#63(L) 8/8/66

Memorandum 66-45

Subject: Study 63(L) - Evidence Code (Evidence Code Revisions)

Attached to this memorandum are two copies of a proposed recommendation to revise the Evidence Code. Also attached are the following exhibits:

Exhibit I (pink) - Statutes of 1865-66, Chapter 281. This is the source of Evidence Code Section 1605.

Exhibit II (yellow) - Comments of California Land Title Association on Evidence Code Sections 1600, 1602, 1603, 1604, and 1605.

Exhibit III (green) - Comments of District Attorneys Association on Evidence Code Sections 402, 403, 412, 413, and 414. (The objections to 412, 413, and 414 are moot because the Commission removed those sections from the recommendation at the last meeting.)

Section 402

You will note that the district attorneys object to the proposed amendment to Section 402. Their position is well-summarized by Mr. Deem, District Attorney of Ventura County.

> The proposed amendment would provide another "sand bag" error for the defendant. Under the proposed wording of the section the defendant could deliberately remain silent while the court by inadvertance determined the minor question on the admissibility of a confession based on voluntariness or Dorado or Massiah or what have you in the presence of the jury and then later magnify the error on appeal.

To refresh your recollection concerning this section and the reason it reads as it does: The predecessor of the provision appeared in the Commission's tentative recommendation on Article 1 of the Uniform Rules of Evidence (6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 19) and in the preprint of the Evidence Code that was published in September of 1964. As it appeared in the preprint bill, it provided:

> . . . but in a criminal action, unless otherwise requested by the defendant, the judge shall hear and determine the question of the admissibilility of a confession or admission of the defendant out of the presence and hearing of the jury.

Gordon Ringer of the Attorney General's office appeared at the October, 1964, meeting and objected to this provision. He apparently construed the provision to mean that the court was required to hold the hearing in the presence of the jury if the defendant so requested. He proposed a revision either giving the judge discretion in all cases to hold the hearing out of the presence of the jury or requiring a hearing out of the presence of the jury in all cases. The Commission then revised the section to delete the phrase "unless otherwise requested by the defendant." The Evidence Code as proposed to the Legislature contained this revision (7 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 57).

After the proposed Evidence Code was introduced into the Legislature, the District Attorneys Association requested the committees hearing the bill to defer consideration until a committee of district attorneys could go over the bill and meet with the Commission and its staff to discuss any disagreements. Hearings on the bill were deferred as requested, and a committee of district attorneys met with the staff in March of 1965 and attended the Commission meeting of March 1965. The District Attorneys had a few major objections and several minor suggestions. Among the major objections was an objection to Section 402 as it then appeared in the bill. Memorandum 65-10 contains the following discussion:

> The district attorneys are concerned that Section 402(b) will unduly extend trial time in cases where a confession or admission is offered. There is no question raised concerning the voluntariness of a confession in most cases and the preliminary hearing is quite perfunctory. There is no need to dismiss the jury in these situations. They suggest that the hearing be held out of the presence of the jury only if the court in its discretion requires or only if the defendant so requests.

In response to the District Attorneys' objection, the Commission amended Section 402 to read as it now does. Certain other changes were made in the bill to meet the District Attorneys' objections and several comments were revised to solve minor problems. The Commission declined to make some of the major changes suggested. For example, the provisions on declarations against penal interest and withdrawn pleas of guilt were left unchanged.

But in the light of the action taken, the minutes state that:

> . . . the District Attorneys' Association agreed to support the bill in its present form [as amended March 23, 1965], withdrawing all previous objections and reserving only an objection to subdivision (c) of Section 788, as to which the association would prefer to retain intact the existing law.

The amendment now proposed to Section 402 is somewhat similar to the provision originally proposed. The principal difference is that the original version required a request from the defendant while the proposed version would require an express waiver that is made a matter of record.

The District Attorneys have again raised the objection to the proposed amendment to Section 402 that they raised to the section in 1965. The question for the Commission is whether to propose the change in the light of the objection. The change can be justified only by second thoughts on the matter, not by intervening events; for Jackson v. Denno--our cited justification for change--was decided in June, 1964, before any of the changes in the section were made.

Section 403

Woodruff J. Deem, District Attorney of Ventura County, approves the proposed revision of Section 403. The Commission at the last meeting decided not to make the change and to leave the section as enacted.

Section 1600

The Land Title Association approves the proposed classification of the presumption in Section 1600 as a presumption affecting the burden of proof. It suggests certain drafting changes:

The Land Title Association suggests a definition of "official record" in the Evidence Code. Such a definition could contain what other requirements must be met to qualify a record as an "official record." Section 1951 of the Code of Civil Procedure contains no such definition and we see no need to add one here. Section 1951 does provide, however, that the original document, when acknowledged as provided in the Civil Code, may be read in evidence "without further proof." Perhaps it is this requirement the Land Title Association is referring to. If so, Evidence Code Section 1451 seems to cover the matter.

The Land Title Association asks whether "official record" means a record of official writings only, noting that the title of the chapter refers only to official writings. Section 1600 relates only to the record itself, which is an official writing. It may be used to prove the original document, which may be a private writing.

The Land Title Association suggests the use of "instrument" in addition to "document." It refers to Government Code Section 27280 which provides:

> 27280. Any instrument or judgment affecting the title to or possession of real property may be recorded pursuant to this chapter.

Some cases have arisen construing the word "instrument" as used in the recording acts. They state that an instrument is some written paper [document(?)] signed and delivered by one person to another transferring the title to or creating a lien on property, or giving a right to a debt or duty. Hoag v. Howard, 55 Cal. 564, 565 (1880).

The DeWolfskill case cited in Exhibit III held that a notice of appropriation of water is not an instrument and therefore was not required to be acknowledged before being recorded; hence, the recorded notice was sufficient despite the lack of acknowledgement. The Hale case cited in Exhibit III held that a receipt was not an instrument and was not entitled to be recorded under the recording acts and, hence, no one was charged with constructive notice of its terms. The Hoag case cited in Exhibit III held that a writ of attachment or a judgment was not an instrument and, hence, a grantee under an unrecorded deed was entitled to prevail over a vendee at a sheriff's sale under a recorded attachment writ. Other cases have held that a judgment or a lis pendens is not an instrument. The rationale of these cases is that liens not created by instrument attach only to the interest then owned. If the owner has conveyed his interest by unrecorded deed, the lien can attach to nothing. However, under Civil Code Section 1107, a subsequent instrument executed by the property owner himself to a good faith purchaser will prevail over a prior unrecorded deed.

All of these cases deal with the recording acts--construing the provisions specifying the documents entitled to be recorded and the conditions that must be met before recording is effective. None of the cases has intimated that an "instrument" is not a "document," they have merely held that not all documents are instruments. An instrument is a document of a particular kind. We think, therefore, that the proposed revision is unnecessary and redundant. But, otherwise, we have no objection to it.

Section 1602

The Land Title Association recommends the classification of the

presumption in Section 1602 (recodified in the Public Resources Code) as a presumption affecting the burden of proof. The staff recommends that it be redrafted to provide a hearsay exception. The Land Title Association committee states that "no member of the Subcommittee considers himself an expert in mining law." But it suggests that the presumption:

> . . . has had application with respect to the industry for the reason that in extended-coverage insurance of patented mining-titles, the date of location of the claim upon which the patent is based has been deemed material in evaluating underwriting-risk relative to possible claims of adverse possessors.

This comment is a little difficult to understand. The issuance of the patent conveys the government's title to the patentee, and since there can be no adverse possession against the government, prior adverse possessors have no title that can prevail against the patentee. A grantee of a patented title, therefore, would be concerned only with the rights of subsequent adverse possessors, not prior, unless there was some irregularity that would subject the patent itself to attack. Insofar as the regularity of the patent is concerned, the patentee would be concerned with adverse claimants at the time of issuance or within two years before. The real significance of the date of location lies in the relative claims of surface owners to subsurface rights in veins that meet or cross below the surface. Our prior memo explains this problem as follows.

A party's rights in a mining claim are regulated by both federal and state law. Of prime importance under both laws is the "location" of the mining claim. Location confers a property right in the location and the minerals found there. To validly establish a location a person must find a mineral vein or lode, he must distinctly mark the boundaries of his claim on the ground surrounding the vein or lode, and he must post a notice of the claim at the point of discovery which identifies the locator, describes the location, and gives the date of location. The notice of location may also be recorded within 90 days after the posting of the notice at discovery site, but failure to record does not impair the locator's rights in regard to any person who has actual knowledge or notice of the location. A person forfeits his right to a location unless he continues to perform at least $100 worth of work (called assessment work) on the site each year. After occupying the location for two years, the locator may secure a patent to the site from the federal government. There is no requirement that a patent be obtained, but a patent perfects the locator's title so that it can no longer be divested by failure to work the claim. The owner of a claim acquires the right to all of the minerals in any vein or lode the apex of which is contained within the surface boundaries of the location. That is, the owner of the claim acquires the right to all of the minerals in the vein or lode even where the dip of the vein extends beyond the vertical extensions of the surface sidelines of the claim. This "extralateral" right, however, does not extend to the minerals in the vein that are beyond the extensions of the end lines of the claim.

Section 1602 of the Evidence Code provides, in effect, that a recital of the date of location of a mineral claim contained in a United States Patent for Mineral Lands "is prima facie evidence of the date of such location." The significance of the provision lies in the fact that the

owner of a mining claim has the right to all of the minerals in a vein or lode, the apex of which is within the surface boundaries of the claim, even though the vein or lode extends beyond the vertical extension of the surface sidelines of the claim. Where two veins or lodes intersect or unite, the right to the minerals at the point of intersection or below the point of union is given to the owner of the claim which was located first. Thus, the date of location can be of considerable significance when conflicting subsurface rights are involved.

In Champion Mining Company v. Consolidated Wyoming Gold Mining Company, 75 Cal. 78 (1888), the owner of one mining claim sued the owner of another mining claim for taking certain minerals that the first owner claimed were his. Two veins or ledges had been followed by the respective parties from their respective claims down to a point of union 500 feet below the surface. The defendant sought to prove the date of the location of his claim by the preliminary papers and proceedings filed and had in the United States Land Office prior to the issuance of his patent. The application for the patent stated that the mine was located in 1851 or 1852. It also stated that for the two years preceeding the application (in 1873) that there had been no opposing or adverse claims to the property. Since United States law required actual possession without adverse claim for two years prior to the issuance of the patent, the defendant contended that the issuance of the patent established that the mine had been located at least as early as 1871. The Supreme Court held that it was unnecessary to determine the propriety of the trial court's ruling admitting the evidence of the patent application proceedings, because there was no evidence that the plaintiff's location was prior to the date of the defendant's patent itself. But the court indicated anyway that "we would be strongly inclined to hold such ruling [admitting such evidence] to have been erroneous."

Although the word "hearsay" is not used, it appears the basis for the court's inclination was the hearsay nature of the evidence offered.

There seems to be a good possibility, then, that the predecessor of Evidence Code Section 1602 was enacted in 1905 merely to provide a hearsay exception. It would be difficult to justify giving the recital more weight than that by means of a presumption because the recital is usually based upon self-serving statements made in an ex parte application or proceeding. Accordingly, we recommend that the section be revised to provide a hearsay exception only instead of a presumption.

We have written to Justice Regan, since he is familiar with mining law, to see if he can provide us with some advice on this subject. We will bring his reply to your attention when we receive it.

Section 1603

The Land Title Association agrees with the classification as a presumption affecting the burden of proof.

The Land Title Association suggests that "official" be inserted before "record" to conform the drafting to Section 1600.

Section 1604

The Land Title Association concurs that no amendment is needed.

Section 1605

We have attached Chapter 281 of the Statutes of 1865-66 as Exhibit I so that you can see the source of the section. The comment describes its purpose, and the Land Title Association concurs in the staff's recommendation relating to it. This section has not been acted upon as yet by the Commission.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Memo 66-45 EXHIBIT I

CHAP. CCLXXXI.—*An Act to provide for the preservation of the Spanish archives, title papers of land claims, and records relating thereto, in the custody of the United States Surveyor-General for California.*

[Approved March 26, 1856.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Duty of Secretary of State.

SECTION 1. It is hereby made the duty of the Secretary of State of California, by and with the consent of the Surveyor-General of the United States for California, to cause all the original Spanish title papers relating to land claims in this State, derived from the Spanish or Mexican Governments, and now on file in the archives in the custody of the said Surveyor-General, to be perpetuated and authenticated in the manner hereinafter provided.

Documents to be engrossed.

SEC. 2. All original grants and documents in the Spanish language, relating to the title of lands in this State, with accurate translations thereof, shall be carefully engrossed in suitable books, to be provided for that purpose.

Copy for County Recorder.

SEC. 3. There shall be carefully prepared a duplicate copy of said records and translations for each county in the State of all titles to land claims within the limits of said county, which copy shall be placed in the custody of the County Recorder thereof, and be and become a part of the public records of such county.

Supervision of work.

SEC. 4. The execution of the work called for in section two of this Act shall be under the supervision of Rufus C. Hopkins, Keeper of Archives in the office of said Surveyor-General.

Translations to be evidence.

SEC. 5. These records shall in each case be authenticated by the said Surveyor-General, under his seal of office, and the said translations by the said Keeper of Archives, under his oath, and thereafter be made receivable as prima facie evidence in all the Courts in this State, with like force and effect as the originals, and without proving the execution of such originals.

Appropriation.

SEC. 6. The sum of eight thousand dollars is hereby appropriated out of any moneys in the State Treasury not otherwise appropriated for the purpose of paying the expenses of engrossing and translating the said Spanish records and translations provided for in this Act, and the Controller of State is hereby authorized and directed to draw his warrants for portions of said sum from time to time, as they shall become due, upon the certificate of said Keeper of Archives, approved by the Secretary of State, and the Treasurer of State is hereby authorized and directed to pay the same out of any money in the State Treasury not otherwise appropriated; *provided*, that the cost of engrossing shall not exceed, per folio, the charges authorized to be made by the Recorder of the County of San Francisco for a like class of work, and the cost of translation shall not exceed that now allowed for translating the State laws into Spanish.

Memo 66-45

EXHIBIT II

HOME OFFICE

Title Insurance and Trust Company

FOUNDED 1893

433 SOUTH SPRING STREET · LOS ANGELES 54 · MADISON 6-2411

BRIANT H. WELLS, JR.
PRESIDENT

ERNEST J. LOEBBECKE
CHAIRMAN OF THE BOARD

August 1, 1966

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

Dear Mr. DeMoully:

This is written to you in my capacity as Chairman of the Legislative Committee of the California Land Title Association.

There is enclosed, as responsive to your letter of June 6th addressed to Mr. Carl Weidman of the California Land Title Association, a Report of Subcommittee on Statutory Presumptions Relating to Real Property. This report is dated July 28, 1966 and has been approved by the Legislative Committee of the California Land Title Association.

In your letter of June 6th to Mr. Weidman you also indicated that you solicit our advice on various other presumptions and their classification in the Evidence Code. Our Subcommittee, which has submitted the enclosed report, is being continued for such purposes and in due course intends to report further to you.

You have also asked us to render a report on the Fictitious Name Statute and on your tentative recommendations relating to the Good Faith Improver of Land Owned by Another. It is anticipated that reports on these subjects should be forthcoming within the next several weeks.

Very truly yours,

Floyd B. Cerini

Floyd B. Cerini
Chairman, Legislative Committee
California Land Title Association

FBC/ob
encl.

cc: Mr. David T. Griffith, Jr.
Mr. Carl E. Weidman

TO: LEGISLATIVE COMMITTEE,
CALIFORNIA LAND TITLE ASSOCIATION

SUBJECT: REPORT OF SUBCOMMITTEE ON STATUTORY PRESUMPTIONS RELATING TO REAL PROPERTY

DATE: JULY 28, 1966

The Subcommittee (of the CLTA Legislative Committee) on Statutory Presumptions Relating to Real Property hereby makes its revised first report to the Committee.

The new California Evidence Code, adopted by the 1965 Legislature, becomes operative on January 1, 1967. Included within the Code are statutes relating to presumptions, some of which are restatements of statutes formerly contained in the Civil, Civil Procedure, and other Codes and some of which are codifications of principles theretofore established only by case-law. The Cobey-Song Evidence Act, which enacted the Evidence Code, also repealed certain sections in other Codes without re-enactment in the Evidence Code, one of the results of which is the elimination of certain statutory presumptions formerly set forth in the Code of Civil Procedure. Such repeals likewise become operative on January 1, 1967.

The California Law Revision Commission is preparing legislation classifying all the presumptions in all the California Codes. Such classification is comprised of three categories: as presumptions affecting the burden of producing evidence, as presumptions affecting the burden of proof, or as heresay exceptions. In this connection, by letter of June 6, 1966, addressed to Carl Weidman, CLTA Executive Vice President, by John H. DeMoully, Executive Secretary of the California Law Revision Commission, and referred to the Subcommittee, the Commission requests the advice of CLTA as to the appropriate classification for the presumptions (including the statutory provisions that make certain evidence "prima facie evidence") relating to real property and mining.

In addition to the CLTA's recommending classification of the respective presumptions, the Commission has requested that CLTA advise it as to the manner in which the CLTA membership interprets

the relevant existing statutes in writing title insurance, indicating that the Commission wishes to codify existing law and practice rather than change it.

The Commission is most immediately concerned with Evidence Code Sections 1600, 1602, 1603, 1604 and 1605. As to the classification of the presumptions in those Sections, receipt of CLTA's advice is asked by August 1, 1966. In view of the CLTA Legislative Committee meeting scheduled for July 28, 1966, the Subcommittee has basically confined this first report to such immediate concern of the Commission.

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There is attached to this report, for assistance in evaluating the recommendations of the Subcommittee, the specific statutory provisions of the five Evidence Code Sections discussed, their respective predecessor code sections, and certain other Evidence Code Sections referred to in the recommendations.

As one of the cornerstones in the public policy underlying the creation of certain types of presumptions is the stability of titles to property (see Evidence Code Sec. 605), the Subcommittee has, in some instances, included recommendations or comments as to the structure or language of the five Evidence Code Sections concerned, from the standpoint of problems which might confront the title insurance industry.

(a) Evidence Code Sec. 1600

Recommendation No. 1:

The Subcommittee concurs with the Commission Staff's recommendation as made in the latter's Minutes of May 27-28, 1966, and recommends that the presumption established by Sec. 1600 be classified as a presumption affecting the burden of proof.

Comment:

Such a classification tends to support the record title to property by requiring that the record title be sustained unless the party attacking that title can actually prove its invalidity (see Evidence Code Sec. 606).

Recommendation No. 2:

The subcommittee recommends that, with respect to Sec. 1600 as well as other Evidence Code Sections, a definition of "official record" be established in the Evidence Code, and, that upon such establishment, subparagraphs (a) and (b) of Sec. 1600 be deleted in their entirety.

Comment:

The Subcommittee does not find a definition of "official record" in the Evidence Code. Under Sec. 1600, even though "the record is in fact a record of an office of a public entity" and "a statute authorized such a document to be recorded in that office", what other aspects must such record possess to qualify it as an "official" record sufficient to raise the presumption? Apparently, meeting the standards expressed in said subparagraphs (a) and (b) is insufficient to make an "official" record as such subparagraphs are cast as additional conditions to be met by an "official" record. As Sec. 1600 lies within Chapter 3 entitled "Official Writings Affecting Property", does an "official record" as used in Sec. 1600 mean only a record of an official writing? The County Recorder's Office is mainly composed of records of private writings. Would they be deemed excluded from the benefits of Sec. 1600? (The same problem is evidenced in Sec. 1532). If "official record" be suitably defined in the Code, such definition could include the matters cast as conditions in said subparagraphs (a) and (b).

Recommendation No. 3:

The Subcommittee recommends that wherever the word "document" appears in Sec. 1600 the same be amended to read "instrument or document".

Comment:

The term "instrument" was used in the predecessor statute (C.C.P. Sec. 1951) but has been transposed into the word "document" in Sec. 1600. The term "instrument" has been construed to have a specific meaning by case-law, particularly where such term relates to recordation in the office of the county recorders. See, for example, Sec. 27280 of the Government Code and the following cases interpreting the word "instrument" as used in such Code section:

DeWolfskill v. Smith, 5 Cal. App. 17 (1907), Hale v. Pendergrast, 42 Cal. App. 104 (1919), and Hoag v. Howard, 55 Cal. 564 (1880). The Subcommittee considers that the specific term, "instrument", because of such case-law interpretation, should be used in Sec. 1600, along with the word "document" to cover personalty items.

Recommendation No. 4:

The Subcommittee recommends that, in the event the Evidence Code does not elsewhere provide that certified copies of the record of the type of document mentioned in Sec. 1600 are admissible in evidence, either Sec. 1600 be amended to so provide or a separate section of the Evidence Code be enacted to provide for admissibility of certified copies of public entity records.

Comment:

The Subcommittee notes that Sec. 1951, C.C.P., upon which said Sec. 1600 is based, specifically designated the method of introducing into evidence the record of the documents concerned; that Sec. 1600 does not include such specific designation; and that, with the repeal of Sec. 1951, C.C.P., the benefits of such designation would appear to be lost.

Industry Application of Predecessor Statute:

The Subcommittee believes that the title insurance industry has regarded the introduction into evidence of a record of a document, of the type and in the manner as provided in Sec. 1951, C.C.P., as establishing a rebuttable presumption of the existence and content of the original instrument and of its execution and delivery by each person by whom it purports to have been executed, and that partially because of such viewpoint, the industry has not deemed it necessary to consider or require the surrender to it of all effective original documents upon which the title evidence and assurances which it issues are based.

(b) Evidence Code Sec. 1602.

Recommendation:

The Subcommittee recommends that the statement of the date of location contained in a mineral patent, as contemplated by Sec. 1602, be classified as a presumption affecting the burden of proof.

Comment:

The Commission was unable to agree as to the classification of this Section, and its Minutes of May 27-28, 1966, directs its staff to check this question of classification with those persons connected with the title companies who are experts in mining law. No member of the Subcommittee considers himself an expert in mining law. The recommendation of the Subcommittee is based upon its opinion that, as the priority of a mining-title patentee, upon issuance of the patent, relates back to the date of the location of the claim, the recommended classification for the presumption inures to the stability of the record title of the patentee and his successors over non-record claimants.

Industry Application of Predecessor Statute:

The Subcommittee believes that Sec. 1927, C.C.P. has been regarded by the title insurance industry as establishing a rebuttable presumption that the date of location so stated in the mineral patent is in fact the date of location. Such presumption has had application with respect to the industry for the reason that in the extended-coverage insurance of patented mining-titles, the date of location of the claim upon which the patent is based has been deemed material in evaluating underwriting-risk relative to possible claims of adverse possessors.

(c) Evidence Code Sec. 1603.

Recommendation No. 1:

The Subcommittee concurs with the Commission Staff's recommendation as made in the latter's Minutes of May 27-28, 1966, and recommends that the presumption established by Sec. 1603 be classified as a presumption affecting the burden of proof.

Comment:

Such a classification tends to support the record chain of title. It obviates the need for independent proof of the steps leading up to the officer's right to sell the realty (for example, the judgment,

the execution, and the sale upon which a sheriff's deed is based); it furthermore obviates the need for proof of a chain of title prior to the execution of the deed.

Recommendation No. 2:

The Subcommittee recommends that, if a definition of "official record" be established in the Evidence Code (as recommended in the Subcommittee's Recommendation No. 2 for Sec. 1600), the word "record" appearing twice in the sixth line of Sec. 1603 be preceded by the word "official".

Comment:

While the reference in Sec. 1603 to the county recorder's office is probably sufficient to identify which record the statute is referring to, it would be more consistent, in view that Sec. 1603 is grouped in Chapter 3 with statutes like Sec. 1600 which employs the term "official record", to utilize the same terminology in Sec. 1603.

Industry Application of Predecessor Statute:

The Subcommittee believes that Sec. 1928, C.C.P. has been considered by the title insurance industry as establishing a rebuttable presumption that the property or interest described in such a deed was thereby conveyed to the grantee therein named, and that, although industry practice requires examination of the regularity of the court proceedings which are the source of the legal process authorizing the officer's conveyance, the statute is given significant weight as a basis to presume the officer's conduct and other steps pursuant to the court's process, as being sufficient relative to insurance of the vesting of record title based upon his deed of conveyance.

(d) Evidence Code Sec. 1604.

Recommendation No. 1:

The Subcommittee concurs with the Commission Staff's recommendation as made in the latter's Minutes of May 27-28, 1966, and recommends that the rebuttable presumption established by Sec. 1604 needs no specific classification.

Comment:

The Commission considers that Sec. 1604 requires no amendment as to classification as the section indicates the proof required to overcome the presumption; the Subcommittee concurs.

Recommendation No. 2:

The Subcommittee recommends that the language in Sec. 1604 which reads "is holding the land for mining purposes" be amended to read "was holding the land for mining purposes".

Comment:

The test of priority for overcoming the presumption is based upon the adverse party's possession or holding at a past date, namely at the time of the location or time of filing the preemption claim. The phrase in Sec. 1604 relative to adverse possession of the adverse party is correctly cast in the past tense; the phrase relative to holding for mining purposes by the adverse party should also be cast in the past tense.

The Subcommittee finds no definition of "certificate of purchase" in the Evidence Code. It is aware of various types of such certificates in Federal and State Acts. e.g. the California Act of April 13, 1859, providing for issuance of such certificates to purchasers of swamp lands in California. If a "certificate of purchase" would be deemed to include a "certificate of sale" as upon execution, a problem as to stability of titles to real property could be raised.

Industry Application of Predecessor Statute:

The Subcommittee believes that Sec. 1925, C.C.P. has been regarded by the title insurance industry as establishing a rebuttable presumption that the holder or assignee of such certificate is the owner of the land, but that such ownership is of the equitable title rather than the legal title. Such presumption has had no significant application with respect to the industry for the reason that the industry normally declines to write insurance of unpatented titles based on certificates of purchase or of location.

(e) Evidence Code Sec. 1605.

Recommendation

The Subcommittee concurs with the Commission Staff's recommendation as made in the latter's First Supp. Memo 66-21 (revised June 3, 1966), and recommends that Sec. 1605 be recast to provide an exception to the best-evidence rule rather than to provide for any type of presumption.

Comment:

The Subcommittee adopts and concurs with the following portion of the Commission Staff's comments set forth in its First Supp. Memo 66-21:

Chapter 281 of the Statutes of 1865-66 required the California Secretary of State to cause copies to be made of all of the original Spanish title papers relating to land claims in this state derived from the Spanish and Mexican governments that were on file in the office of the United States Surveyor-General for California. These copies, authenticated by the Surveyor-General and the Keeper of Archives in his office, were then required to be recorded in the offices of the county recorders of the concerned counties.

Section 5 of the 1865-66 statute, which is now codified as Section 1605 of the Evidence Code, provided that the recorded copies would be admissible "as prima facie evidence" without proving the execution of the originals. It is apparent that the original purpose of the section was to provide an exception to the best evidence rule--which would have required production of the original or an excuse for its nonproduction before the recorded copy could be admitted--and an exception to the rule, now expressed in Evidence Code Section 1401(b), requiring the authentication of the original document as a condition of the admissibility of the copy.

Industry Application of Predecessor Statute:

The Subcommittee believes that, although the industry found Sec. 1927.5, C.C.P. to be of value in introducing in evidence, in litigation where title was attacked, copies and translations of Spanish title papers without the necessity of proving execution of the originals, the industry has not regarded such predecessor statute as establishing a rebuttable presumption for the reason that the statute, in declaring such copies and translations are receivable as prima facie evidence, fails to declare of what such prima facie evidence establishes.

The Subcommittee recommends that its existence be continued, at least for the balance of the Legislative Committee fiscal year because:

(a) The California Law Revision Commission has also requested CLTA's advice as to the classification of the presumptions created by various sections of the California Public Resources Code. The Subcommittee, in its less than thirty days of existence, has lacked time to make this study;

(b) The Commission's Comments to Evidence Code Sec. 620 include the statement that "Conclusive presumptions are not evidentiary rules so much as they are rules of substantive law". And yet the Evidence Code devotes an entire Article (Chapter 3, Article 2) to "Conclusive Presumptions", in some cases restating former statutes in other Codes as to such presumptions. As our industry constantly relies on certain of such presumptions in the insurance of titles, the Subcommittee strongly recommends study in this direction, irrespective of the lack of inquiry by the Commission in this regard.

The members of the Subcommittee, namely Arthur G. Bowman, Robert D. Crawford, Harold Pilskaln, Jr., and the undersigned concur in the foregoing report, and, on behalf of the same, this report is

Respectfully submitted,

David T. Griffith, Jr.
Chairman of the Subcommittee

CODE SECTIONS CONCERNED IN REPORT

(a) The Evidence Code Section

Sec. 1600. Official record of document affecting property interest.

1600. The official record of a document purporting to establish or affect an interest in property is prima facie evidence of the existence and content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if:

(a) The record is in fact a record of an office of a public entity; and

(b) A statute authorized such a document to be recorded in that office.

(b) The Predecessor Statute

C.C.P. Sec. 1951. Instruments affecting real estate; admissibility

Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof.

* * * *

(a) The Evidence Code Section

Sec. 1602. Recital in patent for mineral lands.

1602. If a patent for mineral lands within this state issued or granted by the United States of America, contains a statement of the date of the location of a claim or claims upon which the

granting or issuance of such patent is based, such statement is prima facie evidence of the date of such location.

(b) The Predecessor Statute

C.C.P. Sec. 1927. United States mineral land patent; statement of location date; prima facie evidence.

Whenever any patent for mineral lands within the State of California, issued or granted by the United States of America, shall contain a statement of the date of the location of a claim or claims, upon which the granting or issuance of such patent is based, such statement shall be prima facie evidence of the date of such location.

* * * *

(a) The Evidence Code Section

Sec. 1603. Deed by officer in pursuance of court process.

1603. A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record, is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed.

(b) The Predecessor Statute

C.C.P. Sec. 1928. Deed, record, or certified copy of record; prima facie evidence of conveyance.

A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed.

* * * *

(a) The Evidence Code Section

Sec. 1604. Certificate of purchase or of location of lands.

1604. A certificate of purchase, or of location, of any lands in this state, issued or made in pursuance of any law of the United States or of this state, is prima facie evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

(b) The Predecessor Statute

C.C.P. Sec. 1925. Real estate; certificate of purchase or of location; primary evidence of ownership; contravening evidence.

Certificates of purchase primary evidence of ownership. A certificate of purchase, or of location, of any lands in this State, issued or made in pursuance of any law of the United States, or of this State, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

* * * *

(a) The Evidence Code Section

Sec. 1605. Authenticated Spanish title records.

1605. Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this state, derived from the Spanish or Mexican governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-66, are receivable as prima facie evidence with like force and effect as the originals and without proving the execution of such originals.

(b) The Predecessor Statute

C.C.P. Sec. 1927.5. Copies and translations of original Spanish title papers as evidence.

Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this State, derived from the Spanish or Mexican Governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-6, are receivable as prima facie evidence in all the courts of this State with like force and effect as the originals and without proving the execution of such originals.

* * * *

Memo 66-45

EXHIBIT III

J. F. COAKLEY
DISTRICT ATTORNEY

OFFICE OF
DISTRICT ATTORNEY
ALAMEDA COUNTY
COURT HOUSE
OAKLAND CALIFORNIA 94612
444-0507

R. ROBERT HUNTER
CHIEF ASSISTANT

August 3, 1966

Mr. John DeMoully
Law Revision Commission
30 Crothers Hall
Stanford University
Stanford, California

Dear John:

Enclosed please find our most typical comments on the proposed changes to the Evidence Code.

Sincerely,

Herbert E. Ellingwood

HEE:dc
enc.

COUNTY OF SAN MATEO

KEITH C. SORENSON, DISTRICT ATTORNEY

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COUNTY GOVERNMENT CENTER
REDWOOD CITY, CALIFORNIA 94063
TEL. 369-1441, EXT. 502

ROBERT E. CAREY
CHIEF CRIMINAL DEPUTY
JAMES M. PARMELEE
CHIEF CIVIL DEPUTY
A. L. LAMPORT
CHIEF INSPECTOR

February 10, 1966

Mr. J. F. Coakley
District Attorney
Court House
Oakland, California 94612

Attn: Herb Ellingwood

Re: Evidence Code - Proposed Revisions

Dear Herb:

We have reviewed the proposed bill to revise the Evidence Code, and comment concerning it by giving our reactions to Sections 1, 3, 4, 5, 14 and 15, as indicated on the attached memo from my Deputy, Jim Browning.

Sincerely,

KEITH C. SORENSON,
District Attorney

Office of the
DISTRICT ATTORNEY
Courthouse, Redwood City, Calif.

M E M O R A N D U M

Attention: KCS

FILE: Proposed changes to Evidence Code DATE: 1/31/66

TIME:

OFFICE ☐
PHONE ☐
OTHER ☐

Sec. 1 [Mandatory hearings out of presence of jury re admissibility of admissions or confessions, unless waived by defendant]

It seems that this change would lead to the necessity of "disrupting" criminal trials all too frequently. What the proponents of this change apparently do not realize is that in many criminal trials there may be numerous different types of "admissions" made by the defendant to numerous persons; to require either (1) an out-of-jury hearing, or (2) the defendant to "expressly waive" such hearing in such cases would require much disrupting of proceedings and waste of time.

In any event, Jackson v. Denno, 378 U.S. 368 (1964) relied upon as the reason for the change, does not decide the question of whether a defendant is entitled to an out-of-jury hearing as a matter of right. It merely rejects the "New York" procedure in deciding voluntariness of confessions.

Under New York procedure, "the trial judge must make a preliminary determination regarding a confession offered by the prosecution and exclude it if in no circumstances could the confession be deemed voluntary." In other words, the factual issue of voluntariness (if there is one) is ultimately decided by the jury, along with the question of guilt or innocence.

Under the "Massachusetts" procedure, "the jury passes on voluntariness only after the judge has fully and independently resolved the issue against the accused"; the judge, in short, makes a preliminary finding of fact on voluntariness.

The Massachusetts procedure is recognized as valid in Jackson, supra, at page 378, footnote 8 -

"Given the integrity of the preliminary proceedings before the judge, the Massachusetts procedure does not, in our opinion, pose hazards to the rights of a defendant." (Emphasis added)

FILE ☐

=Signature=

Office of the
DISTRICT ATTORNEY
Courthouse, Redwood City, Calif.

MEMORANDUM

Attention: KCS

FILE: Proposed changes to Evidence Code DATE: 1/31/66

TIME:

OFFICE ☐
PHONE ☐
OTHER ☐

Thus, although the decision does not discuss out-of-jury hearings, it does infer that they are preferred, at least in cases involving confessions; nowhere, however, does the decision indicate that the out-of-jury hearing is required in the absence of an objection or affirmative assertion by defendant; and nowhere does the decision talk about admissions, as distinguished from confessions, in this regard. If the proposed change were made, would the same rule apply to a preliminary out-of-jury hearing on lawfulness of search and seizure? If not, why not?

[illegible]

Secs. 3, 4, 5 [Impact of the Griffin case]
This proposed change, adding Sec. 414 to the Code, raising a caveat that Secs. 412 (weaker and less satisfactory evidence) and 413 (inference by failure to testify) are limited by constitutional considerations, and citing, in "comment", the Griffin case, is too broad. If enacted, the "comment" will strongly suggest that the Griffin case has some bearing or impact upon Sec. 412, which simply is not true. No California case has yet held that it is error to refuse or instruct regarding the quality of lesser evidence when the person offering that evidence had it within his power to produce stronger and more satisfactory evidence.

Sec 14, Sec. 15 [comment by Court]
Again, the proposed changes go too far. The Griffin case, as well as the California counterpart, Bostic, involved defendants who had not taken the stand. The decisions were based upon a denial of the privilege against self-incrimination (i.e., compulsion to take the stand from the comment of court and prosecutor). They did not decide that comment was improper where defendant had waived his privilege against taking the stand, by taking the stand, yet the proposed changes could be construed to preclude even this type of comment.

[illegible]

FILE ☐

Signatures

WOODRUFF J. DEEM
DISTRICT ATTORNEY

HERBERT L. ASHBY
ASSISTANT DISTRICT ATTORNEY

K. DUANE LYDERS
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April 21, 1966

J. Frank Coakley
District Attorney
Alameda County
Courthouse
Oakland, California

Attn: Herb Ellingwood

Re: January 1, CLRC Tentative Recommendation
Relating to Revision of the Evidence Code

Dear Frank:

I know this isn't a very prompt response to your letter of January 21, 1966 requesting my comments on the recommendations of the California Law Revision for the further amendment of the Evidence Code. However, in view of the fact that this is a matter which will come before the next general session of the Legislature, I feel that my comments are still timely. I shall address my comments to the sections of the proposed Bill beginning on page 9 of the Report.

SECTION 1

Section 1 would amend section 402b of the evidence code which now permits a hearing on the admissibility of a confession or an admission in a criminal case to be held in the presence of the jury if the defendant does not object. The amendment would require that the hearing on the question of admissibility of a confession or admission in a criminal case be held out of the presence of the jury unless the defendant expressly waives on the record his right to the out-of-court hearing.

You will recall that at our final meeting with the Law Revision Commission in the spring of 1965 all of us were most adamant that section 402b read as it does now.

The proposed amendment would simply provide another "sand bag" error for the defendant. Under the proposed wording of the section the defendant could deliberately remail silent while the court by inadvertance determined the minor question on the admissibility of a confession based on voluntariness or Dorado or Massiah or what have you in the presence of the jury and then later magnify the error on appeal.

Since the vast majority of criminal trials include either confessions or admissions by the defendant I think it is imperative that we stand very emphatically against this proposed amendment.

SECTION II

I endorse the proposed recommendation in section 2 that section 403 be amended to eliminate the requirement that the instruction must be given whenever a party requests it concerning conditionally admissible evidence. It is thoroughly sound policy to amend the section to permit the judge to decide in each case whether or not the instruction is warranted. This is one more step in getting away from meaningless mumbo jumbo and absurd requirements in the conduct of trials, which frequently merely impede the progress of a trial.

SECTION V

The addition of section 414 is absolutely unnecessary. All legislation is subject to any limitations contained in the California Constitution and due process clause of the fourteenth amendment. We should oppose this amendment and the references to it in sections 3 and 4 amending sections 412 and 413. Aside from the fact that the legislation is unnecessary, the comment to section 414 is misleading. If the amendment is left in the bill, we should make sure that the comment is enlarged to maintain the principle that if the defendant chooses to take the witness stand and testify at all, that it is legitimate for the prosecution to comment on his failure to explain or deny powerful items of evidence against him. See Wigmore on Evidence, section 2273, sub. 4; Clark v. State (Alabama) 6 So. 368 (1889); Odum v. State (Florida) 109 So.2d 163 (1959); State v. Tatum (Iowa) 13 N.W. 632 (1882); State v. Glave (Kansas) 33 P.8 (1893); Samino v. State (Texas) 204 S.W. 233, 234 (1918); State v. Larkin (Missouri) 157 S.W. 600 (1913); Lienburger v. State (Texas) 21 S.W. 603 (1893); McCormick on Evidence, section 132, 16 Corpus Juris Criminal Law, p. 202, section 2248; 238 Corpus Juris Criminal Law Secundum, p. 165, section 1098(b); Digs v. United States, 242 U.S. 494 61 L.Ed. 456; Caminetti v. United States, 242 U.S. 470. A federal case which would appear to hold a contrary rule, Grantello v. United States, 3 F.2d 117, is of course not contra at all because actually while Grantello was sworn as a witness and called to the stand and gave his name, his attorney apparently changed his mind and asked him no questions at all about any matters.

The rule in California should be without qualifications that once the defendant takes the stand he subjects his testimony to the same analysis the prosecution may make of the testimony of any other witness.

SECTION XIV

The proposed amendment to section 1093 of the Penal Code contained in section 14 of the proposed bill should be vigorously opposed for the reasons stated in my proposal to enlarge the comment to proposed section 414. The only change that should be made in present 1093, sub. 6 is that the phrase "whether the defendant testifies or not" should be replaced by the phrase "where the defendant testifies". Other than that the section should remain as it is.

SECTION XV

We should oppose the proposed amendment of section 1127 of the Penal Code as contained in section 15. We should oppose the proposed deletion and should insist that the only change to be made should be the replacement of the words "whether the defendant testifies or not" by the phrase "where the defendant testifies". Other than that the section should remain intact for the reasons stated in my proposed comment to proposed section 414.

Very truly yours,

WOODRUFF J. DEEM
District Attorney

WJD:am

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

RECOMMENDATION

relating to

THE EVIDENCE CODE

Number 1 - Evidence Code Revisions

September 1966

California Law Revision Commission
School of Law
Stanford University
Stanford, California

LETTER OF TRANSMITTAL

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Evidence Code was enacted in 1965 upon recommendation of the California Law Revision Commission.

Resolution Chapter 130 of the Statutes of 1965 directed the Commission to continue its study of the Evidence Code. Pursuant to this directive, the Commission has undertaken two projects:

(1) A study to determine whether any substantive, technical, or clarifying changes should be made in the Evidence Code.

(2) A study of the other California codes to determine what changes are needed in view of the enactment of the Evidence Code.

This recommendation is concerned with the changes that are needed in the Evidence Code. A series of separate recommendations will deal with the changes needed in other codes.

Respectfully submitted,

RICHARD H. KEATINGE,
Chairman

RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

THE EVIDENCE CODE

Number 1 - Evidence Code Revisions

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 new code. In the light of this consideration, 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 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 and that otherwise valid convictions might be reversed if the defendant did not actually waive his right to a hearing beyond the presence and hearing of the jury. 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. Sections 412 and 413 authorize the trier of fact, in determining what inferences to draw from the evidence, to consider the failure of a party to explain or deny the evidence or facts in the case against him, his willful suppression of evidence, or his production of weaker evidence when it was within his power to have produced stronger.

In Griffin v. California, 381 U.S. 763 (1965), the United States Supreme Court held that comment by the court or counsel upon a criminal defendant's failure to produce or explain evidence, when such failure is predicated on an assertion of the constitutional right of a person to refuse to testify against himself, violates the defendant's rights under the 14th Amendment of the United States Constitution.

The Commission considered revising Sections 412 and 413 to indicate the nature of the constitutional limitation on the rules they express. The Commission determined to make no recommendatgion in this regard, however, for the extent of the constitutional limitation is as yet uncertain. Moreover, all sections in the code, not merely these two sections, are subject to whatever constitutional limitations may be found applicable in the particular situations where they are applied. An amendment of these sections providing that they are subject to a constitutional limitation in a particular situtation would merely state an obvious truism.

3. The Evidence Code divides rebuttable presumptions into two classifications and explains the manner in which each class affects the

factfinding process. See EVIDENCE CODE §§ 600-607. Although several specific presumptions are listed and classified in the Evidence Code, the 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 the decision of cases requires the application of these rules, however, the code should deal explicitly with them in the manner recommended below.

4. Prior to the effective date of the Evidence Code, the California courts held that the doctrine of res ipsa loquitur was an inference, not a presumption. But it was "a special kind of inference" whose effect was "somewhat akin to that of a presumption," for if the facts giving rise to the doctrine were established, the jury was required to find the defendant negligent unless he produced evidence to rebut the inference. Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954).

Since the effective date of the Evidence Code (January 1, 1967), it seems clear that the doctrine has been a presumption, for the effect of the doctrine as stated in the Sherwin Williams case is precisely the effect of a presumption under the Evidence Code when there has been no

evidence introduced to overcome the presumed fact. See EVIDENCE CODE §§ 600, 604, 606 and the Comments thereto.

It is uncertain, however, whether the doctrine is a presumption affecting the burden of proof or a presumption affecting the burden of producing evidence. And, in the absence of a decision, it is impossible to determine how the Evidence Code may have modified the prior law in this respect.

Prior to the effective date of the Evidence Code, the doctrine of res ipsa loquitur did not shift the burden of proof. Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63 (1953). The cases considering res ipsa loquitur stated, however, that the doctrine required the adverse party to come forward with evidence not merely sufficient to support 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 meant that the trier of fact was 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 has been what the Evidence Code describes as a presumption affecting the burden of producing evidence. If such statements meant, 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 represented 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 prior 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.

The requirement of the prior law that, upon request, an instruction be given on the effect of res ipsa loquitur is not inconsistent with the Evidence Code and should be retained. 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).

5. Under existing law, a presumption of negligence arises from proof of the violation of a statute, ordinance, or regulation. Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958); Tossman v. Newman, 37 Cal.2d 522, 233 P.2d 1 (1951). Although some cases state that the violation must be one for which a criminal sanction is provided, cases may be found where the presumption has been invoked despite the lack of a criminal sanction for the violation. See Cary v. Los Angeles Ry., 157 Cal. 599, 108 Pac. 682 (1910)(dictum); Forbes v. Los Angeles Ry., 69 Cal. App.2d 794, 160 P.2d 83 (1945). Cf. Clinkscales v. Carver, 22 Cal.2d 72, 136 P.2d 777 (1943). 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.

6. 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.

7. 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.

8. 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.

9. Section 1152 provides that offers to compromise claims for loss or damage, and statements made in the course of negotiations for the settlement of claims for loss or damage, are inadmissible. The language of the section is so worded that it could be construed to refer to negotiations for past injuries only. The section, therefore, should be clarified to make clear that it refers to negotiations for loss or damage yet to be sustained as well as to negotiations for loss or damage previously sustained.

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

11. Section 1600 recodifies a presumption formerly found in Code of Civil Procedure Section 1951, but it does not classify the presumption as affecting either the burden of producing evidence or the burden of proof.

The presumption should be classified as a presumption affecting the burden of proof. This classification is consistent with the prior case law (see Thomas v. Peterson, 213 Cal. 672, 3 P.2d 306 (1931); DuBois v. Larke, 175 Cal. App.2d 737, 346 P.2d 830 (1959); Osterberg v. Osterberg, 68 Cal. App.2d 254, 156 P.2d 46 (1945)) and tends to support the record title to property by requiring the record title to be sustained unless the party attacking that title can actually prove its invalidity.

12. Section 1602 recodifies the provisions of former Section 1927.5 of the Code of Civil Procedure. It prescribes the evidentiary effect of certain recitals in patents for mineral lands within California. The section should be relocated in the Public Resources Code so that it will appear among other statutory provisions relating to specific evidentiary problems involving mining claims.

The section states that a recital in a patent of the date of the lo-

cation of the claim upon which the patent is based is "prima facie evidence" of that date. The purpose for the enactment of the section is not clear, but it seems probable that the section was merely designed to provide a hearsay exception because the California Supreme Court had previously stated that such recitals were inadmissible to prove the date of location. See Champion Mining Co. v. Consolidated Wyoming Gold Mining Co., 75 Cal. 78, 81-83 (1888). The section should be revised to express this original purpose. It is inappropriate to give presumptive effect to such recitals because they frequently are based on the self-serving statements of the patentee.

13. Section 1603 recodifies former Code of Civil Procedure Section 1928. Prior to the enactment of Code of Civil Procedure Section 1928 in 1872, the recitals in a sheriff's deed, made pursuant to legal process, could not be used as evidence of the judgment, the execution, and the sale upon which the deed was based. The existence of the prior proceedings were required to be proved with independent evidence. Hihn v. Peck, 30 Cal. 280, 287-288 (1866); Heyman v. Babcock, 30 Cal. 367, 370 (1866). The enactment of the predecessor of Evidence Code Section 1603 had two effects. First, it obviated the need for such independent proof. See, e.g., Oakes v. Fernandez, 108 Cal. App.2d 168, 238 P.2d 641 (1951); Wagnor v. Blume, 71 Cal. App.2d 94, 161 P.2d 1001 (1945). See also BASYE, CLEARING LAND TITLES § 41 (1953). Second, it also obviated the need for proof of a chain of title prior to the execution of the deed. Krug v. Warden, 57 Cal. App. 563, 207 Pac. 696 (1922).

The presumption stated in Section 1603 should be classified as a presumption affecting the burden of proof to carry out the purpose of the original section and further its purpose of supporting the record chain

of title.

14. Section 1605 is a recodification of former Code of Civil Procedure Section 1927.5. That section originally appeared as Section 5 of Chapter 281 of the Statutes of 1865-66, and it was codified as part of the Code of Civil Procedure in 1955.

Chapter 281 of the Statutes of 1865-66 required the California Secretary of State to cause copies to be made of all of the original Spanish title papers relating to land claims in this state derived from the Spanish and Mexican governments that were on file in the office of the United States Surveyor-General for California. These copies, authenticated by the Surveyor-General and the Keeper of Archives in his office, were then required to be recorded in the offices of the county recorders of the concerned counties.

Section 5 of the 1865-66 statute provided that the recorded copies would be admissible "as prima facie evidence" without proving the execution of the originals. It is apparent that the original purpose of the section was to provide an exception to the best evidence rule--which would have required production of the original or an excuse for its non-production before the recorded copy could be admitted--and an exception to the rule, now expressed in Evidence Code Section 1401(b), requiring the authentication of the original document as a condition of the admissibility of the copy. Section 1605, therefore, should be revised to reflect this original purpose.

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

An act to amend Sections 402, 776, 952, 992, 1012, 1017, 1152, 1201, 1600, 1603, and 1605, to add Sections 646 and 669 to, and to repeal Section 1602 of, the Evidence Code, and to add Section 2325 to the Public Resources 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 and hearing of the jury ~~if any party so requests~~ unless the defendant otherwise requests, the request is made a matter of record, and the court consents to such request .

(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 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.

The doctrine of res ipsa loquitur, as developed by the California courts, is applicable in actions to recover damages for negligence when 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).]

Section 646 provides that the doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. Therefore, when the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find the defendant negligent unless he comes forward with evidence that would support a finding that he exercised due care. EVIDENCE CODE § 604. Under the California cases such evidence must show either a specific cause for the accident for which the defendant

was not responsible or that the defendant exercised due care in all respects wherein his failure to do so could have caused the accident. See, e.g., Dierman v. Providence Hospital, 31 Cal.2d 290, 295, 188 P.2d 12 (1947). If evidence is produced that would support a finding that the defendant exercised due care, the presumptive effect of the doctrine vanishes. 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.

To assist the jury in the performance of its fact-finding function, the court may instruct that the facts that give rise to res ipsa loquitur are themselves circumstantial evidence of the defendant's negligence from which the jury can infer that he failed to exercise due care. Section 646 requires the court to give such an instruction when a party so requests. Whether the jury should draw the inference will depend on whether the jury believes that the probative force of the circumstantial and other evidence of the defendant's negligence exceeds the probative force of the contrary evidence and, therefore, that it is more likely than not that the defendant was negligent.

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. But because of the allocation of the burden of proof to the defendant, the doctrine of res ipsa loquitur will serve no function in the disposition of the case. However, the facts that would give rise to the doctrine may nevertheless be used as circumstantial evidence tending to rebut the evidence produced by the party with the burden of proof.

For example, a bailee who has received undamaged goods and returns damaged goods has the burden of proving that the damage was not caused by his negligence. See discussion in Redfoot v. J. T. Jenkins Co., 138 Cal. App.2d 108, 112, 291 P.2d 134 (1955). Where the defendant is a bailee, proof of the elements of res ipsa loquitur in regard to an accident damaging the bailed goods while they were in the defendant's possession places the burden of proof on the defendant, not merely the burden of producing evidence. When the defendant has produced evidence of his exercise of care in regard to the bailed goods, the facts that would give rise to the doctrine of res ipsa loquitur may be weighed against the evidence produced by the defendant in determining whether it is more likely than not that the goods were damaged without fault on the part of the bailee. But because of the stronger force of the presumption of the bailee's negligence that arises from the same facts that support res ipsa loquitur, the presumption of negligence arising from res ipsa loquitur cannot have any effect on the proceeding.

Effect of the failure of the plaintiff to establish all the preliminary facts that give rise to the presumption. The fact that the plaintiff fails to establish all of the facts giving rise to the res ipsa presumption does not necessarily mean that he has not produced sufficient evidence of negligence to sustain a jury finding in his favor. The 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 all of the evidence in the case even though the plaintiff fails to establish all the elements of res ipsa loquitur. See Prosser, Res Ipsa Loquitur: A Reply to Professor Carpenter, 10 SO. CALIF. L. REV. 459 (1937). In appropriate cases, therefore, the jury may be instructed that even though it does not find that the facts that give rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more likely than not that the defendant was negligent. Such an instruction would be appropriate, for example, in a case where there was evidence of the defendant's negligence apart from the evidence going to the elements of the res ipsa loquitur doctrine.

Examples of operation of res ipsa loquitur presumption

The doctrine of res ipsa loquitur may be applicable to a case under four varying sets of circumstances. First, the facts giving rise to the doctrine may be established as a matter of law by the pleadings, by stipulation, by pretrial order, or by some other means, and there may be no evidence sufficient to sustain a finding that the defendant was not negligent. Second, the facts giving rise to the doctrine may be established as a matter of law but there may be evidence sufficient to sustain a finding of some cause for the accident other than the defendant's negligence or evidence of the defendant's exercise of due care. Third, the defendant may introduce evidence tending to show the nonexistence of the essential conditions of the doctrine but without introducing evidence to rebut the presumption. Fourth, the defendant may introduce evidence to contest both the conditions of the doctrine and the conclusion that his negligence caused the accident. Set forth below is an explanation of the manner in which Section 646 functions in each of these situations.

(1) Basic facts established as a matter of law; no rebuttal evidence. If the basic facts that give rise to the presumption are established as a matter of law (by the pleadings, by stipulation, by pretrial order, etc.), the presumption requires that the jury find the defendant was negligent unless and until there is evidence introduced sufficient to sustain a finding either that the accident resulted from some cause other than the defendant's negligence or that he exercised due care in all possible respects wherein he might have been negligent. When the defendant fails to introduce evidence sufficient to sustain a finding either that he was not negligent or that the accident resulted from some specific cause unrelated to his negligence, the court must simply instruct the jury that it is required to find that the defendant was negligent.

For example, if a plaintiff automobile passenger sues the driver for injuries sustained in an accident, the defendant may determine not to contest the fact that the accident was of a type that ordinarily does not occur unless the driver was negligent. Moreover, the defendant may introduce no evidence that he exercised due care in the driving of the automobile. Instead, the defendant may rest his defense solely on the ground that the plaintiff was a guest and not a paying passenger. In this case, the court should instruct the jury that it must assume that the defendant was negligent. Cf. Phillips v. Noble, 50 Cal.2d 163, 323 P.2d 385 (1958); Fiske v. Wilkie, 67 Cal. App.2d 440, 154 P.2d 725 (1945).

(2) Basic facts established as matter of law; evidence introduced to rebut presumption. Where the facts giving rise to the doctrine are established as a matter of law but the defendant has introduced evidence either of his due care or of a cause for the accident other than his negligence, the presumptive effect of the doctrine vanishes. In most cases, however, the basic facts will still support an inference that the defendant's negligence caused the accident. In this situation the court may instruct the jury that it may infer from the established facts that negligence on the part of the defendant was a proximate cause of the accident. The court is required to give such an instruction when requested. The instruction should make it clear, however, that the jury should draw the inference only if it believes after weighing the circumstantial evidence of negligence together with all of the other evidence in the case that it is more likely than not that the accident was caused by the defendant's negligence.

(3) Basic facts contested; no rebuttal evidence. The defendant may attack only the elements of the doctrine. His purpose in doing so would

be to prevent the application of the doctrine. In this situation, the court cannot determine whether the doctrine is applicable or not, because the basic facts that give rise to the doctrine must be determined by the jury. Therefore, the court must give an instruction on what has become known as conditional res ipsa loquitur.

Where the basic facts are contested by evidence, but there is no rebuttal evidence, the court should instruct the jury that it finds that the basic facts have been established by a preponderance of the evidence, then it must also find that the defendant was negligent.

(4) Basic facts contested; evidence introduced to rebut presumption. The defendant may introduce evidence that both attacks the basic facts that underlie the doctrine of res ipsa loquitur and tends to show that the accident was not caused by his failure to exercise due care. Because of the evidence contesting the presumed conclusion of negligence, the presumptive effect of the doctrine vanishes, and the greatest effect the doctrine can have in the case is to support an inference that the accident resulted from the defendant's negligence.

In this situation, the court should instruct the jury that if it finds that the basic facts have been established by a preponderance of the evidence, then it may infer from those facts that the accident was caused because the defendant was negligent. The jury should draw the inference, however, only if it believes after weighing all of the evidence that it is more likely than not that the defendant was negligent and the accident actually resulted from his negligence.

SEC. 3. 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 common law presumption that is frequently applied in the California cases. See Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958). The presumption may be used to establish a plaintiff's contributory negligence as well as a defendant's negligence. Nevis v. Pacific Gas & Electric Co., 43 Cal.2d 526, 275 P.2d 761 (1954).

Effect of presumption

If the conditions listed in subdivision (a) are established, a presumption of negligence arises which may be rebutted by proof of the facts specified in subdivision (b). The presumption is one of simple negligence only, not gross negligence. Taylor v. Cockrell, 116 Cal. App. 596, 3 P.2d 16 (1931).

Section 669 appears in Article 4 (beginning with Section 660), Chapter 3, of Division 5 of the Evidence Code and, therefore, is a presumption affecting the burden of proof. EVID. CODE § 660. Thus, if it is established that a person violated a statute under the conditions specified in subdivision (a), the opponent of the presumption is required to prove to the trier of fact that it is more probable than not that the violation of the statute was reasonable and justifiable under the circumstances. See EVID. CODE § 606 and the comment thereto. Since the ultimate question is whether the opponent of the presumption was negligent rather than whether he violated the statute, proof of justification or excuse under subdivision (b) negates the existence of negligence and does not establish merely an excuse for negligent conduct. Therefore, if the presumption is rebutted by proof of justification or excuse under subdivision (b), the trier of fact is required to find that the violation of the statute was not negligent.

Violations by children. Section 669 applies to the violation of a statute, ordinance, or regulation by a child as well as by an adult. But

in the case of a violation by a child, the presumption may be rebutted by a showing that the child, in spite of the violation, exercised the care that children of his maturity, intelligence, and capacity ordinarily exercise under similar circumstances. Daun v. Truax, 56 Cal.2d 647, 16 Cal. Rptr. 351, 365 P.2d 407 (1961). However, if a child engages in an activity normally engaged in only by adults and requiring adult qualifications, the "reasonable" behavior he must show to establish justification or excuse under subdivision (b) must meet the standard of conduct established primarily for adults. Cf. Prichard v. Veterans Cab Co., 63 Cal.2d 727, 48 Cal. Rptr. 904, 408 P.2d 360 (1965)(minor driving an automobile).

Failure to establish conditions of presumption. Even though a party fails to establish a violation or that a proven violation meets all the requirements of subdivision (a), it is still possible for the party to recover by proving negligence apart from any statutory violation. Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497 (1950)(plaintiff permitted to recover even though her injury was not of the type to be prevented by statute).

Functions of judge and jury

If a case is tried without a jury, the judge is responsible for deciding both questions of law and questions of fact arising under Section 669. However, in a case tried by a jury, there is an allocation between the judge and jury of the responsibility for determining the existence or nonexistence of the elements underlying the presumption and the existence of excuse or justification.

Subdivision (a), paragraphs (3) and (4). Whether the death or injury involved in an action resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent (paragraph (3) of subdivision (a)) and whether the plaintiff was one of the class of persons

for whose protection the statute, ordinance, or regulation was adopted (paragraph (4) of subdivision (a)) are questions of law. Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497 (1950)(statute requiring parapet of particular height at roofline of vent shaft designed to protect against walking into shaft, not against falling into shaft while sitting on parapet). If a party were relying solely on the violation of a statute to establish the other party's negligence or contributory negligence, his opponent would be entitled to a directed verdict on the issue if the judge failed to find either of the above elements of the presumption. See Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497 (1950)(by implication).

Subdivision (a), paragraphs (1) and (2). Whether or not a party to an action has violated a statute (paragraph (1) of subdivision (a)) is generally a question of fact. However, if a party admits violating the statute or if the evidence of such violation is undisputed, it would be appropriate for the judge to instruct the jury that a violation of the statute, ordinance, or regulation has been established as a matter of law. Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958)(undisputed evidence of driving with faulty brakes).

The question of whether the violation of a statute has proximately caused or contributed to the plaintiff's death or injury (paragraph (2) of subdivision (a)) is normally a question for the jury. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279 (1947). However, the existence or nonexistence of proximate cause becomes a question of law to be decided by the judge if reasonable men can draw but one inference from the facts. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279 (1947). See also, Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958)(defendant's

admission establishes proximate cause); Moon v. Payne, 97 Cal. App.2d 717, 218 P.2d 550 (1950)(failure to obtain permit to burn weeds not proximate cause of child's burns).

Subdivision (b). Normally, the question of justification or excuse is a jury question. Fuentes v. Panella, 120 Cal. App.2d 175, 260 P.2d 853 (1953). The jury should be instructed on the issue of justification or excuse whether the excuse or justification appears from the circumstances surrounding the violation itself or appears from evidence offered specifically to show justification. Fuentes v. Panella, 120 Cal. App.2d 175, 260 P.2d 853 (1953)(instruction on justification proper in light of conflicting testimony concerning violation itself and surrounding circumstances). However, an instruction on the issue of excuse or justification should not be given if there is no evidence that would sustain a finding by the jury that the violation was excused. McCaughan v. Hansen Pacific Lumber Co., 176 Cal. App.2d 827, 833-834, 1 Cal. Rptr. 796, 800 (1959)(evidence went to contributory negligence, not to excuse); Fuentes v. Panella, 120 Cal. App.2d 175, 260 P.2d 853 (1953)(dictum).

SEC. 4. 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. 5. 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 a legal opinion formed and the advice given by the lawyer in the course of that relationship.

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

SEC. 6. 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. 7. 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. 8.. 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 Section 1017 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, 63 Cal.2d 400, 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. 9. Section 1152 of the Evidence Code is amended to read:

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act or service to another who has sustained or will sustain or claims ~~to have~~ that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it.

(b) This section does not affect the admissibility of evidence of:

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim; or

(2) A debtor's payment or promise to pay all or a part of his preexisting debt when such evidence is offered to prove the creation of a new duty on his part or a revival of his preexisting duty.

Comment. The amendment to Section 1152 is intended to clarify the meaning of the section without changing its substantive effect. The words "or will sustain" have been added to make it clear that the section applies to statements made in the course of negotiations concerning future loss or damage as well as past loss or damage. Such negotiations might occur as a result of an alleged anticipatory breach of contract or as an incident of an eminent domain proceeding.

SEC. 10. 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. 11. Section 1600 of the Evidence Code is amended to read:

1600. (a) The official record of a document purporting to establish or effect an interest in property is prima facie evidence of the existence and content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if:

~~(a)~~ (1) The record is in fact a record of an office of a public entity; and

~~(b)~~ (2) A statute authorized such a document to be recorded in that office.

(b) The presumption established by this section is a presumption affecting the burden of proof.

Comment. One effect of making the official record "prima facie evidence" is to create a rebuttable presumption. See EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."). The classification of this presumption as one affecting the burden of proof is consistent with the prior case law. See Thomas v. Peterson, 213 Cal. 672, 3 P.2d 306 (1931); DuBois v. Larke, 175 Cal. App.2d 737, 346 P.2d 830 (1959); Osterberg v. Osterberg, 68 Cal. App.2d 254, 156 P.2d 46 (1945). Such a classification tends to support the record title to property by requiring the record title be sustained unless the party attacking that title can actually prove its invalidity. See EVID. CODE § 606 and Comment thereto.

SEC. 12. Section 1602 of the Evidence Code is repealed.

~~1602.--If a patent for mineral lands within this state issued or granted by the United States of America, contains a statement of the date of the location of a claim or claims upon which the granting or issuance of such patent is based, such statement is prima facie evidence of the date of such location.~~

Comment. Section 1602 of the Evidence Code is repealed because it is superseded by the addition of Section 2325 to the Public Resources Code.

SEC. 13. Section 1603 of the Evidence Code is amended to read:

1603. A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record, is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed. The presumption established by this section is a presumption affecting the burden of proof.

Comment. One effect of Section 1603 is to create a rebuttable presumption. See EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.").

Prior to the enactment of Code of Civil Procedure Section 1928 in 1872 (upon which Section 1603 of the Evidence Code is based), the recitals in a sheriff's deed, made pursuant to legal process, could not be used as evidence of the judgment, the execution, and the sale upon which the deed was based. The existence of the prior proceedings were required to be proved with independent evidence. Hihn v. Peck, 30 Cal. 280, 287-288 (1866); Heyman v. Babcock, 30 Cal. 367, 370 (1866). The enactment of the predecessor of Evidence Code Section 1603 had two effects. First, it obviated the need for such independent proof. See, e.g., Oakes v. Fernandez, 108 Cal. App.2d 168, 238 P.2d 641 (1951); Wagnor v. Blume, 71 Cal. App.2d 94, 161 P.2d 1001 (1945). See also BASYE, CLEARING LAND TITLES § 41 (1953). Second, it obviated the need for proof of a chain of title prior to the execution of the deed. Krug v. Warden, 57 Cal. App. 563, 207 Pac. 696 (1922).

The classification of the presumption in Section 1603 as a presumption affecting the burden of proof is consistent with the classification of the similar and overlapping presumptions contained in Evidence Code Sections 664 (official duty regularly performed) and 1600 (official record of document affecting property). Like the presumption in Section 1600, the presumption in Section 1603 serves the purpose of supporting the record chain of title.

SEC. 14. Section 1605 of the Evidence Code is amended to read:

1605. Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this state, derived from the Spanish or Mexican governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-66, are ~~receivable as prima facie evidence~~ admissible as evidence with like force and effect as the originals and without proving the execution of such originals.

Comment. Chapter 281 of the Statutes of 1865-66 required the California Secretary of State to cause copies to be made of all of the original Spanish title papers relating to land claims in this state derived from the Spanish and Mexican governments that were on file in the office of the United States Surveyor-General for California. These copies, authenticated by the Surveyor-General and the Keeper of Archives in his office, were then required to be recorded in the offices of the county recorders of the concerned counties.

Section 5 of the 1865-66 statute, which is now codified as Section 1605 of the Evidence Code, provided that the recorded copies would be admissible "as prima facie evidence" without proving the execution of the originals. It is apparent that the original purpose of the section was to provide an exception to the best evidence rule--which would have required production of the original or an excuse for its nonproduction before the recorded copy could be admitted--and an exception to the rule, now expressed in Evidence Code Section 1401(b), requiring the authentication of the original document as a condition of the admissibility of the copy. Section 1605, therefore, has been revised to reflect this original purpose.

SEC. 15. Section 2325 is added to the Public Resources Code, to read:

2325. If a patent for mineral lands within this state issued or granted by the United States of America, contains a statement of the date of the location of a claim or claims upon which the granting or issuance of such patent is based, such statement is admissible as evidence of the date of such location.

Comment. Section 2325 is based on Section 1602 of the Evidence Code, which merely restated the provisions of former Section 1927.5 of the Code of Civil Procedure. Although the purpose for the enactment (in 1905) of Section 1927.5 of the Code of Civil Procedure is somewhat obscure, it seems likely that the section was intended merely to provide a hearsay exception and thus overcome the force of the suggestion in Champion Mining Co. v. Consolidated Wyoming Gold Mining Co., 75 Cal. 78, 81-83 (1888) that the issuance of a patent would not be evidence of a location at any time prior to the date of the patent. As a recital of location date in a patent may be based on self-serving statements made in an ex parte proceeding, it is inappropriate to give such a recital presumptive effect.

Section 2325 is probably unnecessary, for the statements that are made admissible by the section are probably admissible anyway under the provisions of Evidence Code Section 1330 (statements in dispositive instruments). Section 2325, however, removes whatever doubt there may be concerning such admissibility. The section has been relocated in the Public Resources Code so that it will appear among other statutory provisions relating to specific evidentiary problems involving mining claims.