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#34(L) 5/13/64

Memorandum 64-29

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article III. Presumptions)

There is attached to this memorandum a revised version of the proposed statute on burden of producing evidence, burden of proof and presumptions. You may use this copy for marking suggested changes and return it to the staff at the next meeting. We have sent another copy of this tentative recommendation to you for inclusion in your collection of tentative recommendations.

Sections 500 through 602, except for Section 511, are as revised and approved by the Commission at the last meeting. The comment to Section 500 has been substantially revised and minor revision has been made in the comments to Sections 510 and 601. The following matters should be noted by the Commission in regard to this tentative recommendation:

Section 511.

The staff was directed to do further research on the operation of presumptions and the allocation of the burden of proof to the defendant in criminal cases. Some question was raised concerning the nature of the instruction to be given the jury on issues where the defendant has the burden of proof. The staff was asked to determine whether the jury is instructed that it may find the presumed fact or whether it is instructed that the presumption is controlling in the absence of sufficient contrary evidence.

CALJIC 40 and the second paragraph of CALJIC 25 are identical. They provide:

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or circumstantial; but unless so controverted, the jury is bound to find in accordance with the presumption.

Corporations Code Section 25500 provides that no company shall sell any security of its own issue until it has first applied for and has secured from the commissioner a permit authorizing it so to do. Corporations Code Section 25700 provides that no person shall act as an agent or broker until it has first applied for and secured from the commissioner a certificate authorizing it so to do. CALJIC Instructions 451 and 452 relate to these violations of the Corporate Securities Law. CALJIC 451 provides:

When a person is on trial under a charge of having sold a security, the sale of which had not been authorized by a permit of the Commissioner of Corporations of the State of California, after the alleged sale has been proved, the burden of proof is upon the defendant to show the existence of such a permit at the time of the transaction, and in the absence of such proof, the jury must find that no such permit was then in existence. [Emphasis added.]

CALJIC 452 provides:

When a person is on trial under a charge of having acted as an agent or broker in the sale of a security, without first having secured from the Commissioner of Corporations of the State of California a certificate, then in effect, authorizing him so to do, after the alleged sale has been proved, the burden is upon the defendant to show the existence of such certificate at the time of the transaction, and in the absence of such proof, the jury must find that no such certificate was then in existence.

CALJIC 704 relates to narcotics possession. It provides:

Upon the trial of a charge of the unlawful possession of a narcotic, it is a defense that the defendant had a lawful, written prescription for such narcotic of a physician, dentist, chiropodist, or veterinarian licensed to practice in this state, but the burden is upon the defendant to prove that he had such written prescription. In the absence of any proof of the existence of such a prescription you must assume, in arriving at a verdict, that the defendant had no such prescription.

CALJIC 801 relates to the defense of insanity. The instruction in the main volume (Rev. Ed. 1958) provides in part:

> The burden of proving insanity is on the defendant; that is to say, it is incumbent upon him to establish by a preponderance of evidence that he was insane at the time of committing the offense charged.
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> The law presumes that the defendant was sane. That presumption may be rebutted but is controlling until overcome by a preponderance of evidence. A preponderance of evidence is such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein.

The 1962 pocket part to CALCIJ contains a revised version of this instruction. The pertinent part of the instruction provides as follows:

> The burden of proving insanity is on the defendant. The law presumes that the defendant was sane. The effect of this presumption is to place on the defendant the burden of proving insanity by a preponderance of the evidence.
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> A preponderance of evidence is such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein.

The pocket part gives no clue to the reason for this change. It explains the revision of the instruction on the ground that the instruction in the main volume erroneously contained "and" instead of "or" in stating the M'Naughton rule relating to insanity. The revision was based on the error pointed out in People v. Richardson, 192 Cal. App.2d 166, 13 Cal. Rptr. 321 (1961). It may be that the language indicating that the "presumption . . . is controlling" was deleted in reliance upon the general instruction on presumptions given above.

CALCIJ 804 relates to intermittent insanity. The instruction provides that if the defendant proves intermittent insanity,

> the law . . . presumes that it [the criminal act] was committed during one of the defendant's lucid intervals. That presumption may be rebutted but is controlling until overcome by a preponderance of evidence showing that the defendant was insane at the time when the offense charged was committed.

Instruction 804 was also modified in the 1962 pocket part of CALJIC. After stating the presumption, the instruction now provides merely:

> The effect of this presumption is to place upon the defendant the burden of proving by a preponderance of the evidence that he was insane and irresponsible at the time the offense was committed.

The form of the instruction appearing in the main volume was given in People v. Nash, 52 Cal.2d 36, 338 P.2d 416 (1959). The Supreme Court affirmed the conviction of Nash and no note was taken of the language, "that presumption may be rebutted but is controlling until overcome by a preponderance of evidence . . . ."

CALJIC 810 relates to the determination of insanity at the time of trial. As the instruction appears in the main volume, it provides in part:

> But in the trial of an insanity issue such as that now before you the law presumes that the defendant is sane, although that presumption may be overcome by evidence to the contrary. . . . Unless and until such insanity is proved by the preponderance of the evidence, the presumption of sanity is controlling.

The pocket part indicates that the sentence beginning with "unless" and ending with "controlling" should be stricken and the following sentence substituted:

> The effect of this presumption is to place upon the defendant the burden of proving such insanity by a preponderance of the evidence.

The pocket part gives no clue to the reason for these changes in the instructions. No case that we know of has questioned them. Presumably, they have been used repeatedly as in the case of People v. Nash. Perhaps reliance is being placed on CALJIC 25 or 40 to explain the effect of the presumption. The reports indicate that juries are being given the CALJIC 25 instruction. People v. Masters, 33 Cal. Rptr. 383, 386 (1963); People v. Porter, 31 Cal. Rptr. 841, 845 (1963).

The appellate cases indicate that instructions requiring juries to follow presumptions are regularly given and are correct statements of the law. We have found no case holding it to be erroneous to instruct a jury that a presumption is controlling in the absence of contrary evidence. In People v. Agnew, 16 Cal.2d 655 (1940), the defendant was prosecuted for the false arrest of one Willis O. Prouty. The trial court gave the following instruction:

> It is admitted by the defendant that he arrested Willis O. Prouty on the charge that he, Prouty, had committed perjury, both in his affidavit which was part of the cross-complaint in the civil suit of Agnew v. Prouty and in the testimony which he, Prouty, gave at the trial of that action. If Prouty did commit such perjury, the defendant had a right to arrest him, but if Prouty did not commit such perjury, the arrest of Prouty by the defendant was unlawful. The burden is on the defendant to prove that Prouty committed perjury.

The defendant was convicted and appealed. The prosecution sought to justify the trial court's instruction upon the authority of People v. McGrew, 77 Cal. 570, 20 Pac. 92. The McGrew instruction was as follows:

> While it is true that the prosecution must prove the imprisonment, it is also true that the imprisonment being proven, the law presumes it unlawful until the contrary is shown. It is for the defendant to justify it by proving that it was lawful.

The Supreme Court held that the presumption mentioned in the McGrew instruction could be relied on by the prosecution. "It therefore seems clear that the McGrew case should not be overruled as the instruction therein approved appears substantially correct as far as it went and is sustained by reason and authority." 16 Cal.2d at 664. The Supreme Court then went on, however, to state that "the instruction given in the McGrew case should [not] be given without proper qualification. The instruction given in the McGrew case implied that the burden was upon the defendant to prove the lawfulness

of the imprisonment by a preponderance of the evidence." 16 Cal.2d at 665. The court went to hold that the McGrew instruction should be qualified by indicating that the burden placed on the defendant is merely "to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged." 16 Cal.2d at 665. So far as the Agnew instruction was concerned, the court said that the instruction "was substantially correct as far as it went, [but] it should not have been given without a qualifying instruction informing the jury that the burden thus placed upon the defendant could be met by evidence which produced in their minds a reasonable doubt as to whether Mr. Prouty had in fact committed perjury." 16 Cal.2d at 666.

Thus, the Supreme Court gave specific approval to an instruction to the effect that "the law presumes . . . until the contrary is shown."

In People v. Scott, 24 Cal.2d 774 (1944), Justice Traynor considered the presumption in the Dangerous Weapons' Control Law that the person in possession of a firearm whose identification marks were obliterated had obliterated the same. The instruction was not considered. In regard to the presumption, the opinion states:

> The presumption does not impose on him the burden of proving who committed the crime, nor does it require him to persuade the jury of his innocence. He must merely go forward with evidence to the extent of raising a reasonable doubt that he tampered with the identification marks. When he has done so, he enjoys the benefit of the presumption of innocence, and it is then incumbent on the prosecution to establish his guilt beyond a reasonable doubt. [24 Cal.2d at 783.]

Presumption instructions were considered by Chief Justice Gibson in People v. Hardy, 33 Cal.2d 52, 198 Pac.2d 865 (1948). The defendant was charged with murder. She claimed that she had received a blow on the head

and was unconscious at the time of the murder. She claimed that the blow on the head caused both amnesia and automatism. On the claim of automatism the trial court instructed:

> When the evidence shows that a defendant acted as if he was conscious, the law presumes that he then was conscious. This presumption is disputable, but is controlling on the question of consciousness until overcome by a preponderance of the evidence, which means such evidence as when weighed against the presumption, and any evidence supporting the presumption has more convincing force, and from which it results that the greater probability of truth lies therein.

The Supreme Court recognized the presumption but criticized the instruction for requiring the defendant to overcome the presumption by a preponderance of the evidence. The court said:

> The mere fact that there is a presumption which tends to support the prosecution's case does not change the amount or quantum of proof which the defendant must produce. (People v. Agnew, 16 Cal.2d 655.) The prosecution is required to prove the offense beyond a reasonable doubt and, in so doing, may rely on any applicable presumptions. The defendant, on the other hand, is not required to prove his innocence by a preponderance of the evidence, but only to produce sufficient evidence to raise a reasonable doubt in the minds of the jury. [33 Cal.2d at 64.]

Here again the Supreme Court did not criticize the portion of the instruction stating that the presumption is controlling, it attacked only that portion of the instruction requiring the defendant to overcome the presumption by a preponderance of the evidence.

In People v. Harmon, 89 Cal. App.2d 55, 200 Pac.2d 32 (1948), the defendant was convicted of illegal possession of narcotics. The conviction was affirmed with the following opinion:

> It is claimed that the trial court erred in giving or refusing certain instructions. The first attack is [upon the instruction?] that the burden of proof is upon the defendant that he possessed a written prescription and that in the absence of such evidence it must be assumed that he had no such prescription. . . . Whether one has such a prescription is a fact peculiarly within the knowledge of the accused. . . . Upon the failure of the defendant to prove a written prescription, it must be assumed that there was no such prescription. [89 Cal. App.2d at 58-59 (emphasis added).]

pparently, an instruction similar to that given in People v. Harmon was given in People v. Jackson, 106 Cal. App.2d 114, 234 Pac.2d 766 (1951) (hearing denied). The instruction contained the statement "that the burden was upon the defendant to show that there was a written prescription in existence to justify or excuse his possession of narcotics or his actions in that in the absence of proof of the existence of such prescription, the jury must find that no such prescription was in existence." 106 Cal. App.2d at 124. Although the case, like the case of People v. Nash, is instructive as to the practice of the courts, it is not authority for the validity of the instruction for there was no contention that a prescription did exist. The defendant was a doctor and was being prosecuted for dispensing narcotics without a prescription.

In People v. Bushton, 80 Cal. 160 (1889) the jury was instructed upon the effect of Penal Code Section 1105 which provides that upon a trial for murder that after proof of the killing by the defendant the burden of proving circumstances of mitigation, justification, or excuse is upon the defendant. The trial court had instructed the jury that the defendant's burden was to show any circumstances of mitigation, excuse, or justification by a preponderance of the evidence. The Supreme Court reversed stating that Section 1105

> casts upon the defendant the burden of proving circumstances . . . that justified or excused the commission of the homicide. This does not mean . . . by a preponderance of the evidence . . . . He is only bound under this rule to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged. . . .
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> The section under consideration was not intended to, and does not change this rule as to the weight of the evidence. It simply provides that, certain facts being proved, the presumption of guilt shall follow, unless the defendant shall himself prove certain other facts. It does not attempt to

> provide the degree of proof required of him, but leaves the rule as to the degree of evidence necessary to convict as it was before. [80 Cal. at 164.]

In People v. Thomas, 25 Cal.2d 880, 156 P.2d 7 (1945) the jury was instructed in the language of Section 1105. This was held to be error. An instruction in the language of a statute is proper only if the jury would have no difficulty in understanding the statute without guidance from the court. The statute itself gives no clue to the burden upon the defendant and does not clearly indicate that the presumption is of second degree murder, not first. A series of cases appear in the Supreme Court reports in which the trial court gave similarly erroneous instructions based on Penal Code Section 1105. See, e.g., People v. Valentine, 28 Cal.2d 121, 169 P.2d 1 (1946); People v. Cornett, 33 Cal.2d 33, 198 P.2d 877 (1948). Finally, in People v. Deloney, 41 Cal.2d 832, 264 P.2d 532 (1953), a similar erroneous instruction was given again. The Supreme Court pointed out that it had repeatedly held that a jury should not be instructed in the language of Section 1105. Again, the jury was not advised that the instruction had no application in determining the degree of murder. The court concluded:

> In any event, an instruction in the language of section 1105, even with an adequate explanation of its meaning, has no proper place in a charge to the jury. As restated in People v. Thomas, supra, 25 Cal.2d 880, "logic suggests that since such section in reality merely declares a rule of procedure and does not relieve the State of the burden of proving each and every essential element of guilt beyond a reasonable doubt the propriety of reading it to the jury, even with the proper explanation, is doubtful."

The foregoing resume indicates that the practice of the California courts is and has been to instruct juries that presumptions are controlling in the absence of contrary evidence sufficient to raise a reasonable doubt.

If the issue is sanity, the jury has been instructed to find the defendant sane unless persuaded to the contrary.

The cases hold that the law conforms to instructions of this sort. A typical statement is that in People v. Hickman, 204 Cal. 470, 477 (1928): "a person charged with crime is presumed to be sane until the contrary is established by a preponderance of the evidence." At lease one square holding can be found approving an instruction requiring the jury to assume the presumed fact. People v. Harmon, 89 Cal. App.2d 55, 200 Pac.2d 32 (1948). The Supreme Court has approved an instruction "so far as it goes" telling the jury that a presumption is controlling until overcome by other evidence, but has indicated that such an instruction should not be given without the added qualification that the presumption is overcome by evidence creating a reasonable doubt. People v. Agnew, 16 Cal.2d 655 (1940). No case has been found criticizing an instruction to the effect that the presumed fact must be assumed in the absence of sufficient contrary evidence, or the presumption is controlling in the absence of sufficient contrary evidence. Accordingly, we conclude that Section 511 and Section 606 correctly declare the law applicable to the burden of proof and presumptions affecting the burden of proof in criminal cases.

Moreover, we think that these sections declare the correct rule as a matter of policy. If the jury is merely told that the presumption permits it to find the presumed fact,by what criterion is the jury to decide whether to find the presumed fact.. The jury is given no guidance. If I were a rational juror, and the judge told me that a presumption permitted me find the presumed fact, I would then ask the judge, "How do I decide whether to find the presumed fact or not?" If justice is to be administered evenly,

and not according to the caprice of juries, juries must be told that presumptions require the presumed facts to be assumed until the evidence in the case creates a reasonable doubt in their minds as to the existence of the presumed facts.

This does not mean that there are directed verdicts in criminal cases. The jury still is the body that must apply those rules of law we call presumptions. The jury may disregard the instructions, but this should not relieve the judge of his duty to tell the jury what the law is. In People v. Lem You, 97 Cal. 224 (1893), the trial judge, apparently impressed by the fact that the jury does have the power to disregard the instructions and to decide the case as it sees fit, instructed the jury that it should decide whether allegedly perjured testimony was material to the action in which it was given. The Supreme Court held that this was error with the following language:

> The question of the materiality of evidence, no matter when or how it may arise, is always one of law for the court, and not of fact for the jury. It usually arises in the ordinary trial of a cause, where one party offers evidence and the other objects to it as immaterial; and in that case it would be clear to everyone that the question was for the court. But the question is exactly the same when, on a trial for perjury, the materiality of the alleged false testimony arises. Of course, a jury, in rendering a general verdict in a criminal case, necessarily has the naked power to decide all the questions arising from the general issue of not guilty; but it only has the right to find the facts, and apply to them the law as given by the court. And on a trial for perjury, it is the duty of the court to instruct the jury as to what facts would show material testimony.

Similarly, the jury has the power to find a defendant guilty of manslaughter for a death caused in the course of a felony. The judge, however, does not instruct the jury that if it finds the death was caused by the commission of the felony that it may find the defendant guilty of murder. It instructs the jury that a death caused by a felony is murder. In People v. Powell, 34 Cal.2d

196, 208 Pac.2d 974 (1949), the defendant was found guilty of manslaughter for a death caused by an abortion. The conviction was affirmed because the defendant cannot complain if he is convicted of a lesser offense than the one the evidence shows he committed. The court said:

> It cannot be doubted that a trier of fact has and often exercises the power, because of obvious extra legal factors or for no apparent reason, to find a defendant guilty of a lesser degree or class of crime than that shown by the evidence. Furthermore, even if it be assumed that the trier of fact erred here when he found defendant guilty only of manslaughter, defendant cannot invoke reversal on an error which is favorable to him.

In What is Second Degree Murder in California?, 9 So. Calif. L. Rev. 112, 128-132 (1936), Bishop Pike has gathered a number of cases in which juries have apparently disregarded the instructions and have convicted the defendant of second degree murder when the evidence showed first degree murder. Some extra legal justification can be found for most of these decisions, but ten cases apparently had no factor justifying the jury's mercy. Typical quotations from the cases collected are:

> Suffice it to say that the killing was wanton, premeditated, and unattended by any mitigating circumstances whatsoever.

> Indeed, the evidence presented by the people discloses, in our judgment, a deliberate, cold-blooded murder--in truth, the destruction of a life of a mere boy under circumstances devoid of the slightest semblance of justification or excuse.

The existence of this power in the jury does not warrant an instruction that the jury may find the defendant guilty of first degree murder if the jury finds that the killing was deliberate, premeditated, and with malice aforethought. On the contrary, the jury is instructed that wilful, deliberate, and premeditated killing is murder of the first degree. CALJIC 303.

Similarly, therefore, we think the jury should be instructed as to what the law requires insofar as presumptions and the burden of proof are concerned. The comments to Sections 604 and 606 spell out in considerable detail the nature of the instructions we think should be given on these matters.

Sections 603, 605

The Commission directed the staff to consider a revision of these sections. The Commission was of the opinion that the definitions of a presumption affecting the burden of proof and a presumption affecting the burden of producing evidence did not necessarily cover the entire field. Some presumption might exist that fit neither description. The staff was directed to consider revising one of the definitions to include all presumptions not covered by the other definition. The Commission tentatively decided to revise the definition of a presumption affecting the burden of proof. However, no agreement could be reached on a working definition and the staff was directed to submit several drafts.

In connection with this problem, the staff was asked to report on the functioning of presumptions in criminal cases. This report is above in connection with Section 511. The staff was directed to propose any modifications of Section 604 made necessary by this further research.

We set forth below the definitions that were approved at the March meeting so that you will be able to compare them with the drafts submitted at this meeting. The predecessor of the section defining a presumption affecting the burden of proof read as follows:

> A presumption affecting the burden of proof is a presumption established to effectuate some public policy, other than to facilitate the determination of the particular action in which the question arises, such as the policy in favor of the legitimacy of children, the validity of marriage, the stability of titles to property, or the security of those who trust themselves or their property to the administration of others.

The predecessor of the section defining a presumption affecting the burden of producing evidence read as follows:

> A presumption affecting the burden of producing evidence is a presumption established to facilitate the determination of the action in which the question arises by dispensing with the necessity for proof of the presumed fact unless evidence is introduced sufficient to sustain a finding of the non-existence of the presumed fact. Such a presumption is one where the presumed fact may be logically inferred from the established fact and there may be no evidence of the presumed fact, or the evidence is more readily available to the party against whom the presumption operates, or there is little likelihood of dispute as to the presumed fact, and there is no public policy requiring the placing of the burden of proof on the party against whom the presumption operates.

The definition of a presumption affecting the burden of proof was approved in the form quoted above. The staff was directed to revise the definition of a presumption affecting the burden of producing evidence, to tabulate the matters listed at the end, and to indicate that there must be a high probability, instead of a logical inference, of the existence of the presumed fact. As revised, the section read as follows:

> A presumption affecting the burden of producing evidence is a presumption established to facilitate the determination of the action in which the presumption is applied by dispensing with the necessity for proof of the presumed fact unless evidence is introduced sufficient to sustain a finding of its nonexistence. Such a presumption is one where there is no public policy requiring the placing of the burden of proof on the party against whom the presumption operates, the existence of the presumed fact is a highly probable inference from the established fact, and:
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> (1) There is unlikely to be direct evidence of the presumed fact readily available; or
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> (2) The evidence is likely to be more readily available to the party against whom the presumption operates; or
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> (3) There is little likelihood of bona fide dispute as to the presumed fact.

The Commission believed that there may be some presumption that does not arise from a policy and which is not based on a highly probable inference. Upon reconsidering the matter, we think that not all presumptions affecting the burden of proof are necessarily based on a "highly probable inference". Some of them--such as the presumption of receipt from proof

of mailing--undoubtedly are. Others, however, we believe are based on a logical inference but not necessarily on a "highly probable inference". For example, we believe the presumption that a writing is presumed to be truly dated is such a presumption. The redraft of this definition, above, is defective in that the requirement of "highly probable" applies to all of the matters listed. Actually, the requirement is already expressed in subdivision (3) which states that there is little likelihood of bona fide dispute as to the presumed fact. If the presumed fact is highly probable, of course, there is little likelihood of bona fide dispute. But some may be based on a logical inference plus the fact that contrary evidence is more likely to be known to the party against whom the presumption operates. Others may be based on the logical inference plus the fact that there is unlikely to be evidence of the presumed fact readily available.

It has occurred to us, too, that the difficulty with the two definitions is that the matters listed at the end of the definition of a presumption affecting the burden of producing evidence may be illustrative, rather than definitive. If they are regarded as illustrative, the problem seen by the Commission seems to disappear. Then all presumptions based on a public policy, other than facilitating the determination of the particular action by dispensing with the necessity for proof, are presumptions affecting the burden of proof. All presumptions based only on a policy of facilitating the determination of the action in which the presumption is applied by dispensing with the necessity for proof in the absence of contrary evidence are presumptions affecting the burden of producing evidence. We doubt that any presumptions have been created for

no reasons of policy whatsoever. Accordingly, in the tentative recommendation, we have redrafted these sections so that all public policy presumptions are presumptions affecting the burden of proof except those presumptions based solely on the desire to facilitate the determination of the particular action in which the presumption is applied. Presumptions based solely on the policy of facilitating the determination of particular actions are presumptions affecting the burden of producing evidence. We have attached to this memorandum on blue paper additional drafts of these provisions, but we recommend the ones now appearing in the tentative recommendation.

The illustrative matters that formerly appeared in the definition of a presumption affecting the burden of producing evidence now appear in the comment to that section.

Section 607.

At the April meeting, the Commission decided that it would not recommend a series of sections specifying that particular matters that formerly appeared in Section 1963 of the Code of Civil Procedure are not presumptions. The Commission asked the staff to draft a single section indicating that certain specified subdivisions are not presumptions.

As only a single section was needed to accomplish this purpose, we have deleted the Article 5 that formerly appeared in the presumptions chapter and have substituted for it a single section in the General Provisions Article of the presumptions chapter. This section is Section 607.

We recommend the form of statute that appears in the tentative recommendation rather than one that specifies particular subdivisions. This form of section does not require any duplication. We do not need a section

specifying, for example, that subdivision 1 (innocence) is not a presumption but is an allocation of the burden of proof. Nor do we need a reference to subdivision 19 to make clear that it is not a presumption but it is a maxim (Civil Code Section 3545).

Section 620.

This section has been revised to indicate that there are other conclusive presumptions in addition to the ones listed in this article. This was the Commission's instruction at the April meeting.

Sections 622-624.

These are subdivisions two, three, and four of Code of Civil Procedure Section 1962. They relate to various kinds of estoppel.

At the April meeting the Commission asked the staff to find a location for them in the Civil Code as they do not function like presumptions. We could find no convenient place to locate them in the Civil Code. Although they may not be presumptions, they do affect litigation. Accordingly we have placed them in the article on conclusive presumptions that is replacing Code of Civil Procedure Section 1962. This seems to be the most convenient place to locate these matters.

Sections 630, 660.

These sections have been revised in accordance with the Commission's instructions to indicate more clearly that there are other presumptions affecting the burden of producing evidence or the burden of proof in addition to those listed in these articles.

Section 646.

We have several times indicated that we would submit a report to you on the doctrine of res ipsa loquitur. We have classified the doctrine as a

presumption affecting the burden of producing evidence because this is how the California courts have classified it.

First, is the doctrine of **res** ipsa loquitur a presumption as defined in Section 600? A presumption is a rule of law which requires the presumed fact to be assumed when another fact or groups of facts is proved or otherwise established in the action. In Burr v. Sherwin Williams Company, 42 Cal.2d 682, 268 Pac.2d 1041 (1954), the Supreme Court held:

> A few decisions have criticized instructions to the effect that **res** ipsa loquitur imposes a mandatory burden upon the defendant to rebut the inference of negligence and have apparently proceeded on the theory that the doctrine creates an inference which is enough to avoid a nonsuit but which the trier of fact may accept or reject as it sees fit, even though the defendant offers no evidence. . . . This view, which is inconsistent with most of the California decisions, is very difficult to apply, and there are substantial reasons why we should hold that in every type of res ipsa loquitur case the defendant should have the burden of meeting the inference of negligence.
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> * * * * *
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> It is our conclusion that in all res ipsa loquitur situations the defendant must present evidence sufficient to meet or balance the inference of negligence, and that the jurors should be instructed that, if the defendant fails to do so, they should find for the plaintiff. [42 Cal.2d at 690-691.]

Thus, under the holding of the Burr case, the finding of the facts giving rise to the res ipsa loquitur doctrine requires the jury to find the defendant negligent unless he comes forward with some contrary evidence. The trier of fact is not permitted to accept or reject the inference of negligence as it sees fit when the defendant offers no evidence. Therefore, res ipsa loquitur is, in the words of Section 600, a rule of law which requires the defendant to be found negligent when the facts giving rise to the doctrine are found or otherwise established in the action. The doctrine of res ipsa loquitur, therefore, is a rule of law that is described by Section 600 as a presumption.

What kind of presumption is it? It is clear from the holdings in the Burr case and others such as Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63 (1953), that the doctrine of res ipsa loquitur does not shift the burden of proof to the defendant to prove that he was not negligent. In this respect, the doctrine differs from the presumption of the negligence of a bailee. The presumption, then, is not a presumption affecting the burden of proof as described in Section 605.

In the Hardin case the court said that the doctrine "does not mean that the burden of proof shifts from plaintiff to defendant. The defendant has merely the burden of going forward with the evidence, that is, the burden of producing evidence sufficient to meet the inference of negligence by offsetting or balancing it." 41 Cal.2d at 437. This looks superficially like a Traynor presumption, which we have not described in our statutes. However, it must be remembered that "the doctrine, of course, does not apply at all unless it appears that there is a probability of negligence . . . ." 42 Cal.2d at 691. Hence, there is always an inference of negligence as well as the presumption. If the presumption is treated as a Thayer presumption--a presumption affecting the burden of producing evidence--the presumption totally disappears if the defendant produces any evidence of his lack of negligence. The case is then resolved upon the inferences remaining. So far as the inferences are concerned, the defendant is entitled to a verdict if his proof balances the inferences arising from the plaintiff's proof. The plaintiff is entitled to a verdict if the inferences arising from his proof preponderate in convincing force. This is what the jury is instructed under the Hardin and Burr decisions. Therefore, the doctrine of res ipsa loquitur fits precisely our definition of a presumption affecting

the burden of producing evidence.

If res ipsa loquitur is a presumption, why do the California courts characterize it is an inference? Despite the fact that the doctrine of res ipsa loquitur requires the jury to find the defendant negligent, and despite the fact that the Code of Civil Procedure defines an inference as "a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect", the California courts persist in characterizing the doctrine of res ipsa loquitur as an inference, not a presumption. Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 436 (1953). The characterization, of course, is exactly contrary to the code definitions. The reason for the characterization flows from the California doctrine that a presumption is evidence. Because of this doctrine, presumptions and inferences are treated differently when the party against whom the presumption or inference is operating moves for a directed verdict or a judgment notwithstanding the verdict. Under California law, if the plaintiff relies on an inference, the defendant's evidence is reviewed on the defendant's motion for a directed verdict, and if the defendant's evidence is sufficiently strong, the defendant may be granted a directed verdict. On the other hand, where the plaintiff is relying on a presumption instead of an inference, the defendant's evidence can never dispell the presumption, and a directed verdict for the defendant is improper. A directed verdict for the defendant would be proper only if the plaintiff's evidence tended to dispell the presumption. Professor Chadbourn discusses these matters at pages 23-34 of his study. A graphic illustration of the principles expounded by Professor Chadbourn is found in Leonard v. Watsonville Community Hospital, 47 Cal.2d 509, 305 P.2d 36 (1956). A clamp was left

in plaintiff's abdomen during an operation. Defendant E assisted in the operation. At the close of the plaintiff's case a nonsuit was granted as to E. The Supreme Court held that the doctrine of res ipsa loquitur applied, but the doctrine was dispelled as a matter of law by the testimony of the witnesses called by the plaintiff under Code of Civil Procedure Section 2055. For purposes of the motion, these witnesses were regarded as the defendant's witnesses. The Supreme Court said:

> Cases involving the use of evidence adduced under section 2055 to dispel a presumption must be distinguished from those involving inferences. Generally speaking, it may be said that a presumption is dispelled as a matter of law only when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of such party's own witnesses. . . . Accordingly, it is the general rule that a presumption favorable to a plaintiff cannot be so dispelled by the testimony of a defendant given pursuant to section 2055 because a defendant called under that section is not treated as the plaintiff's witness. . . . On the other hand, as we have seen, an inference can be dispelled as a matter of law by evidence produced by either party. [47 Cal.2d at 517-518.]

If res ipsa loquitur is regarded as a Thayer presumption, the result of the Leonard case will not be changed. The testimony of the witnesses called under 2055 contrary to the presumed fact would cause the presumption to disappear completely from the case. All that would be left would be the inference of negligence arising from res ipsa loquitur and the opposing testimony of the defendants. The court, then, would resolve the case exactly as if inferences only were involved. Thus, the court would resolve the case exactly as it did in the Leonard case.

Professor Chadbourn points out in his study the distinction between inferences and presumptions that the California courts have developed for purposes of ruling on a motion for a directed verdict or nonsuit by the party against whom the presumption or inference operates is irrational and should be

abardcned. Professor Chadbourn states that the Thayer theory of presumptions would remove this irrational difference. We concur. We believe we have eliminated the irrational aspects of California presumption law. We believe, too, that the classification of res ipsa loquitur as a Thayer presumption will continue existing California law in effect without change.

Civil Code Section 164.5.

No action was taken on this section at the last meeting. We have proposed this section in order to dispose of Code of Civil Procedure Section 1963(40). When we have recodified all of the remaining provisions in Code of Civil Procedure Section 1963, we have rewritten them so that they make sense. We do not believe we should depart from that policy in regard to subdivision (40). So far as we can tell, the purpose of subdivision (40) is merely to provide a termination date for the presumption of community property. This is what Section 164.5 does.

Concern was expressed at the last meeting over the expression in 164.5 of the presumption of community property. The presumption in 164.5 is expressed in the terms in which the courts have expressed it from the earliest days of our State. The courts constructed the presumption out of the language of Civil Code Section 164 and its predessor statute. The statute on which Section 164 is based read:

> All property acquired after the marriage by either husband or wife, except as may be acquired by gift, bequest, devise, or descent, shall be common property.

The 1872 version of Civil Code Section 164 read:

> All other property acquired after marriage, by either husband or wife, or both, is community property.

This language remained unchanged until 1917 when the amendment held unconstitutional in the Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1 (1934), was added. The only significant amendment since that time was that proposed by the Law Revision Commission in 1961.

Despite the fact that the section stated that all property acquired after marriage, except that acquired by gift, bequest, devise, or descent, is

is community property, the courts did not so construe the section. Instead they held that this sentence of 164 creates a presumption of community property. The presumption could be overcome by showing that the property was acquired in exchange for separate property. Meyer v. Kinzer, 12 Cal. 245 (1859); Estate of Rolls, 193 Cal. 594 (1924); Estate of Jolly, 196 Cal. 547 (1925).

Few cases can be found involving property acquired out of the State. Apparently, the general rule is that the party relying on the presumption must establish that the property was acquired during marriage--such as by purchase. The burden is then on the party asserting the separate character of the property to prove that the property was acquired in exchange for separate property. Wilson v. Wilson, 76 Cal. App.2d 119, 172 P.2d 568 (1946). In Scott v. Remley, 119 Cal. App. 384, 387 (1931), the court said that "the presumption that the property in the possession of a husband is community property applies only to property acquired in California, or by persons domiciled here . . . ." In the Scott case, a finding that property was community property was held to be unsupported where the evidence conclusively showed that the property was acquired out of the State. Insofar as Civil Code Section 164 declares substantively what is community property and not merely what is presumed to be community property, it has been construed to apply only to property acquired by domiciliaries. Estate of Frees, 187 Cal. 150, 154 (1921). It seems likely, therefore, that the presumption based on the language of Section 164 does not apply to property acquired out of the State.

Although Section 164.5 as drafted expresses the presumption in the same language that the courts have expressed it for the last 100 years, we think that in the interest of accuracy we should revise it. Rather than to attempt

to articulate the presumption precisely, we believe we should leave the courts free to develop the presumption from Section 164 as modified by the Law Revision Commission as the courts may see fit. Subdivision 40 of Code of Civil Procedure Section 1963, then, should be recodified as Section 164.5 of the Civil Code in the following language:

> The presumption that property acquired during marriage is community property of that marriage does not apply to any property to which legal or equitable title is held by a person at the time of his death if the marriage during which the property was acquired was terminated by divorce more than 4 years prior to such death.

Amendments and repeals.

The sections appearing in the remainder of the tentative recommendation have not been approved by the Commission. The revisions are self-explanatory for the most part, and where they are not the Comment indicates the reason for the revision.

Section 1963.

At the last meeting, the Commission directed the staff to attempt to retain as many provisions of Code of Civil Procedure Section 1963 as possible. The results of our handiwork appear in the disposition table on pages 55 and 56. The proposed Civil Code Sections appear at the appropriate place on page 46.

Respectfully submitted,

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Assistant Executive Secretary

EXHIBIT I

ALTERNATIVE DRAFTS OF SECTIONS 603 AND 605

Alternative 1:

603. A presumption affecting the burden of proof is a presumption established to implement a public policy that warrants placing the burden of proof on the party against whom it operates.

605. Any presumption that is not a conclusive presumption or a presumption affecting the burden of proof is a presumption affecting the burden of producing evidence.

Alternative 2:

603. A presumption affecting the burden of proof is a presumption established to implement a public policy other than the policy of dispensing with unnecessary proof and facilitating determination of the case in which the presumption is applied.

605. Any presumption that is not a conclusive presumption or a presumption affecting the burden of proof is a presumption affecting the burden of producing evidence.

Alternative 3:

603. A presumption affecting the burden of producing evidence is a presumption, other than a presumption described in Section 605, where the presumed fact may be logically inferred from the presumed fact and:

(a) There is little likelihood of dispute as to the presumed fact; or

(b) There is likely to be no direct evidence of the existence or non-existence of the presumed fact; or

(c) The evidence of the existence or nonexistence of the presumed fact is more readily available to the party against whom the presumption operates.

605. A presumption affecting the burden of proof is a presumption established to implement some public policy such as the policy in favor of the legitimacy of children, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.