#34 9/8/64

Second Supplement to Memorandum 64-61

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Division 5--Presumptions)

Attached to this memorandum is a letter from the Assembly Committee on Criminal Procedure. The letter expresses concern over the repeal of Code of Code of Civil Procedure Section 1962-1 which provides a conclusive presumption of "a malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another." The letter suggests that the presumption may be beneficial in punitive damage cases or in defamation cases.

The reason that the Supreme Court characterized the presumption as having "little meaning" in People v. Gorshen, 51 Cal.2d 716 (1959) is because the facts giving rise to the presumption are just as subjective as the presumed facts. In addition to the Supreme Court's reason, we have indicated that the provision is circuitous. Under the section proof of an unlawful act is necessary to give rise to the presumption, yet proof of a guilty intent (the presumed fact) is necessary to establish the commission of an unlawful act. Penal Code § 20.

The section might be regarded as definitional. It seems to have been so regarded in Davis v. Hearst, 160 Cal. 143 (1911). The court said there:

> But before this presumption arises, the jury is to find as facts: (1) the commission of an unlawful act; (2) that its commission was deliberate, and (3) that it was committed with the deliberate purpose of injuring another. In these three findings it will be noted are all the elements of malice in fact. [160 Cal. at 167-168.]

For this purpose, however, the section is unneeded. The courts have had no difficulty in determining what malice in fact is apart from the provisions of this presumption. The same case, Davis v. Hearst, repudiated the doctrine

of "malice in law" insofar as libel and slander actions and exemplary damages are concerned, held that malice in fact is not an essential ingredient of a cause of action for libel, and held that malice in fact is essential to recover punitive or exemplary damages. But in developing its definition of "malice in fact" the court proceeded without regard to the provisions of Code of Civil Procedure Section 1962. The reference to Section 1962 came after the principles had been developed. Thus, at 160 Cal. 157, the court said:

> Malice as universally understood by the popular mind has its foundation in ill-will, and is evidenced by an attempt wrongfully to vex, injure, or annoy another. This malice may be designated malice in fact. It is the malice described in subdivision 4 of section 7 of the Penal Code, where it is said: "The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person.

In any event, if malice in fact is to be defined in the codes, it should be defined directly and not by a conclusive presumption which bears little resemblance to a real presumption.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

California Legislature

Assembly Committee on Criminal Procedure

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GORDON H. WINTON, JR.
CHAIRMAN

August 5, 1964

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

Dear Mr. DeMoully,

Assemblyman Winton has directed us to reply to your letter of July 1, 1964 asking for his comments on the tentative recommendations of your Commission relating to evidence. We have had these recommendations reviewed and, with one exception, do not find that any change recommended by the Commission would substantially affect trials of criminal actions in this state.

Some questions are raised by the elimination of Subdivision 1 of Section 1962 of the Code of Civil Procedure providing that there is a conclusive presumption of "a malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another." The Commission's comment quotes a statement from People v. Gorshen, 51 Cal.2d, 716, 731, that the presumption "has little meaning, either as a rule of substantive law or as a rule of evidence ...". However, the Gorshen case was speaking of the concept of malice as used in the term "malice aforethought" in the definition of homicide. Did the Commission consider the beneficial effects of the presumption created by Subdivision 1 of CCP 1962 in cases where the plaintiff asks for exemplary damages and in cases where damages are sought for libel or slander? In the latter cases, the presumption might be worth preserving.

Assemblyman Winton has also asked me to assure you that we are at your disposal for any assistance we may be able to give you in the future.

Very truly yours,

William H. Keiser

WILLIAM H. KEISER

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