(34(L))

First Supplement to Memorandum 64-29

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

This supplement discusses the need for Section 664 in the light of the de facto officer doctrine and the reason that Section 665 is worded the way it is.

Section 664

The de facto officer doctrine has been summarized as follows:

> The de facto doctrine in sustaining official acts is well established. Present a de jure office, "Persons claiming to be public officers while in possession of an office, ostensibly exercising their function lawfully and with the acquiescence of the public, are de facto officers. . . . The lawful act of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it." . . .
>
> It is likewise established that the right of a de facto officer to an office cannot be collaterally attacked. . . . A right to hold office may not be collaterally attacked by a challenge to the official acts performed by the person holding such office. [In re Redevelopment Plan for Bunker Hill, 61 Adv. Cal. 1, 22 (1964).]

California Jurisprudence summarizes the doctrine as follows:

> To protect those who deal with apparent incumbents of offices under circumstances that would lead men to suppose they are legal officers, the law validates their acts as to the public and third persons on the ground that, as to them, they are officers if not in fact though de jure, and that public policy requires that their acts be considered valid. [41 Cal. Jur.2d 113.]

A better understanding of the doctrine can be obtained from a consideration of the specifics of the cases rather than the generalities set forth above. In People v. Sassovich, 29 Cal. 480 (1866), the defendant was convicted of murder. The judge had been appointed to the court by the Governor. The defendant

contended that the Governor had no authority under the constitution to appoint the judge. The court said that the defendant's contention was without merit.

> The person who filled the office of Judge at the time this case was tried was appointed and commissioned by the Governor under and in pursuance of the provisions of the Act in question. He entered therefore under color of right and title to the office, and became Judge de facto if not de jure, and his title to the office cannot be questioned in this collateral mode. . . . His title can only be questioned in an action brought directly for that purpose as provided in the fifth chapter of the Practice Act. The acts of de facto officers must be held valid as respects the public and the rights of third persons. [29 Cal. at 485.]

People v. Hecht, 105 Cal. 621 (1895), was a proceeding in quo warranto attacking the authority of the San Francisco Board of Freeholders to hold office. The complaint was based on the fact that two of the elected members, I. W. Hellman and W. B. Bourn, were ineligible to hold office because they had not been residents of San Francisco for a sufficient length of time. The complaint claimed that the remaining members of the Board of Freeholders could not conduct business as there was not a legally constituted board of fifteen members, and the complaint claimed that the actions taken in which Hellman and Bourn participated were void. The trial court decided the matter adversely to the complainant on demurrer. The Supreme Court held that the facts alleged showed Bourn and Hellman to be disqualified and the demurrer should have been overruled insofar as it attacked their right to hold office. However, the Supreme Court held that the remainder of the elected members could constitute the board and that any actions taken by Hellman and Bourn prior to the attack on their right to hold office would be valid under the de facto officer doctrine.

> They were de facto officers in the discharge of the duties of a de jure office, and as such their acts while they remained such were as valid and binding as those of de jure officers. [105 Cal. at 629.]

In Town of Susanville v. Long, 144 Cal. 362 (1904), the city sued to recover a business license fee. The defendant claimed the ordinance authorizing the fee was void because the trustees of the town were not the rightful holders of office. The court answered the contention by saying that the "trustees were at least officers de facto when they passed the ordinance" 144 Cal. at 365.

> The law provides machinery for trying the title to an office in an action in which the officer is a party, and the right to the office is the question involved. To allow every person prosecuted for the violation of an ordinance, in the proceedings in which he is prosecuted, to question the legality of the formation of the municipal corporation, or the title to office of its various officers would lead to endless confusion, and embarrass the government of such municipal corporation. [144 Cal. at 365.]

In Matter of Danford, 157 Cal. 425 (1910), Danford was disbarred by a judgment of the Superior Court. He attacked the judgment on the ground that the judge was not a citizen and, therefore, was disqualified to be a judge. The Supreme Court said that the motion attacking the judge was, on its face, without merit for the judge was at least a de facto officer. His authority could not be attacked collaterally by motion to set aside his judgment.

In Clark v. City of Manhattan Beach, 175 Cal. 637 (1917), plaintiff property owner sought an injunction to prevent the sale of municipal bonds. The plaintiff attacked the election at which the sale of bonds was approved on thr ground that some members of the election board were not qualified because they had been city employees within ninety days preceding the election. The validity of the election was upheld on the ground that the members of the board were at least de facto officers.

Oakland Paving Co. v. Donovan, 19 Cal. App. 488 (1912), was an action to enforce a street assessment lien. The act under which the improvement was made required the superintendent of streets to perform certain acts authenticating that the work had been done and making up the assessment roll. The superintendent of

streets of Oakland was given a sixty-day leave of absence during which the work in question was performed. The requisite acts on the part of the superintendent of streets were performed by a person who had been named by the City Board of Public Works as acting superintendent. The defendant property owner contended that the act in question required the superintendent of streets to perform the requisite acts. There was an incumbent of that office, hence, there could be no de facto incumbent of the office. The District Court of Appeal discusses the de facto doctrine at length. The opinion holds that the de facto officer doctrine applies because the acting superintendent was in full possession of the office, was performing the duties of the office, was holding himself out to the world and was reputed to be legally exercising the duties, and to every appearance was the superintendent. The rights of the plaintiff contractor cannot be made to depend upon the power of the Board of Public Works to appoint an acting superintendent. He cannot be required to investigate the incumbent's title or authority to act.

> It was sufficient for plaintiff that it found him in possession of the office and all its records, invested with its insignia, was being treated and was regarded by the public as rightfully performing the duties of the office. [19 Cal. App. at 495.]

The court describes a de facto officer as one where the duties of the officer were exercised:

> First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be;
>
> Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like;
>
> Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such as ineligibility, want of power, or defect being unknown to the public;

Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such. [19 Cal. App. at 495.]

In order to evaluate the presumption in Section 664, it is necessary to consider the cases that have applied the presumption in the light of the principles set forth above.

The first case we have found that applies the presumption is Delphi School Dist. v. Murray, 53 Cal. 29 (1878). That involved a condemnation action brought on behalf of the school district. The complaint alleged that the duly elected, qualified and acting trustees for the district were bringing the action in the name of the district. The answer denied that the officials were the duly elected, qualified and acting trustees. The trial court found that they were acting as trustees, but there was no sufficient evidence of the election of three members of the board. The trial court therefore found that they were not de jure trustees of the school district and gave judgment for the defendant. The Supreme Court held that the finding that they were acting as trustees gave rise to a presumption under Code of Civil Procedure Section 1963(14) that they were the de jure officers. The court also said that the presumption "was, of course, disputable in its character, and might have been met and overcome by other evidence." But since there was no contrary evidence, the lower court was wrong in giving judgment for the defendant.

The de facto officer doctrine, if it had been invoked, would seem to have been applicable. There was no need to invoke the disputable presumption in the case. The de facto doctrine conclusively establishes the validity of the action of the trustees in bringing the action. The authority of the trustees should be attacked in a quo warranto action not collaterally in the condemnation action.

People v. Otto, 77 Cal. 45 (1888), was an action against the sheriff and the sureties on his bond for certain taxes collected by the sheriff in his capacity

as tax collector that were not paid over to the county. Judgment was given on the pleadings. The defendants admitted that the taxes in question were collected by a person acting as undersheriff. The court said, "there being no allegation that he wrongfully acted as such, it may properly be inferred that he was de jure as well as de facto the undersheriff of defendant Otto." The court cited the presumption in subdivision 14 of Section 1963 of the Code of Civil Procedure in support of its statement. The court concluded that the undersheriff had the authority to collect the taxes in question in the name of the defendant sheriff so as to bind the sheriff and his bondsmen.

People v. Ah Lee Doon, 97 Cal. 171 (1893), was a murder case where the local judge was disqualified to sit. The Governor appointed another judge from an adjoining county to sit in the case. The visiting judge received the plea of the defendant two days before the Governor's appointment. No question was raised concerning the judge's authority at the time of entering the plea, but on appeal the defendant objected that the judge had no authority to act in the case on the day the plea was received. The Supreme Court said:

> It is true that the order of the Governor, issued on January 12th, conferred no authority to act on the 10th. But Judge Murphy may have been, and probably was, presiding on the 10th by invitation of Judge Angellotti. Such invitation would have conferred the requisite authority. . . . No question as to Judge Murphy's authority was raised at the time of entering the plea, and it must be presumed that he was lawfully exercising jurisdiction. (Code Civ. Proc., sec. 1963, subds. 14-16.) [97 Cal. at 177.]

It is difficult to see how the case is distinguishable from People v. Sassovich or Oakland Paving Co. v. Donovan.

In People v. Cobler, 108 Cal. 538 (1895), the defendant was charged with embezzling funds while he was a deputy county assessor for the County of Los Angeles. He contended that there was no evidence that the assessor ever

qualified by filing a bond and oath, and that there was no evidence that he himself had ever filed an oath or bond as required of a deputy. The court rejected the contentions with the words:

> It was clearly shown that Mr. Gray was acting as assessor of the county of Los Angeles during the year 1898, and the defendant was acting as his deputy. The law presumes "that a person acting in a public office was regularly appointed to it," and "that official duty has been regularly performed." . . . If, therefore, the defendant, while acting as deputy assessor, received as such officer monies belonging to the county, and fraudulently appropriated them to his own use, he was guilty of embezzlement under the provision of section 504 of the Penal Code.

The de facto officer doctrine might have been cited to preclude this collateral attack upon the qualification of the county assessor. Apparently, it was overlooked.

In City of Monterey v. Jacks, 139 Cal. 542 (1903), the trustees of the city conveyed the city's pueblo lands to Jacks and Ashley in payment of a legal fee. Some years later the conveyance was attacked by the city for the reason, among others, that the persons purporting to act as trustees of the city and who executed the deed were never trustees. The Supreme Court pointed out that there was ample evidence that the parties who signed the deed were the acting trustees of the city, were known to be such from common report, and had transacted the city's business for a considerable length of time. "We think this evidence was sufficient to establish that they were de facto officers, and, this having been proven, their legal selection will be presumed until the contrary is shown. The presumption is indulged in that a person acting in a public office was regularly appointed to it." Emphasis added. In view of the finding that the trustees were the de facto officers, the remaining language concerning the presumption of regular appointment creates the erroneous impression that the validity of the deed could be attacked by showing the want of legal authority in the acting

trustees. The de facto officer doctrine would preclude such an attack.

In People v. Howard, 72 Cal. App. 561 (1925), the presumption of regular appointment was cited to supply the proof that a person who signed a certified copy of a conviction and commitment to San Quentin was in fact the person legally appointed as the secretary of the warden. It seems likely that it was unnecessary to cite the presumption, and, in any event, the Commission's proposed Section 1414 covers the situation presented in the case.

People v. Beal, 108 Cal. App.2d 200, 239 P.2d 84 (1951), involved the same problem presented in People v. Howard. A certified copy of the defendant's prison record was admitted, and the defendant argued that there was no evidence that the deputy director who signed the certified copy was in fact the deputy director. "As Klinger purported to act as such it would be presumed prima facie that he was a regularly appointed deputy." 108 Cal. App.2d at 205.

From the foregoing, it appears that most of the cases in which the presumption has been cited could be decided without regard to the presumption. The de facto officer doctrine should have controlled the decision in most of these cases. The presumption as to official seals and signatures in proposed Section 1414 prescribes the correct rule for the Howard and Beal cases. The only case in which the presumption may have played any significant role is People v. Otto. In People v. Otto, the question was not whether the persons who paid their taxes to the undersheriff had discharged their obligation to pay taxes. The de facto officer doctrine would have protected them on that issue. The question was whether the undersheriff's actions were binding on the sheriff and his sureties in the absence of a legal, de jure, appointment. The court assumed the legality of the appointment under the presumption in Section 664 and went on to discuss the liability of the sheriff's sureties for the actions of the de jure undersheriff.

People v. Otto may be obsolete under existing law. Government Code Section 820.8 now provides that a public employee is not liable for an injury caused by the act or omission of another. This section eliminates the former common law liability of some officers for the acts of their deputies. Deputies and officers are now customarily covered by personal or blanket bonds. It is settled that a bond for a particular officer is valid and enforceable whether the officer is a de jure officer or a de facto officer. People v. Hammond, 109 Cal. 384 (1895); Hill v. New Amsterdam Casualty Co., 105 Cal. App. 156 (1930).

Accordingly, it appears that the presumption stated in proposed Section 664 may be unnecessary. Its existence seems to have caused some courts to overlook the de facto officer doctrine in deciding cases that might properly have been decided under that doctrine. Perhaps, this provision was an inaccurate attempt on the part of the 1872 drafters to state the de facto officer doctrine. In any event, since we have found no case in which the presumption seems significant aside from the de facto officer doctrine, we believe the presumption can be repealed.

Section 665

The Commission considered the presumption that official duty has been regularly performed (Code Civ. Proc. § 1963-15) but passed over it without action. Action was deferred so that it could be considered together with the presumption that the law has been obeyed (Code Civ. Proc. § 1963-33). No action has been taken in regard to the "law has been obeyed" presumption, either.

There are several different kinds of cases that arise under these statutory provisions. A large group of cases cite the presumptions as various expressions of the presumption against wrongdoing (§ 1963-1) or the presumption of due care

(§ 1963-4). Another group of cases cites the presumptions as make-weights in cases where a plaintiff, who has the burden of proof anyway, contends that a judgment for the defendant is not supported by the evidence--the presumption is used to show that there was evidence for the defendant. Of course, the presumption here has no significance at all. The defendant did not have to prove his case, the plaintiff had to prove his. All that the court need find is that the plaintiff did not prove his case to a sufficient extent so that no rational juror could disbelieve it.

In reviewing the very large body of cases that have cited these presumptions, we have discovered some where the presumption seems to play a significant role. Many of these are gathered in our Memorandum 64-2. The presumptions seem to be most important in those cases where they are invoked to sustain ordinances (County of San Diego v. Seifert, 97 Cal. 594 (1893)), resolutions (City of National City v. Dunlop, 86 Cal. App.2d 380 (1948)), bond issues (District Bond Co. v. Hilliker, 37 Cal. App.2d 81 (1940)), tax assessments (Crowell v. Harvey Investment Co., 128 Cal. App. 241 (1932)), etc.

Since cases of this sort are the only ones we have been able to find in which the presumption has played a significant role, we have revised the presumption as stated in Section 665 to read:

> When official action has been taken, it is presumed that all prerequisites to such action have been taken.

However, as we pointed out at the beginning of this part of the memorandum, no action has been taken by the Commission either on the presumption that official duty has been performed or that the law has been obeyed.

We attach hereto an excerpt from Memorandum 64-2 that relates to this matter.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXHIBIT I

C.C.P. § 1963

15. That official duty has been regularly performed.

Class: Thayer presumption.

The annotations indicate that this presumption is usually applied to sustain some official action the validity of which is dependent upon some preceding official action and there is no evidence as to whether the preceding action was taken or not. The presumption is that, since someone had the duty to take action, such action was taken.

At times, however, it is applied in the face of conflicting evidence. For example, in City of National City v. Dunlop, 86 Cal. App.2d 380, 194 P.2d 788 (1948), the city brought an ejectment action to compel the defendant to leave a portion of a city street. The defendant asserted that the property was not a city street, and relied on a resolution vacating the street adopted by the city a few years before. The city contended the resolution was void for lack of proper posting of notice of hearing on the resolution. It produced an official who testified that it was his duty to do all of the legal posting for National City, and to his knowledge the requisite posting was not done. The court, relying on the presumption, held that the city had the burden of proof and that the evidence it produced was not sufficient to negative the presumption that some other official did the necessary posting. The appellate court affirmed a judgment of the trial court, made without a jury verdict; hence, the case gives no real indication whether presumption affects the burden of proof.

In People v. Siemsen, 153 Cal. 387, 95 Pac. 863 (1908), the defendant attacked the information on the ground that it was filed before he had been held to answer by a magistrate. His attorney testified that he had

seen the complaint on the day the information was filed and that no commitment order was affixed to it at that time; although, at the time of trial such an order, dated two days prior to the information, was affixed to the complaint. The judge testified that he had no independent recollection but thought he signed the order two days prior to the information because the order bore that date. The appellate court sustained the trial court's refusal to set aside the information in reliance on the presumption. Again, however, since the trial court was affirmed, little clue is given as to the effect of the presumption on the burden of proof. Moreover, the burden would probably have been placed on the defendant anyway, for he was the moving party on the motion to set aside the information.

In People v. Metropolitan Surety Co., 164 Cal. 174, 180, 128 Pac. 324 (1912), the Supreme Court said:

> The presumption that an officer has performed his official duty is, at best, "weak and inconclusive" . . . , and whatever force it possesses would seem to vanish upon proof that the particular duty in question . . . had in fact been violated.

The foregoing tends to indicate that the presumption should be classified as a Thayer presumption, disappearing from the case when any contrary evidence sufficient to warrant a finding is introduced.

There are, however, considerations pointing the other way. The presumption is used to sustain resolutions (the National City case, above), ordinances (San Diego County v. Seifert, 97 Cal. 594, 32 Pac. 644 (1893)), bond issues (District Bond Co. v. Hilliker, 37 Cal. App.2d 81, 98 P.2d 782 (1940)), tax assessments (Crowell v. Harvey Inv. Co., 128 Cal. App. 241, 17 P.2d 189 (1932)), and similar matters of great public concern. The

public interest in the stability of the listed matters would tend to indicate that the person attacking the official action should have the burden of persuasion on the issue--that official action should not be upset unless the trier of fact is persuaded that it should be. Then, too, the inference that an action was taken because there was a duty to take action does not seem too strong. Hence, there seems to be considerable justification for classifying the presumption as a Morgan presumption.

The Commission should be aware of some of the other applications of the presumption, too. The presumption has been applied to sustain the validity of arrests when there has been no evidence that the officers were proceeding without a warrant or without reasonable cause. People v. Farrara, 46 Cal.2d 269, 294 P.2d 23 (1956); People v. Beard, 46 Cal.2d 278, 294 P.2d 29 (1956); People v. Citrino, 46 Cal.2d 284, 294 P.2d 32 (1956). Perhaps these cases can be explained, however, on the ground that the defendant in the situation was the moving party--moving to dismiss an information or indictment as based on illegally obtained evidence, moving to supress evidence, or objecting to the admissibility of evidence. Hence, he would have the burden of proof anyway and would lose in the absence of any evidence. In Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23 (1956), the court held that proof by the defendant of an entry or arrest without a warrant was prima facie evidence of an illegal entry or illegal arrest, and was conclusive in the absence of prosecution evidence showing reasonable cause. Thus, the defendant's proof completely dispelled the presumption and, in effect, invoked a presumption operating against the prosecution.

In People v. Perry, 79 Cal. App.2d Supp. 906, 180 P.2d 465 (1947), it was held that the prosecution could not rely on the presumption to supply

an element in its burden of proof. That was a prosecution for interfering with an arrest, and it was held that the prosecution must prove the lawfulness of the arrest without relying on presumptions. The presumption that an arrest is unlawful (People v. Agnew, 16 Cal.2d 655, 107 P.2d 601 (1940)) prevails over the presumption of performance of a legal duty.

In Caminetti v. Guaranty Union Life Insur. Co., 52 Cal. App.2d 330, 126 P.2d 159 (1942), the insurance company applied for an order terminating a conservatorship. The insurance commissioner, on ex parte application, had taken over the company because of a "hazardous condition" to the policy holders. The company objected to the fact that the trial court placed the burden of proof on the company to show that the ground for takeover did not exist or had been removed. The appellate court affirmed the allocation of the burden of proof partly because of the presumption and partly because the company was the moving party.

In People v. James, 5 Cal. App. 427, 90 Pac. 561 (1907), the defendant in a murder prosecution sought to discharge the burden of proof on justification that is placed by statute on the defendant. The court refused to instruct "that the law presumes that if the defendant was an officer and acting as such at the time of the alleged homicide that he was doing his duty." On appeal, this ruling was affirmed, the court commenting that a homicide by a peace officer is not presumed justifiable merely because of his official position.

In County of Sutter v. McGriff, 130 Cal. 124, 62 Pac. 412 (1900), a condemnation action, the court held that the plaintiff had to prove compliance with a statute requiring a tender as a prerequisite to the action, and it would not rely on this presumption to discharge its burden of proof.

In Estate of Stobie, 30 Cal. App.2d 525, 86 P.2d 883 (1930), the guardian appealed from an order requiring him to pay $40 per month to the State for the maintenance of his ward in a state mental hospital. The State had petitioned for the order and did not prove that the amount fixed by the State was equal to the cost of upkeep--the limit of the amount the State was entitled to receive. The court held that the presumption could be relied on and that the guardian had the burden of introducing evidence showing that the figure was arbitrary and unreasonable.

In Hollander v. Denton, 69 Cal. App.2d 348, 159 P.2d 86 (1945), the court held that a party with the burden of proof who relies on an ordinance need not prove due publication--the presumption sufficed.

These cases are cited to show some of the variety of holdings involving this presumption. Some of the cases indicate that there should be no presumption at all. The ordinary burden of proof allocates the burden of proof properly and the party with that burden cannot rely on the presumption to discharge it. People v. James, supra; People v. Perry, supra; County of Sutter v. McGriff, supra. Others indicate that the presumption should apply in the absence of evidence in favor of the party with the burden of proof. Estate of Stobie, supra. There is some indication that the presumption has been relied on to assign the burden of proof. Caminetti v. Guaranty Union Life Insur. Co., supra.

Although we are not free from doubt, we are inclined to give the presumption a Thayer classification. Although there should be a policy favoring the regularity of official action, we think that policy is sufficiently served by an assumption that will be made only in the absence of evidence.

file

STATE OF CALIFORNIA

C A L I F O R N I A L A W
R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION AND A STUDY

Relating to

The Uniform Rules of Evidence
Burden of Producing Evidence, Burden of Proof,
and Presumptions

(Replacing Article III of the Uniform Rules of Evidence)

May 1964

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

Draft: March 13, 1964
Revised: April 10, 1964
Revised: May 8, 1964

LETTER OF TRANSMITTAL

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing a tentative recommendation on Burden of Producing Evidence, Burden of Proof, and Presumptions. This tentative recommendation replaces Article III (Presumptions) of the Uniform Rules of Evidence.

This report also contains a research study relating to Article III of the Uniform Rules prepared by one of the Commission's research consultants, Professor James H. Chadbourn of the Harvard Law School and an additional research study relating to the subject of this tentative recommendation prepared by the Commission's other research consultant, Professor Ronan E. Degnan of the School of Law, University of California at Berkeley. Only the tentative recommendation (as distinguished from the research studies) expresses the views of the Commission.

This report is one in a series of reports being prepared by the Commission on the Uniform Rules of Evidence, each report covering a different article of the Uniform Rules.

In preparing this report, the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence. The proposed Missouri Evidence Code (1948) promulgated by the Missouri Bar also was of great assistance to the Commission.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, Room 30, Crothers Hall, Stanford University, Stanford, California.

Respectfully submitted,

JOHN R. McDONOUGH, JR.
Chairman

May 1964

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Burden of Producing Evidence, Burden of Proof, and Presumptions

The Uniform Rules of Evidence (hereinafter sometimes designated as the "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.[2]

A tentative recommendation of the Commission on the burden of producing evidence, the burden of proof, and presumptions is set forth herein. This recommendation replaces Article III of the Uniform Rules of Evidence. (Article III, consisting of Rules 13 through 16, relates to presumptions.)

A presumption is a rule of law requiring that a particular fact be assumed to exist when some other fact is established. Upon this proposition, all courts and writers seem to agree. But little agreement can be found as to the nature of the showing required to overcome a presumptions. Some courts and writers contend that a presumption disappears upon the introduction of sufficient evidence to sustain a finding of the nonexistence of the presumed fact. Others contend that a presumption endures until the trier of fact is persuaded of the nonexistence of the presumed fact.

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1. A pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 30 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

2. Cal. Stats. 1956, Res. Ch. 42, p. 263.

In California, a presumption is regarded as evidence to be weighed with all of the other evidence. Hence, it almost always endures until the final decision in the case. Some California decisions hold that presumptions do not place the burden of proof on the adverse party to show the nonexistence of the presumed fact. But it seems clear that many presumptions in California do place the burden of proof on the adverse party, and in some instances he cannot meet that burden except by clear and convincing proof. The statutes in California sometimes specify that proof of a particular fact or group of facts is "prima facie evidence" of another fact. It is difficult to determine whether these statutes are intended to create presumptions (legally required conclusions) or whether they are intended to indicate that the conclusionary fact may, but need not, be found if the underlying fact is proved. In some instances, such statutes have been construed to require a finding of the conclusionary fact unless the trier of fact is persuaded of its nonexistence.

The URE distinguishes presumptions according to the probative value of the evidence giving rise to the presumption: if the underlying evidence has probative value, the presumption affects the burden of proof; but if the underlying evidence has no probative value in relation to the presumed fact, the presumption does not affect the burden of proof.

The Commission approves the notion that some presumptions should affect the burden of proof and that others should not, but it disagrees with the basis of the classification proposed in the URE. Moreover, the URE rules are inadequate to resolve many of the uncertainties and inconsistencies in the present California law relating to presumptions. Accordingly, the Commission has undertaken to rewrite completely the URE provisions on presumptions.

Because presumptions sometimes affect the burden of proof and always affect the burden of producing evidence, the Commission has considered in connection with its study of presumptions certain existing statutes relating to the burden of proof and the burden of producing evidence. These statutes, enacted for the most part in 1872 and unchanged since that time, have been found to be inaccurate and based on obsolete theories of pleading and proof. These statutes have been revised to eliminate obsolete material and to restate accurately the existing California law relating to the burden of proof and burden of producing evidence. The statutes proposed by the Commission do not purport to deal comprehensively with these burdens; the proposed statutes are intended merely to correct and recodify existing statutes on the subject.

Because the URE was not designed to accomodate the extensive proposals the Commission recommends in regard to presumptions, the burden of proof, and the burden of producing evidence, the Commission has departed from the format of the URE in setting forth its tentative recommendation in regard to these matters.

In the material which follows, the URE rules are set forth in strikeout type so that they may be readily compared with the recommendations of the Commission. Following the URE rules the Commission's proposals appear in a form in which they might be enacted as part of a new California Evidence Code.* Each section recommended by the Commission is followed by a comment setting forth the major considerations that influenced the Commission in recommending the provision and any important substantive changes in the corresponding California law.

For an analysis of the URE rules and the California law relating to the burden of producing evidence, the burden of proof, and presumptions, see the research studies beginning on pages CCO and CCO.

* The Law Revision Commission intends to recommend that its proposals relating to evidence be enacted as a new code, the Evidence Code.

ARTICLE III. PRESUMPTIONS

[RULE 13.--Definition.--A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.]

[RULE 14.--Effect of Presumptions.--Subject to Rule 16, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the non-existence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.]

[RULE 15.--Inconsistent Presumptions.--If two presumptions arise which are conflicting with each other the judge shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance both presumptions shall be disregarded.]

[RULE 16.--Burden of Proof Not Relaxed as to Some Presumptions.--A presumption, which by a rule of law may be overcome only by proof beyond a reasonable doubt, or by clear and convincing evidence, shall not be affected by Rules 14 or 15 and the burden of proof to overcome it continues on the party against whom the presumption operates.]

DIVISION 5. BURDEN OF PRODUCING EVIDENCE, BURDEN OF PROOF, AND PRESUMPTIONS

CHAPTER 1. BURDEN OF PRODUCING EVIDENCE

500. The burden of producing evidence is on the party to whom it is assigned by statutory or decisional law. In the absence of such assignment, the party who has the burden of producing evidence shall be determined by the court as the ends of justice may require.

COMMENT

Section 1981 of the Code of Civil Procedure provides that the party holding the affirmative of the issue must produce the evidence to prove it, and that the burden of proof lies on the party who would be defeated if no evidence were given on either side.

The term "burden of proof" as used in Section 1981 probably embraces both the concept of burden of persuasion and the concept of burden of producing evidence. However, the distinction between these concepts was not as clear in 1872 as it became after Professors Thayer and Wigmore made their analyses of the law of evidence. This statute separates the concepts and provides the guides for determining the incidence of the burden of producing evidence in Section 500 and the guides for determining the incidence of the burden of proof in Section 510.

It has long been recognized that the party with the affirmative of the issue does not necessarily have the burden of producing evidence or the

burden of proof. For example, the party who claims that a bailee was negligent must prove only that the bailee received the goods in undamaged condition and that the goods were lost or damaged while in the bailee's possession. The bailee must prove that the loss or damage occurred without negligence on his part. George v. Bekins Van & Storage Co., 33 Cal.2d 834, 205 P.2d 1037 (1949). The party suing for malicious prosecution must show the lack of probable cause. Griswold v. Griswold, 143 Cal. 617, 77 Pac. 672 (1904). Lack of consideration for a written instrument is a defense which must be proved by the defendant. CAL. CIV. CODE § 1615.

There appears to be no single criterion for determining the incidence of the burden of producing evidence or the burden of proof. The courts consider a variety of factors in determining the allocation of these burdens. Among these considerations are the peculiar knowledge of the parties concerning the particular fact, the most desirable result in terms of public policy and justice to the litigants in the absence of evidence, the probability of the existence or nonexistence of the disputed fact, and the relative ease of proving the existence of a fact as compared with proving the nonexistence of a fact. See 9 WIGMORE, EVIDENCE §§ 2486-2488; Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 STAN. L. REV. 5, 8-14 (1959).

Accordingly, Section 500 has abandoned the erroneous proposition that the burden of producing evidence is on the party with the affirmative of the issue and has substituted a general reference to the statutory and decisional law that has developed despite the provisions of Code of Civil Procedure Section 1981. In the absence of any statutory or decisional authority, the judge should weigh the various considerations that affect

the burden of producing evidence and allocate the burden as the ends of justice may require in litigation of the kind in which the question arises.

Section 500 deals with the allocation of the burden of producing evidence. At the outset of the case, this burden will coincide with the burden of proof. 9 WIGMORE, EVIDENCE 279. But, during the course of the trial the burden may shift from one party to another irrespective of the incidence of the burden of proof. For example, if the party with the initial burden of producing evidence establishes a fact giving rise to a presumption, the burden of producing evidence will shift to the other party, whether or not the presumption is one that affects the burden of proof. In addition, a party may introduce evidence of such overwhelming probative force that no person could reasonably disbelieve it in the absence of countervailing evidence, in which case the burden of producing evidence would shift to the opposing party to produce some evidence. These principles are in accord with well settled California law. See discussion in WITKIN, CALIFORNIA EVIDENCE 71-75. See also, 9 WIGMORE, EVIDENCE § 2487.

CHAPTER 2. BURDEN OF PROOF

Article 1. General

510. The burden of proof is on the party to whom it is assigned by statutory or decisional law. In the absence of such assignment, the party who has the burden of proof shall be determined by the court as the ends of justice may require.

COMMENT

The criteria for determining the party who has the burden of persuasion (the "burden of proof") are the same as the criteria for determining the party who has the burden of producing evidence. See Comment to Section 500. However, the determination takes place at a different time. The burden of producing evidence is determined by the judge at the outset of a trial and from time to time during the course of a trial. The burden of persuasion must be determined only at the close of the evidence and when the question in dispute is to be submitted to the trier of fact for determination. Thus, although the incidence of the burden of producing evidence and the burden of persuasion are determined by similar factors, they may at times be on different parties to the action. For example, the prosecution in a criminal action has the burden of proof beyond a reasonable doubt as to the issues relating to the defendant's guilt. The defendant, however, may at times be required to come forward with evidence in order to avoid a determination that a fact essential to his guilt has been established against him. See, e.g., People v. Hardy, 33 Cal.2d 52, 198 P.2d 865 (1948); People v. Scott, 24 Cal.2d 774, 151 P.2d 517 (1944); see CALJIC, Nos. 451, 452, and 704 (Rev. ed. 1958). Similarly, the plaintiff in a negligence action has the burden of proof on the issue of negligence, but if the plaintiff relies on res ipsa loquitur the defendant will have the burden in the course of the trial of coming forward with evidence of his lack of negligence. See, e.g., Burr v. Sherwin-Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954).

Although it is sometimes said that the burden of proof never shifts (see cases collected in WITKIN, CALIFORNIA EVIDENCE at 71), this is true only in the limited sense that the burden of proof is not determined until the case is finally submitted for decision. Cf. MORGAN, SOME PROBLEMS OF PROOF 79-81 (1956). During the trial, assumptions as to the eventual allocation of the burden of proof may be changed, and in this sense the burden of proof does shift. For example, the party asserting that an arrest was unlawful has the burden of proving that fact at the outset of the case. However, if he proves, or it is otherwise established, that the arrest was made without a warrant, the party asserting the lawfulness of the arrest then has the burden of proof on the issue of probable cause. See, e.g., Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23 (1956); Dragna v. White, 45 Cal.2d 469, 289 P.2d 428 (1955); People v. Gorg, 45 Cal.2d 776, 782, 291 P.2d 469 (1955).

511. The provisions of this chapter, except Section 522, that assign the burden of proof as to specific issues are subject to Penal Code Section 1096. Therefore, when the defendant in a criminal case has the burden of proof under this chapter as to the existence or nonexistence of any fact, except his sanity, essential to his guilt or innocence, his burden of proof is to establish a reasonable doubt as to his guilt.

COMMENT

Under existing California law, certain matters have been called "presumption" even though they do not fall within the definition contained

in Code of Civil Procedure Section 1959. Both existing Section 1959 and proposed Section 600, infra, define a presumption to be an assumption or conclusion of fact that the law requires to be drawn from the proof or establishment of some other fact. Despite the statutory definition, subdivisions (1) and (4) of Code of Civil Procedure Section 1963 provide presumptions that a person is innocent of crime or wrong and that a person exercises ordinary care for his own concerns. It is apparent that these so-called presumptions of innocence and of due care do not arise from the establishment or proof of a fact in the action. Similarly, some cases refer to a presumption of sanity, which does not arise from the proof or establishment of a fact in the action. Because these "presumptions" do not arise from the proof or establishment of some fact in the action, they are not in fact presumptions but are preliminary allocations of the burden of proof in regard to the particular issue. This preliminary allocation of the burden of proof may be satisfied in particular cases by proof of a fact giving rise to a presumption that does affect the burden of proof. For example, the initial burden of proving negligence may be satisfied in a particular case by proof that undamaged goods were delivered to a bailee and that such goods were lost or damaged while in the bailee's possession. Upon such proof, the bailee would have the burden of proof as to his lack of negligence. George v. Pekins Van & Storage Co., 33 Cal.2d 834, 205 P.2d 1037 (1949).

Because the assumptions referred to above do not meet the definition of a presumption contained in Section 600, they are not continued in this statute as presumptions. Instead, there follow in the next article several sections allocating the burden of proof on specific issues. Section 511 is

included, however, to make clear that nothing in these sections changes the rule that the prosecution must prove every element of a defendant's guilt beyond a reasonable doubt. The only issue going to the defendant's guilt or innocence upon which the defendant has the burden of proof is the issue of insanity. Under these statutes, as under existing law, the defendant must prove his insanity by a preponderance of the evidence. People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911 (1953). On all other issues relating to the defendant's guilt, under these statutes as under existing law, the defendant's burden is merely to establish a reasonable doubt as to his guilt. People v. Hardy, 33 Cal.2d 52, 63-66, 198 P.2d 865 (1948); People v. Scott, 24 Cal.2d 774, 783 (1944); People v. Agnew, 16 Cal.2d 655, 665, 107 P.2d 601 (1940).

Article 2. Burden of Proof on Specific Issues

520. The party claiming that a person is guilty of crime or wrong has the burden of proof on the issue.

COMMENT

The above section is based on subdivision (1) of Code of Civil Procedure Section 1963. Of course, in a criminal case the prosecution has the burden of proof beyond a reasonable doubt. PEN. CODE § 1096.

521. The party claiming that a person did not exercise a requisite degree of c re has the burden of proof on the issue.

COMMENT

The above section is based on subdivision (4) of Code of Civil Procedure Section 1963.

522. The party claiming that any person, including himself, is or was insane has the burden of proof on the issue.

COMMENT

The above section codifies an allocation of the burden of proof that is frequently referred to in the cases as a presumption. See, e.g., People v. Daugherty, 40 Cal.2d 876, 899, 256 P.2d 911 (1953).

523. Whenever in any action or proceeding, civil or criminal, brought by, or in the name of, the state or the people thereof, or by or in the name of any political subdivision or agency of the state, or by any public board or officer on behalf of any thereof, to enforce any law which denies any right, privilege or license to any person not a citizen of the United States, or not eligible to become such citizen, or to a person not a citizen or resident of this state, and whenever in any action or proceeding in which the state or any political subdivision or agency thereof, or any public board or officer acting on behalf thereof, is or becomes a party, it is alleged in the pleading therein filed on behalf of the state, the people thereof, political subdivision or agency, or of such board or officer, that such right, privilege or license has been exercised by a person not a citizen of the United States, or not eligible to become such citizen, or by a person not a citizen or resident of this state, as the case may be, the burden shall be upon the party for or on whose behalf such pleading was filed to establish the fact that such right, privilege or license was exercised by the person alleged to have exercised the same, and upon such fact being so established the burden shall be upon such person, or upon any person, firm or corporation

claiming under or through the exercise of such right, privilege or license, to establish the fact that the person alleged to have exercised such right, privilege or license was, at the time of so exercising the same, a citizen of the United States, or eligible to become such citizen, or was a citizen or resident of this state, as the case may require, and was at said time legally entitled to exercise such right, privilege or license.

COMMENT

This section is a recodification of Code of Civil Procedure Section 1983. It was held unconstitutional as applied under the Alien Land Law. Morrison v. California, 291 U.S. 82 (1934). But it has been held constitutional as applied under the Deadly Weapons Act. People v. Cordero, 50 Cal. App.2d 146, 122 P.2d 648 (1942)(hearing denied).

CHAPTER 3. PRESUMPTIONS

Article 1. General

600. A presumption is a rule of law which requires a fact to be assumed from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.

COMMENT

The foregoing definition of a presumption is substantially the same as that contained in Code of Civil Procedure Section 1959: "A presumption is a deduction which the law expressly directs to be made from particular facts." The above definition has been taken from URE Rule 13.

The second sentence may not be necessary in light of the definition of "evidence" in Revised Rule 1(1). Revised Rule 1(1) defines evidence as the testimony, material objects, and other matters cognizable by the senses that are presented to a tribunal as a basis of proof. Presumptions and inferences, then, are not "evidence" but are conclusions that either are required to be drawn or are permitted to be drawn from evidence. An inference under this statute is merely a fact conclusion that rationally can be drawn from the proof of some other fact. A presumption under this statute is a conclusion the law requires to be drawn (in the absence of a sufficient contrary showing) when some other fact is proved or otherwise established in the action.

Nonetheless, the second sentence has been added here to repudiate specifically the rule of Smellie v. Southern Pacific Co., 212 Cal. 540 (1931). That case held that a presumption is evidence that must be weighed against

conflicting evidence; and in Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313 (1952), the Supreme Court held that conflicting presumptions must be weighed against each other. These decisions require the jury to perform an intellectually impossible task. It is required to weigh the testimony of witnesses and other evidence as to the circumstances of a particular event against the fact that the law requires an opposing conclusion in the absence of contrary evidence and determine which "evidence" is of greater probative force. Or else, it is required to weigh the fact that the law requires two opposing conclusions and determine which required conclusion is of greater probative force.

Moreover, the doctrine that a presumption is evidence imposes upon the party with the burden of proof an even higher burden of proof than is warranted. For example, if a presumption relied on by the defendant in a criminal case is not dispelled by the prosecution's proof beyond a reasonable doubt, the effect is that the prosecution must produce some additional, but unascertainable, quantum of additional proof in order to overcome the presumption. Similarly, in a civil case, if a party with the burden of proof has a presumption invoked against him and the presumption remains in the case as evidence even though the jury believes that he has produced a preponderance of the evidence, the effect is that he must produce some additional quantum of proof in order to dispel the effect of the presumption. No guidance is given to the jury or to the parties as to the amount of this additional proof by the doctrine that a presumption is evidence. The most that a party in a civil case should be expected to do is prove his case by a preponderance of the evidence (unless some specific presumption or rule of law requires proof of a particular issue by clear and convincing evidence).

And the most that the prosecution should be expected to do in a criminal case is establish the defendant's guilt beyond a reasonable doubt. To require some additional quantum of proof, unspecified and uncertain in amount, to dispel a presumption which persists as evidence in the case unfairly weights the scales of justice against the party with the burden of proof.

To avoid the confusion engendered by the doctrine that a presumption is evidence, these statutes describe "evidence" as the matters presented in judicial proceedings and use presumptions solely as devices to aid in determining the facts from the evidence presented.

601. (a) A presumption is either conclusive or rebuttable.

(b) Every rebuttable presumption in the law of this State is either:

(1) A presumption affecting the burden of producing evidence; or

(2) A presumption affecting the burden of proof.

COMMENT

Under existing law, some presumptions are conclusive. The court or jury is required to find the existence of the presumed fact regardless of the strength of the opposing evidence. The conclusive presumptions are specified in Section 1962 of the Code of Civil Procedure.

Under existing law, too, all presumptions that are not conclusive are rebuttable presumptions. CODE CIV. PROC. § 1961. But the existing statutes make no attempt to classify the rebuttable presumptions.

For several decades, courts and legal scholars have wrangled over the purpose and function of presumptions. The view espoused by Professors Thayer (THAYER, A PRELIMINARY TREATISE ON EVIDENCE 313-353 (1898)) and Wigmore (9

WIGMORE, EVIDENCE §§ 2485-2491 (3d ed. 1940)), and accepted by most courts (see Study, p. 3), is that a presumption is a preliminary assumption of a fact that disappears from the case upon the introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact. In Professor Thayer's view, a presumption merely reflects the judicial determination that the same conclusionary fact exists so frequently when the preliminary fact is established that proof of the conclusionary fact may be dispensed with unless there is actually some contrary evidence:

> Many facts and groups of facts often recur, and when a body of men with a continuous tradition has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut short the process and lay down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them. [A PRELIMINARY TREATISE ON THE LAW OF EVIDENCE 326.]

Professors Morgan and McCormick and others argue that a presumption should shift the burden of proof to the adverse party. (See Study, infra, pp. 5-8.) They believe that presumptions are created for reasons of policy and argue that if the policy underlying a presumption is of sufficient weight to require a finding of the presumed fact when there is no contrary evidence, it should be of sufficient weight to require a finding when the mind of the trier of fact is in equilibrium, and, a fortiori, it should be of sufficient weight to require a finding if the trier of fact does not believe the contrary evidence.

The American Law Institute Model Code of Evidence adopted the Thayer view of presumptions. The URE adopted the Morgan view insofar as presumptions based on a logical inference are concerned, and adopted the Thayer view as to presumptions not based on a logical inference.

The Commission has concluded that the Thayer view is correct as to some presumptions, but that the Morgan view is right as to others. The fact is that presumptions are created for a variety of reasons and no single theory or rationale of presumptions can deal adequately with all of them. This conclusion is not unique. In 1948, a committee of the Missouri Bar which drafted a proposed Missouri Evidence Code came to the same conclusion. In that proposed code, presumptions were divided into two categories: (1) presumptions affecting the burden of proof (essentially Morgan presumptions), and (2) presumptions affecting the burden of producing evidence (essentially Thayer presumptions). The same classification is recommended here.

The classification proposed in the URE is unsound. The public policy expressed in many presumptions not based on an underlying rational inference would be thwarted if the presumption disappeared from the case upon the introduction of contrary evidence, whether believed or not. For example, Labor Code Section 3708 provides that an employee's injury is presumed to be the direct result of the employer's negligence if the employer fails to secure the payment of workmen's compensation. Clearly, there is no rational connection between the fact to be proved--failure to secure payment of compensation--and the presumed fact of negligence. If the presumption disappeared upon the introduction of any contrary evidence sufficient to sustain a finding, even though not believed, and if the employer introduced such evidence, the court would be compelled to direct a verdict against the employee unless he actually produced evidence that the employer was negligent. The directed verdict would be required because of the lack of any evidence from which it could be rationally inferred that the employer

was negligent. Yet, it seems likely that the Labor Code presumption was adopted to force the employer to do more than merely introduce some evidence--perhaps a bare denial--which is believed by no one. If the presumption did no more, the employee would be forced in virtually every case to prove the employer's negligence. The presumption has practical significance only if it survives the introduction of contrary evidence and forces the employer to persuade the jury that he was not negligent.

Thus, a presumption affecting the burden of proof is most needed when the logical inference supporting the presumption is weak or nonexistent but the public policy underlying the presumption is strong. Because the URE fails to provide for presumptions affecting the burden of proof at precisely the point where they are most needed, the Commission has disapproved URE Rules 14-16 and has substituted for them proposed statutes classifying presumptions according to the nature of the policy considerations upon which the presumptions appear to be based.

602. A statute providing that a fact or group of facts is prima facie evidence of another fact creates a rebuttable presumption.

COMMENT

Section 602 indicates the construction to be given to the large number of statutes scattered through the codes that state that one fact or group of facts is prima facie evidence of another fact. See, e.g., AGR. CODE § 18, COMM. CODE § 1202, REV. & TAX. CODE § 6714. In some instances, these statutes have been enacted for reasons of public policy that require them to be treated as presumptions affecting the burden of proof. See People v. Mahoney, 13 Cal.2d 729, 733-734 (1939); People v. Schwartz, 31 Cal.2d 59,

63 (1947). It seems likely, however, that in many instances such statutes are not intended to affect the burden of proof but only the burden of producing evidence. Section 602 provides that these statutes are to be regarded as rebuttable presumptions. Hence, unless some specific language applicable to the particular statute in question indicates whether it affects the burden of proof or only the burden of producing evidence, the courts will be required to classify these statutes as presumptions affecting the burden of proof or the burden of producing evidence in accordance with the criteria set forth in proposed Sections 603 and 605.

603. A presumption affecting the burden of producing evidence is a presumption established to implement no public policy except to facilitate the determination of the particular action in which the presumption is applied by dispensing with the necessity for proof of the presumed fact in the absence of contrary evidence.

COMMENT

Sections 603 and 605 set forth the criteria for determining whether a particular presumption is a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof. Many presumptions are classified in Articles 3 and 4 of this chapter (Sections 630-676). In the absence of specific statutory classification, the courts may determine whether a presumption is a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof by applying the standards contained in Sections 603 and 605.

Section 603 describes those presumptions that are not based on any public policy extrinsic to the action in which they are invoked. These

presumptions are designed to dispense with unnecessary proof of facts that are likely to be true if not disputed. Typically, such presumptions are based on an underlying logical inference. In some cases the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence. In other cases, evidence of the nonexistence of the presumed fact, if there is any, is so much more readily available to the party against whom the presumption operates that he will not be permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence. In still other cases, there may be no direct evidence of the existence or nonexistence of the presumed fact; but, because the case must be decided, a presumption requires a determination that the presumed fact exists because common experience indicates that it usually exists in such cases. Typical of such presumptions are the presumption that a mailed letter was received (Section 641) and presumptions of the authenticity of documents (Sections 643-645).

The presumptions described in Section 603 are not expressions of policy, they are expressions of experience. They are intended solely to eliminate the need for the trier of fact to reason from the proven or established fact to the presumed fact, and to forestall argument over the existence of the presumed fact, when there is no evidence tending to prove the nonexistence of the presumed fact.

604. A presumption affecting the burden of producing evidence requires the trier of fact to find the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.

COMMENT

Section 604 describes the manner in which a presumption affecting the burden of producing evidence operates. Such a presumption is merely a preliminary assumption in the absence of contrary evidence. If contrary evidence is introduced, the trier of fact must weigh the inferences arising from the facts established by proof against the contrary evidence and resolve the conflict. For example, if a party proves that a letter was mailed, the trier of fact is required to find that the letter was received in the absence of any contrary evidence. If the adverse party denies receipt, the presumption is gone from the case. The trier of fact must then weigh the denial against the inference of receipt from proof of mailing and decide whether or not the letter was received.

If a presumption affecting the burden of producing evidence is relied on, the judge must determine whether there is evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If there is such evidence, the presumption disappears and the judge need say nothing about it in his instructions. If there is not evidence sufficient to

sustain a finding of the nonexistence of the presumed fact, the judge must instruct the jury concerning the presumption. If the basic fact from which the presumption arises is established (by the pleadings, stipulation, judicial notice, etc.) so that the existence of the basic fact is not a question of fact for the jury, the jury should be instructed that the presumed fact is also established. If the basic fact is a question of fact for the jury, the judge must charge that if the jury find the basic fact, they must also find the presumed fact. MORGAN, BASIC PROBLEMS OF EVIDENCE 36-38 (1957).

Of course, in a criminal case, the jury has the power to find a defendant guilty of a lesser crime than shown by the evidence or to acquit a defendant despite the facts established by the undisputed evidence. Cf. People v. Powell, 34 Cal.2d 196, 208 P.2d 974 (1949); Pike, Second Degree Murder in California, 9 SO. CAL. L. REV. 112, 128-132 (1936). Nonetheless, the jury should be instructed on the rules of law applicable, including those rules of law called presumptions. The fact that the jury has the power to disregard the applicable rules of law should not affect the nature of the instructions given. See People v. Lem You, 97 Cal. 224, 32 Pac. 11 (1893); People v. Macken, 32 Cal. App.2d 31, 89 P.2d 173 (1939).

605. A presumption affecting the burden of proof is a presumption, other than a presumption described in Section 603, 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.

Section 605 describes a presumption affecting the burden of proof. Such presumptions are established in order to carry out or make effective some public policy.

Frequently, they are designed to facilitate determination of the action in which they are applied; and, hence, they may appear to meet the criteria for presumptions affecting the burden of producing evidence. But there is always some further reason of policy for the establishment of the presumption; and it is the existence of this further basis in policy that distinguishes a presumption affecting the burden of proof from a presumption affecting the burden of producing evidence. For example, the presumption of death from seven years' absence (Section 667) exists in part to facilitate the disposition of actions by supplying a rule of thumb to govern certain cases in which there is likely to be no direct evidence of the presumed fact. But the policy in favor of distributing estates, of settling titles, and of permitting life to proceed normally at some time prior to the expiration of the absentee's normal life expectancy (perhaps 30 or 40 years) that underlies the presumption indicates that it should be a presumption affecting the burden of proof.

Frequently, too, a presumption affecting the burden of proof will have an underlying basis in probability and logical inference. For example, the presumption of the validity of a ceremonial marriage may be based in part on probability--most marriages are valid. But an underlying logical inference is not essential. In fact, the lack of an underlying inference is a strong indication that the presumption affects the burden of proof. Only the needs

of public policy can justify the direction of a particular conclusion that is not warranted by the application of probability and common experience to the known facts. Thus, the total lack of any inference underlying the presumption of the negligence of an employer that arises from his failure to secure the payment of workmen's compensation (LABOR CODE § 3708) is a clear indication that the presumption is based on policy and affects the burden of proof. Similarly, the fact that the presumption of death from seven years' absence may conflict directly with the inference that life continues for its normal expectancy is an indication that the presumption is based on policy and affects the burden of proof.

606. A presumption affecting the burden of proof imposes upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact. When a presumption affecting the burden of proof operates in a criminal action to establish any fact except the defendant's sanity that is essential to his guilt, the defendant's burden of proof is to establish a reasonable doubt as to the existence of the presumed fact.

COMMENT

Section 606 describes the manner in which a presumption affecting the burden of proof will operate. The party against whom it is invoked will have in the ordinary case the burden of proving the nonexistence of the presumed fact by a preponderance of the evidence. Certain presumptions affecting the burden of proof may be overcome only by clear and convincing evidence. When such a presumption is relied on, the party against whom the presumption operates will have a heavier burden of proof and will be required to persuade the trier of fact of the nonexistence of the presumed fact by

proof "sufficiently strong to command the unhesitating assent of every reasonable mind." In re Jost, 117 Cal. App.2d 379, 383, 256, P.2d 71 (1953).

If the party against whom the presumption operates already has the same burden of proof as to the nonexistence of the presumed fact that is assigned by the presumption, the presumption can have no effect on the case and no instruction in regard to the presumption should be given. See opinion of Traynor, J. in Speck v. Sarver, 20 Cal.2d 585, 590, 128 P.2d 16 (1942) (dissenting opinion); Morgan, Instructing the Jury on Presumptions and Burden of Proof, 47 HARV. L. REV. 59, 69 (1933). If there is not evidence sufficient to sustain a finding of the nonexistence of the presumed fact, the judge's instructions will be the same as if the presumption were merely a presumption affecting the burden of producing evidence. See the Comment to Section 604. If there is evidence of the nonexistence of the presumed fact, the judge should instruct the jury on the manner in which the presumption affects the fact-finding process. If the basic fact from which the presumption arises is so established that the existence of the basic fact is not a question of fact for the jury (as, for example, by the pleadings, judicial notice, or stipulation of the parties), the judge must instruct the jury that the presumed fact is to be assumed to be true until the jury is persuaded to the contrary by the requisite degree of proof (proof by a preponderance of the evidence, clear and convincing proof, etc.). See McCORMICK, EVIDENCE 672 (1954). If the basic fact is a question of fact for the jury, the judge must instruct the jury that if the jury find the basic fact, they must also find the presumed fact unless persuaded by the evidence of the nonexistence of the presumed fact by the requisite degree of proof. MORGAN, BASIC PROBLEMS OF EVIDENCE 38 (1957).

In a criminal case, a presumption affecting the burden of proof may be relied upon by the prosecution to establish a fact essential to the defendant's guilt. But, in such a case, the defendant will not be required to overcome the presumption by a preponderance of the evidence or by clear and convincing evidence; the defendant will be required to create only a reasonable doubt as to the existence of the presumed fact. This is the effect of a presumption in a criminal case under existing law. People v. Hardy, 33 Cal.2d 52, 198 P.2d 865 (1948); People v. Scott, 24 Cal.2d 774 (1944); People v. Agnew, 16 Cal.2d 655, 107 P.2d 601 (1940).

Instructions in criminal cases on presumptions affecting the burden of proof will be similar to the instructions given on presumptions and on issues where the defendant has the burden of proof under existing law. The judge should instruct that the jury must find the presumed fact unless the evidence has produced a reasonable doubt in their mind as to its existence. Cf. People v. Hardy, 33 Cal.2d 52, 63-64, 198 P.2d 865 (1948), People v. Agnew, 16 Cal.2d 655, 661-667, 107 P.2d 601 (1940); People v. Martina, 140 Cal. App.2d 17, 25, 294 P.2d 1015 (1956). See the instruction on intermittent sanity in People v. Nash, 52 Cal.2d 36, 44, 338 P.2d 416 (1959) ("That presumption [that the crime was committed during lucid interval when proof shows intermittent insanity] 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."); see also CALJIC Nos. 451, 452, 704 (Rev. ed. 1958). Except where the issue is the insanity of the defendant, the judge must be careful to specify that a presumption is rebutted by any evidence creating a reasonable doubt as to the presumed fact. In the absence of this qualification, the jury may be

led to believe that the defendant has the burden of proof by a preponderance of the evidence and the instruction will be erroneous. People v. Agnew, 16 Cal.2d 655, 107 P.2d 601 (1940). Cf. People v. Hardy, 33 Cal.2d 52, 198 P.2d 865 (1948).

Of course, in a criminal case the jury has the power to disregard the instructions in regard to presumptions. But the existence of this power should not affect the duty of the court to instruct them on the rules of law, including presumptions, applicable to the case. See the Comment to Section 604.

607. A matter listed in former Section 1963 of the Code of Civil Procedure is not a presumption unless declared to be a presumption by statute. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate in any case to which a provision of former Section 1963 would have applied.

COMMENT

In former Section 1963 of the Code of Civil Procedure are listed 40 rebuttable presumptions. Many of these presumptions do not meet the criteria of presumptions set forth in this article. Many do not meet even the definition of a presumption in former Section 1959 of the Code of Civil Procedure. Some do not arise from the establishment of a preliminary fact--for example, the presumptions of due care and innocence. Others have no underlying public policy and arise under such varying circumstances that no fixed conclusion should be required in every case--for example, the presumption of marriage from common reputation. In some cases, the 1872 draftsmen used the language

of presumptions to state merely the admissibility of evidence--for example, the presumption that the regular course of business has been followed merely indicates that evidence of a business practice or custom is admissible as evidence that the practice or custom was followed on a particular occasion. Such provisions should not be continued in the statutes as presumptions.

Section 1963 will be repealed. The provisions of former Section 1963 that meet the criteria of presumptions in this article are recodified in Articles 3 and 4 of this chapter. The substance of other provisions of former Section 1963 has been continued in a variety of ways. The substantive meaning of some of these provisions has been incorporated into appropriate sections of the codes. See, e.g., CODE CIV. PROC. § 2061. And others appear as maxims of jurisprudence in Part IV of the Civil Code.

Section 607 is included in this chapter on presumptions to make clear that the provisions of former Section 1963 that are not continued in the statutes as presumptions are not continued as common law presumptions either. In particular cases, of course, the jury may be permitted to infer the existence of a fact that would have been presumed under former Section 1963. The repeal of these presumptions will not affect the process of drawing inferences. Section 607 makes this clear. The repeal merely means that the presumed fact is not required to be found in all cases in which the underlying fact is established.

Article 2. Conclusive Presumptions

620. The presumptions in this article and all other presumptions declared to be conclusive by statute or rule of law are conclusive presumptions.

COMMENT

Section 1962 of the Code of Civil Procedure provides that the matters listed in that section are conclusive or indisputable presumptions.

Subdivision 1 of Section 1962 has been characterized by the Supreme Court as virtually meaningless. People v. Gorshen, 51 Cal.2d 716, 731, 336 P.2d 492 (1959). Subdivision 6 of Section 1962 states a truism: that judgments are conclusive when declared by law to be conclusive. Subdivision 6 also contains a pleading rule relating to judgments that has no place in an article on presumptions. Subdivision 7 is merely a cross-reference section to all other conclusive presumptions declared by law.

Accordingly, this article contains only the matters stated in subdivisions 2, 3, 4, and 5 of Section 1962. Other statutes not listed in this article also provide conclusive presumptions. See, e.g., CIVIL CODE § 3440. There may also be a few nonstatutory conclusive presumptions. See WITKIN, CALIFORNIA EVIDENCE § 63 (1958).

Conclusive presumptions are not evidentiary rules so much as they are rules of substantive law. Hence, the Commission has not recommended any substantive revision of the conclusive presumptions contained in this article.

621. Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.

COMMENT

Section 621 is a restatement of subdivision 5 of Code of Civil Procedure Section 1962.

621. The recital in a written instrument is conclusively presumed to be true as between the parties thereto; but this rule does not apply to the recital of a consideration.

COMMENT

Section 622 is a restatement of subdivision 2 of Code of Civil Procedure Section 1962.

623. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.

COMMENT

Section 623 is a restatement of subdivision 3 of Code of Civil Procedure Section 1962.

624. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

COMMENT

Section 624 is a restatement of subdivision 4 of Code of Civil Procedure Section 1962.

Article 3. Presumptions Affecting the Burden of Producing Evidence

630. The presumptions in this article and all other presumptions described by Section 603 are presumptions affecting the burden of producing evidence.

§ 622
§ 623
§ 624
§ 630

COMMENT

Article 3 sets forth a list of presumptions, recognized in existing law, that are classified here as presumptions affecting the burden of producing evidence. The list is not exhaustive. Other presumptions affecting the burden of producing evidence may be found in other codes. Others will be found in the common law. Specific statutes will classify some of these, but some must await classification by the courts. The list here, however, will eliminate any uncertainty as to the proper classification for the presumptions in this article.

631. Money delivered by one to another is presumed to have been due to the latter.

COMMENT

The presumption in Section 631 is a restatement of the presumption in subdivision 7 of Code of Civil Procedure Section 1963.

632. A thing delivered by one to another is presumed to have belonged to the latter.

COMMENT

The presumption in Section 632 is a restatement of the presumption in subdivision 8 of Code of Civil Procedure Section 1963.

633. An obligation delivered up to the debtor is presumed to have been paid.

COMMENT

The presumption in Section 633 is a restatement of the presumption in subdivision 9 of Code of Civil Procedure Section 1963.

634. A person in possession of an order on himself for the payment of money, or delivery of a thing, is presumed to have paid the money or delivered the thing accordingly.

COMMENT

The presumption in Section 634 is a restatement of the presumption found in subdivision 13 of Code of Civil Procedure Section 1963.

635. An obligation possessed by the creditor is presumed not to have been paid.

COMMENT

The presumption in Section 635 is a common law presumption recognized in the California cases. Light v. Stevens, 159 Cal. 288, 113 Pac. 659 (1911).

636. The payment of earlier rent or installments is presumed from a receipt for later rent or installments.

COMMENT

The presumption in Section 636 is a restatement of a presumption in subdivision 10 of Code of Civil Procedure Section 1963.

637. The things which a person possesses are presumed to be owned by him.

COMMENT

The presumption in Section 637 is a restatement of a presumption found in subdivision 11 of Code of Civil Procedure Section 1963.

638. A person who exercises acts of ownership over property is presumed to be the owner of it.

COMMENT

The presumption in Section 638 is a restatement of a presumption found in subdivision 12 of Code of Civil Procedure Section 1963. Subdivision 12 of Code of Civil Procedure Section 1963 provides that a presumption of ownership arises from common reputation of ownership. This is inaccurate, however, for common reputation is not admissible to prove private title to property. Berniaud v. Beecher, 76 Cal. 394, 18 Pac. 598 (1888); Simons v. Inyo Cerro Gordo Co., 48 Cal. App. 524, 192 Pac. 144 (1920).

639. A judgment, when not conclusive, is presumed to correctly determine or set forth the rights of the parties; but there is no presumption that the facts essential to the judgment have been correctly determined.

COMMENT

The presumption in Section 639 is a restatement of the presumption found in subdivision 17 of Code of Civil Procedure Section 1963. The presumption involved here is that the judgment correctly determines that one party owes another money, or that the parties are divorced, or their marriage has been annulled, or any similar rights of the parties. The presumption does not apply to the facts underlying the judgment. For example, a judgment of

annulment is presumed to determine correctly that the marriage is void. Clark v. City of Los Angeles, 187 Cal. App.2d 792, 9 Cal. Rptr. 913 (1960). But the judgment may not be used to establish presumptively that one of the parties was guilty of fraud as against some third party who is not bound by the judgment.

In a few cases, a judgment may be used as evidence of the facts necessarily determined by the judgment. See Revised Rule 63(20), (21), and (21.5). But even in those cases, the judgments do not presumptively establish the facts determined, they are merely evidence.

640. A writing is presumed to have been truly dated.

COMMENT

The presumption in this section is the same as the presumption in subdivision 23 of Code of Civil Procedure Section 1963.

641. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.

COMMENT

The presumption in Section 641 is the same as the presumption in subdivision 24 of Code of Civil Procedure Section 1963.

642. A trustee or other person, whose duty it was to convey real property to a particular person, is presumed to have actually conveyed to him when such presumption is necessary to perfect title of such person or his successor in interest.

COMMENT

The presumption in Section 642 is the same as the presumption in subdivision 37 of Code of Civil Procedure Section 1963.

643. A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic when it:

(1) Is at least 30 years old;

(2) Is in such condition as to create no suspicion concerning its authenticity;

(3) Was kept, or when found was found, in a place where such writing, if authentic, would be likely to be kept or found; and

(4) Has been generally acted upon as authentic by persons having an interest in the matter.

COMMENT

Section 643 is a restatement of the presumption found in subdivision 34 of Code of Civil Procedure Section 1963. Although the Section 1963 statement of the Ancient Documents Rule requires the document to have been acted upon as if genuine before the presumption applies, some recent cases have not insisted upon this requirement. Kirkpatrick v. Tapo Oil Co., 144 Cal. App.2d 404, 303 P.2d 274 (1946); Estate of Nidever, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960). The requirement that the document be acted upon as genuine is, in substance, a requirement of the possession of property by those persons who would be entitled to such possession under the document if it were genuine. See 7 WIGMORE, EVIDENCE §§ 2141, 2146; Tentative Recommendation

and a Study Relating to the Uniform Rules of Evidence (Article IX. Authentication and Content of Writings), 6 CAL. LAW REVISION COM'N, REP., REC. & STUDIES 101, 135-137. Giving the Ancient Documents Rule a presumptive effect, i.e., requiring a finding of the authenticity of an ancient document, seems justified when it is a dispositive instrument and the persons interested in the matter have acted upon the instrument for a period of at least 30 years as if it were genuine. Evidence which does not arise to this strength may be sufficient in particular cases to warrant an inference of genuineness and thus justify the admission of the document into evidence, but the presumption should be confined to those cases where the evidence of genuineness is not likely to be disputed. See 7 WIGMORE, EVIDENCE 605. Accordingly, Section 643 limits the presumptive application of the Ancient Documents Rule to dispositive instruments.

644. A book, purporting to be printed or published by public authority, is presumed to have been so printed or published.

COMMENT

The presumption in Section 644 is a restatement of the presumption in subdivision 35 of Code of Civil Procedure Section 1963.

645. A book, purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published, is presumed to contain correct reports of such cases.

COMMENT

Section 645 is a restatement of the presumption found in subdivision 36 of Code of Civil Procedure Section 1963.

646. Res ipsa loquitur is a presumption affecting the burden of producing evidence.

COMMENT

The California courts have characterized the doctrine of res ipsa loquitur as an inference, not a presumption. Hardin v. San Jose City Lines, 41 Cal.2d 432, 436, 260 P.2d 63 (1953)("while some of the earlier decisions in the State used the word 'presumption' in discussing the effect of res ipsa loquitur, it is now settled that the doctrine raises an inference of negligence and not a presumption"). Despite this characterization of the doctrine, the courts have also held that if the requisite facts are found that give rise to the doctrine, the trier of fact is required to find the defendant guilty of negligence unless the defendant comes forward with sufficient evidence to sustain a finding that he was not guilty of negligence. Burr v. Sherwin-Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954). Accordingly, the doctrine in fact gives rise to a presumption affecting the burden of producing evidence as that kind of presumption has been defined in these statutes.

As the doctrine of res ipsa loquitur precisely fits the description of a presumption affecting the burden of producing evidence as defined in Sections 603 and 604, the doctrine has been placed in Section 646 among the specific presumptions of this class.

Article 4. Presumptions Affecting the Burden of Proof

660. The presumptions in this article and all other presumptions described by Section 605 are presumptions affecting the burden of proof.

COMMENT

In many cases it will be difficult to determine whether a particular presumption is a presumption affecting the burden of proof or a presumption affecting the burden of producing evidence. To avoid uncertainty, it is desirable to classify as many presumptions as possible. Article 4, therefore, lists several presumptions found in existing law that are to be regarded as presumptions affecting the burden of proof. The list is not exclusive.

661. A child of a woman who is or has been married, born during the marriage or within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the husband or wife, or the descendant of one or both of them, or by the people of the State of California in a criminal action brought under Section 270 of the Penal Code. In a civil action, the presumption may be rebutted only by clear and convincing proof.

COMMENT

Section 661 contains the substance of Sections 194 and 195 of the Civil Code and subdivision 31 of Code of Civil Procedure Section 1963 as these sections have been interpreted by the courts.

Civil Code Section 194 provides a presumption of legitimacy for children born within ten months after the dissolution of a marriage. The courts have

said that the ten-month period referred to is actually 300 days. Estate of McNamara, 181 Cal. 82, 183 Pac. 552 (1919). Hence, the more accurate time period has been substituted for the ten-month period referred to in Section 194.

As under existing law, the presumption may be overcome only by clear and convincing evidence. Kusior v. Silver, 54 Cal.2d 603, 7 Cal. Rptr. 129, 354 P.2d 657 (1960).

662. The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

COMMENT

Section 662 expresses a common law presumption recognized in existing case law. Under the California cases, the presumption may be overcome only with clear and convincing evidence. Olson v. Olson, 4 Cal.2d 434, 437, 49 P.2d 827 (1935); Rench v. McMullen, 82 Cal. App.2d 872, 187 P.2d 111 (1947).

663. A ceremonial marriage is presumed to be valid.

COMMENT

Section 663 expresses a common law presumption recognized in existing California cases. Estate of Heusen, 173 Cal. 448, 160 Pac. 548 (1916); Wilcox v. Wilcox, 171 Cal. 770, 155 Pac. 95 (1916); Freeman S.S. v. Pillsbury, 172 Fed.2d 321 (9 Cir. 1949).

664. A person acting in a public office is presumed to have been regularly appointed or elected to it.

§ 661
§ 662
§ 663
§ 664

COMMENT

Section 664 is a restatement of subdivision 14 of Code of Civil Procedure Section 1963.

665. When official action has been taken, it is presumed that all prerequisites to such action have been taken.

COMMENT

Section 665 is a restatement of the presumption arising under the provisions of subdivisions 15 and 33 of Code of Civil Procedure Section 1963. Under this presumption, when an ordinance has been adopted, when a tax assessment has been made, when bonds have been issued, and when any other official action has been taken that depends for its validity on the taking of some prior action required by law, the presumption places the burden of proof on the party asserting the invalidity of the official action to establish that the necessary prerequisite steps were not taken.

Thus, where an arrest has been made, in the absence of evidence to the contrary, it will be presumed that the arrest was pursuant to a warrant. People v. Farrara, 46 Cal.2d 269, 294 P.2d 23 (1956); People v. Beard, 46 Cal.2d 278, 294 P.2d 29 (1956); People v. Citrino, 46 Cal.2d 284, 294 P.2d 32 (1956). However, the burden of proof thus placed on the party asserting the invalidity of an arrest may be satisfied by proof that the arrest was without a warrant, in which case the party claiming the arrest was valid must show that there was probable cause for the arrest. Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23 (1956); Dragna v. White, 45 Cal.2d 469, 471, 289 P.2d 428 (1955)("Upon proof . . . [of arrest without process] the burden is on the defendant to prove justification for the arrest.").

666. Any court of this State or the United States, or any court of general jurisdiction in any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction. This presumption applies only when the act of the court or judge is under collateral attack.

COMMENT

Section 666 is a restatement of the presumption in subdivision 16 of Code of Civil Procedure Section 1963. Under existing law, the presumption applies only to courts of general jurisdiction. The presumption has been held inapplicable to a superior court in California when acting in a special or limited jurisdiction. Estate of Sharon, 179 Cal. 447, 177 Pac. 283 (1918). The presumption has also been held inapplicable to courts of inferior jurisdiction. Santos v. Dondero, 11 Cal. App.2d 720, 54 P.2d 764 (1936). There is no reason to perpetuate this distinction insofar as the courts of California and of the United States are concerned. California's municipal and justice courts are served by able and conscientious judges and are no more likely to act beyond their jurisdiction than are the superior courts. Moreover, there is no reason to suppose that a superior court or a federal court is less respectful of its jurisdiction when acting in a limited capacity (for example, as a juvenile court) than it is when acting in any other capacity. Section 666, therefore, applies to any court or judge of any court of California or of the United States. So far as other states are concerned, the distinction will still be applicable, and the presumption will apply only to courts of general jurisdiction.

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

COMMENT

This presumption formerly appeared in subdivision 26 of Code of Civil Procedure Section 1963.

AMENDMENTS AND REPEALS OF EXISTING STATUTES RELATING TO BURDEN OF PRODUCING EVIDENCE, BURDEN OF PROOF, AND PRESUMPTIONS

Several sections of the Civil Code and Code of Civil Procedure contain provisions that are inconsistent with or are superseded by the statute proposed in the Commission's Tentative Recommendation relating to the burden of producing evidence, the burden of proof, and presumptions. These sections should be revised or repealed to conform to the Tentative Recommendation. In some instances, the appropriate adjustment requires the addition of new sections to either the Code of Civil Procedure or the Civil Code.

Set forth below is a list of sections that should be added, amended, or repealed in light of the Commission's Tentative Recommendation. In a few instances the revision recommended is self-explanatory. Where it is not, a comment appears explaining the reason for the proposed adjustment.

Civil Code

Section 164.5. The following new section should be added to the Civil Code:

164.5. Subject to the other presumptions stated in this chapter, all property acquired during marriage is presumed to be community property of that marriage. This presumption may be overcome only by clear and convincing proof. This presumption 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 four years prior to such death.

COMMENT

This section states existing decisional and statutory law. The presumption stated in the first sentence is established by a number of California cases. It places upon the person asserting that any property is separate property the burden of proving that it was acquired by gift, devise, or descent, or that the consideration given for it was separate property, or that it is personal injury damages, or that for some other reason the property is not community property. E.g., Rozan v. Rozan, 49 Cal.2d 322, 317 P.2d 11 (1957); Meyer v. Kinzer, 12 Cal. 247 (1859). See Continuing Education of the Bar, THE CALIFORNIA FAMILY LAWYER § 4.8 (1961).

The second sentence also states existing case law. E.g., Estate of Rolls, 193 Cal. 594, 226 Pac. 608 (1924); Meyer v. Kinzer, supra.

The third sentence states the apparent effect of subdivision 40 of Code of Civil Procedure Section 1963. The meaning of subdivision 40, however, is not clear. See 4 WITKIN, SUMMARY OF CALIFORNIA LAW 2733 (1960); Note, 43 CALIF. L. REV. 687, 690-691 (1955).

Sections 193, 194, and 195 provide:

193. LEGITIMACY OF CHILDREN BORN IN WEDLOCK. All children born in wedlock are presumed to be legitimate.

194. All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage.

195. The presumption of legitimacy can be disputed only by the people of the State of California in a criminal action brought under the provisions of Section 270 of the Penal Code, or the husband or wife, or the descendant

§ 164.5
§ 193
§ 194
§ 195

of one or both of them. Illegitimacy, in such case, may be proved like any other fact.

COMMENT

Sections 193, 194, and 195 should be repealed. They are superseded by the more accurate statement of the presumption in Evidence Code Section 661.

Sections 3544-3548. The following new sections should be added to the Civil Code:

3544. A person intends the ordinary consequences of his voluntary act.

3545. Private transactions are fair and regular.

3546. Acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact.

3547. Things happen according to the ordinary course of nature and the ordinary habits of life.

3548. A thing continues to exist as long as is usual with things of that nature.

COMMENT

Sections 3544-3548 restate the provisions of subdivisions 3, 19, 27, 28, and 32 of former Code of Civil Procedure Section 1963. These provisions have been relocated among the maxims of jurisprudence. These maxims are not intended to qualify any substantive provisions of law, but to aid in their just application. CIVIL CODE § 3509.

Section 1826 provides:

1826. THE DEGREE OF CERTAINTY REQUIRED TO ESTABLISH FACTS. The law does not require demonstration; that is such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

COMMENT

Section 1826 should be repealed. It is an inaccurate description of the normal burden of proof.

Section 1833 provides:

1833. Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: The certificate of a recording officer is prima facie evidence of a record, but it may afterwards be rejected upon proof that there is no such record.

COMMENT

Section 1833 should be repealed. It is inconsistent with Evidence Code Section 602.

Section 1847 provides:

1847. WITNESS PRESUMED TO SPEAK THE TRUTH. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence

affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

COMMENT

Section 1847 should be repealed. It is inconsistent with the definition of a presumption in Evidence Code Section 600. The right of a party to attack the credibility of a witness by any evidence relevant to that issue is assured by Revised Rule 20.

Section 1867 provides:

1867. MATERIAL ALLEGATION ONLY TO BE PROVED. None but a material allegation need be proved.

COMMENT

Section 1867 is based on the obsolete theory that some allegations are necessary that are not material, i.e., essential to the claim or defense. CODE CIV. PROC. § 463. Section 1867 provides that only the material allegations need be proved. As the section is obsolete it should be repealed.

Section 1869 provides:

1869. AFFIRMATIVE ONLY TO BE PROVED. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, or even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

COMMENT

Section 1869 should be repealed. It is inconsistent with and superseded by Sections 500 and 510. Moreover, it is an inaccurate statement of the manner in which the burden of proof is allocated under existing law.

Section 1908.5. A new section should be added to the Code of Civil Procedure to read:

1908.5. When a judgment or order of a court is conclusive, the judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence.

COMMENT

This is a new section that recodifies the rule of pleading stated in subdivision 6 of Section 1962 of the Code of Civil Procedure. See the Comment to Section 1962.

Sections 1957, 1958, 1959, 1960, and 1961 provide:

1957. INDIRECT EVIDENCE CLASSIFIED. Indirect evidence is of two kinds: 1. Inferences; and, 2. Presumptions.

1958. INFERENCE DEFINED. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

1959. PRESUMPTION DEFINED. A presumption is a deduction which the law expressly directs to be made from particular facts.

1960. WHEN AN INFERENCE ARISES. An inference must be founded: 1. on a fact legally proved; and, 2. on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

1961. PRESUMPTIONS MAY BE CONTROVERTED, WHEN. A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted the jury are bound to find according to the presumption.

COMMENT

Sections 1957, 1958, 1959, 1960, and 1961 should be repealed. Sections 1957, 1958, and 1960 are superseded by Revised Rule 1(1)(defining "evidence") and Revised Rule 1(2)(defining "relevant evidence"). Section 1959 is superseded by Evidence Code Section 600, and Section 1961 is superseded by Chapter 3 (beginning with Section 600) which prescribes the nature and effect of presumptions.

Section 1962 provides:

1962. The following presumptions, and no others, are deemed conclusive:

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another;

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;

3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it;

4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation;

5. Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate;

6. The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence;

7. Any other presumption which by statute is expressly made conclusive.

COMMENT

Section 1962 should be repealed.

Subdivision 1 should be repealed because it "has little meaning, either as a rule of substantive law or as a rule of evidence . . . ." People v. Gorshen, 51 Cal.2d 716, 731, 336 P.2d 492 (1959).

Subdivisions 2, 3, 4, and 5 are superseded by Evidence Code Sections 621-624.

The first clause of subdivision 6 states a meaningless truism: that judgments are conclusive when declared by law to be conclusive. The pleading rule in the next two clauses has been recodified as Section 1908.5 of the Code of Civil Procedure.

Subdivision 7 is merely a cross-reference section to all other conclusive presumptions declared by law.

Section 1963 provides:

1963. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

1. That a person is innocent of crime or wrong;

2. That an unlawful act was done with an unlawful intent;

3. That a person intends the ordinary consequence of his voluntary act;

4. That a person takes ordinary care of his own concerns;

5. That evidence wilfully suppressed would be adverse if produced;

6. That higher evidence would be adverse from inferior being produced;

7. That money paid by one to another was due to the latter;

8. That a thing delivered by one to another belonged to the latter;

9. That an obligation delivered up to the debtor has been paid;

10. That former rent or installments have been paid when a receipt for later is produced;

11. That things which a person possesses are owned by him;

12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership;

13. That a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly;

14. That a person acting in a public office was regularly appointed to it;

15. That official duty has been regularly performed;

16. That a court or judge, acting as such, whether in this State or any other state or country, was acting in the lawful exercise of his jurisdiction;

17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties;

18. That all matters within an issue were laid before the jury and passed upon by them; and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them;

19. That private transactions have been fair and regular;

20. That the ordinary course of business has been followed;

21. That a promissory note or bill of exchange was given or endorsed for a sufficient consideration;

22. That an endorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill;

23. That a writing is truly dated;

24. That a letter duly directed and mailed was received in the regular course of the mail;

25. Identity of person from identity of name;

26. That a person not heard from in seven years is dead;

27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact;

28. That things have happened according to the ordinary course of nature and the ordinary habits of life;

29. That persons acting as copartners have entered into a contract of copartnership;

30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage;

31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate;

32. That a thing once proved to exist continues as long as is usual with things of that nature;

33. That the law has been obeyed;

34. That a document or writing more than 30 years old is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained;

35. That a printed and published book, purporting to be printed or published by public authority, was so printed or published;

36. That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the State or country where the book is published, contains correct reports of such cases;

37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest;

38. The uninterrupted use by the public of land for a burial ground, for five years, with the consent of the owner, and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose;

39. That there was a good and sufficient consideration for a written contract;

40. That property owned at the time of death by a person who had been divorced from his or her spouse more than four years prior thereto was not community property acquired during marriage with such divorced spouse, but is his or her separate property.

COMMENT

Section 1963 should be repealed. Many of the presumptions listed are classified and restated in the Evidence Code. Other provisions have been recodified as maxims of jurisprudence in Part IV of the Civil Code. Others are not continued at all. In the table below is given the disposition of each subdivision. Following the table are comments indicating the reasons for repealing those provisions that are not continued.

Section 1963 (subdivision)	Superseded by
(1)	Proposed Evidence Code Section 520
(2)	Not continued
(3)	Proposed Civil Code Section 3544
(4)	Proposed Evidence Code Section 521
(5)	Not continued
(6)	Not continued
(7)	Proposed Evidence Code Section 631
(8)	Proposed Evidence Code Section 632
(9)	Proposed Evidence Code Section 633
(10)	Proposed Evidence Code Section 636
(11)	Proposed Evidence Code Section 637
(12)	Proposed Evidence Code Section 638
(13)	Proposed Evidence Code Section 634
(14)	Proposed Evidence Code Section 664
(15)	Proposed Evidence Code Section 665
(16)	Proposed Evidence Code Section 666
(17)	Proposed Evidence Code Section 639

Section 1963 (subdivision)	Superseded by
(18)	Not continued
(19)	Proposed Civil Code Section 3545
(20)	Not continued
(21)	Commercial Code Sections 3306,3307, and 3408
(22)	Not continued
(23)	Proposed Evidence Code Section 640
(24)	Proposed Evidence Code Section 641
(25)	Not continued
(26)	Proposed Evidence Code Section 667
(27)	Proposed Civil Code Section 3546
(28)	Proposed Civil Code Section 3547
(29)	Not continued
(30)	Not continued
(31)	Proposed Evidence Code Section 661
(32)	Proposed Civil Code Section 3548
(33)	Proposed Evidence Code Section 665
(34)	Proposed Evidence Code Section 643
(35)	Proposed Evidence Code Section 644
(36)	Proposed Evidence Code Section 645
(37)	Proposed Evidence Code Section 642
(38)	Not continued
(39)	Unnecessary--Duplicates Civil Code Section 1614
(40)	Proposed Civil Code Section 164.5

Subdivision 2 is not continued because it has been a source of error and confusion in the cases. An instruction based upon it is error whenever specific intent is in issue. People v. Snyder, 15 Cal.2d 706, 104 P.2d 639 (1940); People v. Maciel, 71 Cal. App. 213, 234 Pac. 877 (1925). A person's intent may be inferred from his actions and the surrounding circumstances, and an instruction to that effect may be given. People v. Besold, 154 Cal. 363, 97 Pac. 871 (1908).

Subdivisions 5 and 6 are not continued because, despite Section 1963, there was no presumption of the sort stated. The "presumptions" merely indicated that a party's evidence should be viewed with distrust if he could produce better and that unfavorable inferences should be drawn from the evidence offered against him if he failed to deny or explain it. A party's failure to produce evidence could not be turned into evidence against him by reliance on these presumptions. Hampton v. Rose, 8 Cal. App.2d 447, 56 P.2d 1243 (1935); Girvetz v. Boys' Market, Inc., 91 Cal. App.2d 827, 206 P.2d 6 (1949). The substantive effect of these "presumptions" is stated more accurately in Section 2061 of the Code of Civil Procedure.

Subdivision 18. No case has been found where this subdivision has had any effect. The doctrine of res judicata determines the issues concluded between the parties without regard to this presumption. Parnell v. Hahn, 61 Cal. 131, 132 (1882)("And the judgment as rendered . . . is conclusive upon all questions involved in the action and upon which it depends or upon matters which, under the issues, might have been litigated and decided in the case").

Subdivision 20. The cases have used this "presumption" merely as a justification for holding that evidence of a business custom will sustain a finding that the custom was followed on a particular occasion. E.g., American Can Co. v. Agricultural Insur. Co., 27 Cal. App. 647, 150 Pac. 996 (1915); Robinson v. Puls, 28 Cal.2d 664, 171 P.2d 430 (1946). Revised Rule 49 provides for the admissibility of business custom evidence to prove that the custom was followed on a particular occasion. There is no reason to compel the trier of fact to find that the custom was followed by applying a presumption. The evidence of the custom may be strong or weak, and the trier of fact should be free to decide whether the custom was followed or not. No case has been found giving a presumptive effect to evidence of a business custom under subdivision 20.

Subdivision 22. The purpose of subdivision 22 appears to have been to compel an accommodation endorser to prove that he endorsed in accommodation of a subsequent party to the instrument and not in accommodation of the maker. See, e.g., Pacific Portland Cement Co. v. Reinecke, 30 Cal. App. 501, 158 Pac. 1041 (1916). The liability of accommodation endorsers is now fully covered by the Commercial Code. Accommodation is a defense which must be established by the defendant. COMM. C.§§ 3307, 3415(5). Hence, subdivision 22 is no longer necessary.

Subdivision 25. Despite subdivision 25, the California courts have refused to apply the presumption of identity of person from identity of of name when the name is common. E.g., People v. Wong Sang Lung, 3 Cal. App. 221, 224, 84 Pac. 843 (1906). The matter should be left to inference, for the strength of the inference will depend in particular cases on whether the name is common or unusual.

Subdivision 29 has been cited but once in its 92-year history. It is unnecessary in light of the doctrine of ostensible authority.

Subdivision 30, in effect, declares that a marriage will be presumed from proof of cohabitation and repute. Pulos v. Pulos, 140 Cal. App.2d 913, 295 P.2d 907 (1956). Because reputation evidence may sometimes strongly indicate a marriage and at other times fail to do so, requiring a finding of a marriage from proof of such reputation is unwarranted. The cases have sometimes refused to apply the presumption because of the weakness of the reputation evidence relied on. Estate of Baldwin, 162 Cal. 471, 123 Pac. 267 (1912); Cacioppo v. Triangle Co., 120 Cal. App.2d 281, 260 P.2d 985 (1953). Discontinuance of the presumption will not affect the rule that the existence of a marriage may be inferred from proof of reputation. White v. White, 82 Cal. 427, 23 Pac. 276 (1890) ("cohabitation and repute do not make a marriage; they are items of evidence from which it may be inferred that a marriage has been entered into").

Subdivision 38 has not been applied in its 92-year history. The substantive law relating to implied dedication and dedication by prescription makes the presumption unnecessary. See WITKIN, SUMMARY OF CALIFORNIA LAW 882-886 (7th ed. 1960).

Section 1981 provides:

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

COMMENT

Section 1981 should be repealed. It is superseded by Sections 500 and 510.

Section 2061 should be revised to read:

2061. [~~JURY-JUDGES-OF-EFFECT-OF-EVIDENCE,-BUT-TO-BE-INSTRUCTED-ON CERTAIN-POINTS.~~] The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;

2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number [~~or against a presumption~~] or other evidence satisfying their minds;

3. That a witness false in one part of his testimony is to be distrusted in others;

4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral omission of a party with caution;

5. [~~That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of the evidence; that in criminal cases guilt must be established beyond a reasonable doubt;~~] That the burden of proof rests on the party to whom it is assigned by statute or rule of law, informing the jury which party that is; and when the evidence is contradictory, or if not contradicted might nevertheless be disbelieved by them, that before they find in favor of the party who bears the burden of proof they must be persuaded by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt as the case may be;

6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict; and, therefore,

7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust , and that inferences unfavorable to a party may be drawn from any evidence or facts in the case against him when such party has failed to explain or deny such evidence or facts by his testimony or has wilfully suppressed evidence relating thereto.

COMMENT

Subdivision 5 has been revised in the light of proposed Chapter 2 (commencing with Section 510). Subdivisions 6 and 7 state in substance the meaning that has been given to the presumptions formerly appearing in subdivisions 5 and 6 of Code of Civil Procedure Section 1963.