDENCE CODE § 600.

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

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

6. Under existing law, a presumption of negligence arises from proof of the violation of a statute, ordinance, or regulation for which criminal sanctions are imposed. Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958); Tossman v. Newman, 37 Cal.2d 522, 233 P.2d 1 (1951). In addition to the violation, the party relying on the presumption must show that he is one of the class of persons for whose benefit the statute, ordinance, or regulation was adopted, that the accident was of the nature the enactment was designed to prevent, and that the violation was the proximate cause of the damage or injury. See Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954); Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497 (1950).

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

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

The presumption should also be modified by the elimination of the requirement that the violation be subject to a criminal sanction. So long as the court must find that the enactment was adopted for the protection of the person relying on the presumption and that the violation was the proximate cause of an accident of the nature that the enactment was designed to prevent, there seems to be no purpose served by requiring the court to find, in addition, a criminal sanction for the violation. Frequently noncriminal sanctions such as license revocation or suspension are far more severe than misdemeanor penalties. Although the California cases customarily state that a criminal sanction for the violation is necessary, no case has been found holding the presumption inapplicable because of the absence of a criminal sanction. Cf. Clinkscales v. Carver, 22 Cal.2d 72, 136 P.2d 777 (1943).

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

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

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

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

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

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

10. 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, 952, 992, 1012, 1017, and 1201 [illegible], and to add Sections 414, 646, and 669 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. 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. If the facts that give rise to the presumption are found or otherwise established in the action and the party against whom the presumption operates introduces evidence which would support a finding that he was not negligent, the court may, and on request shall, instruct the jury as to any inference that it may draw from the facts so found or established.

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

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 rebut 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" in the following respect: 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. However, the jury may still be able to draw an inference of negligence from the facts that gave rise to the presumption. See EVIDENCE CODE § 604 and the Comment thereto. In rare cases, the defendant may produce such conclusive evidence that the inference of negligence is dispelled as a matter of law. See, e.g., Leonard v. Watsonville Community Hospital, 47 Cal.2d 509, 305 P.2d 36 (1956). But, except in such a case, the facts giving rise to the doctrine will support an inference of negligence even after its presumptive effect has disappeared.

Under Section 646, the court must decide whether the defendant's evidence attacks the elements of the doctrine or the conclusion of negligence that is required when the elements are established. If the defendant's evidence attacks only the elements of the doctrine, then an instruction on what has become known as conditional res ipsa loquitur becomes necessary. For example, if the defendant's evidence does not relate to his own use of care but relates instead to his lack of exclusive control over the instrumentality that caused the injury, then the court must instruct the jury that, if it finds the elements of the doctrine exist, it is required to find that the defendant was negligent. If the defendant offers evidence of his care, the mandatory or presumptive effect of the doctrine disappears. But if the facts

giving rise to the doctrine would still support an inference of negligence, Section 646 requires the court to instruct that if the jury finds that the elements of the doctrine exist (probability of negligence, exclusive control, lack of voluntary action by injured person) it may infer that the defendant was negligent, and if this inference seems to the jury to be more persuasive than the defendant's evidence of his care, the jury should find that the defendant was negligent. In other words, the court should instruct that if the jury, after considering the evidence (probability of negligence, etc.) and the inference of negligence that may be drawn therefrom and weighing it against the evidence of the defendant's exercise of care, believes that the evidence and inference of negligence preponderates in convincing force, it should find for the plaintiff. If after such weighing the jury cannot decide whether it is likelier that the defendant was negligent or careful, or if the jury believes that it is likelier that the defendant was careful, then the jury should find for the defendant.

Whether Section 646 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--that is, the party with the burden of proof wins on the issue if the inferences arising from the evidence in his favor preponderate in convincing force, but

the adverse party wins if they do not--then 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.

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

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 669 is added to the Evidence Code, to read:

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

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

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

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

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

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

Comment. Section 669 codifies a frequently applied common law presumption that is recognized in the California cases. Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958). The conditions of the presumption are those that have been developed in the California case law. See Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958); Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954); Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497 (1950).

Section 669 does not contain the requirement that the violation be one for which a criminal sanction is provided. Whether this changes existing law is uncertain. In defining the presumption, most cases include the requirement of a criminal sanction, but no case has been found that has presented the issue whether the presumption may be invoked despite the lack of a criminal sanction for the violation. But see Clinkscales v. Carver, 22 Cal.2d 72, 136, P.2d 777 (1943).

SEC. 8. Section 776 of the Evidence Code is amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEC. 9. Section 952 of the Evidence Code is amended to read:

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

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

SEC. 10. Section 992 of the Evidence Code is amended to read:

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

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

SEC. 11. Section 1012 of the Evidence Code is amended to read:

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

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

SEC. 12. Section 1017 of the Evidence Code is amended to read:

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

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

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

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

SEC. 13. 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. 14. 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. 15. 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).