#34(L) 9/10/64

Third Supplement to Memorandum 64-61

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

This memorandum discusses the comments of the Southern Section of the State Bar Committee.

In a cover letter, the chairman of the Southern Section pointed out that the southern views differ considerably from those of the Northern Section. Hence, the views of the committee as a whole cannot be ascertained until a joint meeting is held. The committee expects to meet as a whole in October.

Sections 500 and 510.

The Committee suggests that Section 500 be amended to read:

> The burden of producing evidence is on the party to whom it is assigned by rule of 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.~~] Otherwise, the burden of producing evidence is initially on the party who has the burden of proof.

The Committee suggests that Section 510 be amended to read:

> The burden of proof is on the party to whom it is assigned by rule of 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.~~] Otherwise, the burden of proof is on the party who has the affirmative as to the existence of the fact in issue.

The Committee agree that the burden of proof is not always on the party with the affirmative of the issue; but they assert that when it is not so assigned, it is assigned otherwise by a rule of law based on such considerations of policy as are identified in the comment to Section 500.

The Committee disagree with the proposition that the burden of proof may shift. They construe Section 510 to mean that the trial court is to

determine the incidence of the burden of proof from case to case, and argue that this is unfair to litigants. Hence, they wish to place more definite standards in the respective sections.

The Committee's criticisms are similar to those voiced by the Judicial Council staff. The sections are vague. However, we did not intend to mean that the incidence of the burden of proof is subject to the discretion of the judge from case to case. What we intended to say was that, in the absence of precedent, the courts are required to weigh the various factors that go into the incidence of the burden of proof and determine where it belongs in the particular kind of case before the court. But this decision is not discretionary. It is a question of law upon which the court has no more discretion than it does when deciding whether a particular kind of hearsay evidence is inadmissible.

It must be conceded that Section 510 is subject to the interpretation given it by the Committee. The Committee's amendment, however, if read the same way, would require the courts, in the absence of precedent, to assign the burden of proof to the party with the affirmative of the issue without regard to the other policies that should be considered in determining the incidence of the burden.

The assertion that the burden of proof never shifts and is determinable when an issue of fact is first presented is subject to some dispute. For example, it is difficult to reconcile the concept that the burden never shifts with the fact that a plaintiff starts with the burden of proof as to the defendant's negligence in the ordinary case, but if the plaintiff proves a violation of a statute, the presumption is that the defendant was negligent unless the defendant satisfies the jury that the violation was excusable.

Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581 (1947); Combs v. Los Angeles Ry. Corp., 29 Cal.2d 606 (1947). After the evidence is in, it is easy enough to determine that the plaintiff's burden of proof is only as to certain facts and the defendant's burden is only as to certain others; but before the evidence was in, the assumption was that the plaintiff had the entire burden of proof and the defendant had none. As the comment states, if you look at the matter after the evidence is in, it is easy to say the burden of proof doesn't shift. But the preliminary assumptions did. This disagreement, however, doesn't go to the merits of the question whether Section 510 should be modified.

The alternatives before the Commission are: (1) retain the existing provision; (2) modify it as suggested by the Committee; (3) list the factors going into the decision as to the incidence of the burden of proof; (4) delete the second sentence; (5) omit the section.

Because of the misinterpretation of Section 510 by those who will have to work with it, we think the section should be modified to eliminate the possibility for misinterpretation.

We do not agree with the Committee's suggested revision because it tends to imply that the affirmative of the issue is the most important factor--and is the only factor to be considered in novel situations. Moreover, the "affirmative of the issue" is frequently an illusory concept. For example, is sanity or insanity the affirmative of the issue? See also Witkin, California Evidence § 56, pp. 72-73 ("The 'affirmative of the issue' lacks any substantial objective meaning, and the allocation of the burden actually requires the application of several rules of practice and policy, not entirely consistent and not wholly reliable").

The Commission previously could not agree on a statement of the factors to be considered and, hence, came to the conclusion that Section 510 should not list them.

Section 510 would be less subject to misinterpretation if the second sentence were deleted. When there is no precedent as to the incidence of the burden of proof--when there is no statutory or decisional allocation of the burden--then the court must formulate a rule of law to cover the situation. Removal of the second sentence would remove the implication that the court in determining the incidence of the burden of proof is not formulating a new rule of law but is merely exercising its discretion in the particular case.

We do not recommend repeal of the section, for it seems desirable to retain the concept expressed in the division that there are preliminary assignments of the burden of proof and at-trial reassignments of the burden that flow from the application of presumptions. It would be possible to redefine a presumption to include any assumption of fact, including preliminary assumptions made before the introduction of evidence. This would obviate the need for Section 510 and would make Sections 520-522 into presumptions. However, this would resurrect the problem of conflicting presumptions and would make all initial allocations of the burden of proof subject to Section 607, and we do not believe either result is desirable.

Section 500.

If any version of Section 510 is retained, the substance of the suggested modification of Section 500 seems desirable.

Section 511.

The Committee disapproves the drafting of Section 511. They suggest that the problem might better be handled in the Penal Code.

The Committee suggests that the second sentence of Section 511 be amended to read:

> When the burden of proof as to the existence or nonexistence of a fact is assigned to a defendant in a criminal case by rule of law, such burden is only to raise a reasonable doubt as to the existence or nonexistence of such fact except as otherwise specifically provided by such rule of law.

The principal problem with the above draft is that it does not distinguish between ultimate facts dealing with the defendant's guilt or innocence and other facts that may be in dispute on other issues--the existence of a privilege, double jeopardy, etc.

The second sentence might be revised to meet the Committee's objections as follows:

> When under the provisions of a statute, other than Section 522, the defendant in a criminal case has the burden of proof as to the nonexistence of any fact essential to his guilt, his burden of proof is to raise a reasonable doubt as to the existence of such fact.

Article 2.

The Committee suggests the substitution of "as to the existence or nonexistence of the facts essential to a determination of that issue" for "on that issue". To meet the criticism, the Committee's suggested language should probably be modified to "as to the existence of such fact".

The Committee queries whether the list of burdens listed should be more extensive but has no specific suggestions. The matters listed--except insanity--are taken from Code of Civil Procedure Section 1963. Insanity was added because it is such an important matter; and listing it facilitated the drafting of Section 511 relating to the defendant's burden of proof in criminal cases.

Section 600.

The Committee approves the first sentence but is in disagreement over the repeal of the Smellie rule in the second sentence. They suggest a compromise by adding "except when the presumption is in favor of a deceased person or persons claiming through a deceased person." There is a disagreement in the Committee whether the suggested qualifying language goes too far, but they think that it would make the section more acceptable to the bar at large.

The effect of the suggested change is that a party who has the burden of proof must not only satisfy the jury that evidence of the fact preponderates, he must also overcome whatever weight the jury chooses to give the presumption. Instead of a simple and easily understood job of fact finding, the jury is given the job of weighing the fact that the law requires a finding under certain circumstances (not present in the case) against the evidence that is in the case. We believe that if it is at all possible to get rid of this doctrine, we should do so.

Sections 601-607.

The Committee approves these sections, except to the extent that Section 604's "in-which" clause is subject to the preceding suggestion relating to the Smellie case. The thought is also expressed that the "in-which" clause of Section 604 is superfluous.

Section 608.

The suggestion is made that "inference" be defined. This would permit the deletion of Section 608 and the listing of some of the former provisions of Section 1963 in an article relating to specific inferences.

Section 623.

The Committee suggests changing "falsify" to "deny".

Articles 3 and 4; Sections 630 and 660.

The Committee suggests adding the word "rebuttable" before the word "presumptions" in the title of the article and the second line of the sections.

Respectfully submitted,

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Assistant Executive Secretary

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August
28th
1964

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Attention: Mr. John H. DeMoully

Re: Evidence Code, Division 5

Gentlemen:

The Southern Section of the State Bar Committee met on August 25, 1964 to consider Division 5 of the proposed Evidence Code, relating to the burden of producing evidence, burden of proof and presumptions. A quorum, consisting of Messrs, Edgar, Groman, Robinson and Westbrook were present.

CHAPTERS 1 AND 2

Sections 500 & 510

The Section approves the burden of producing evidence and the burden of proof in Sections 500 and 510 and the basic rules as to the assignment of the respective burdens expressed in the first sentences of these two sections. However, it is the consensus that the parallel second sentences of these two sections are unnecessarily abstruse and indefinite. In lieu thereof, the Section proposed the following:

1. The second sentence of Section 500 should read:

"Otherwise, the burden of producing evidence is initially on the party who has the burden of proof."

2. The second sentence of Section 510 should read:

"Otherwise, the burden of proof is on the party who has the affirmative as to the existence of the fact in issue."

These two suggestions can best be discussed in reverse order.

The Section agrees with the proposition, expressed in the last paragraph on page 501 of the Comment, that the burden of proof does not always lie with the party having the affirmative of the issue and that, to this extent,

present C.C.P. § 1981 does not express existing law correctly. It disagrees with the view, expressed in the first and second paragraphs on page 502 of the Comment, that the burden of proof "must be determined only at the close of the evidence" and that "During the trial, . . . the burden of proof does shift." These concepts are contrary to the definition of burden of proof in Section 115 as relating to "the existence or non-existence of a fact." The Section believes that the burden of proof in this respect is always determinable when an issue as to "the existence or non-existence of a fact" is first presented. The example given in the second paragraph on page 502 of the Comment proves this point: i.e., the burden of proving the non-existence of a warrant always rests on the party asserting the non-existence of that fact and the burden of proving the existence of probable cause always rests on the party asserting the existence of the fact. In short, the Comment confuses the ultimate issue, lawfulness of an arrest, with the issue as to the existence or non-existence of particular facts which are determinative of the ultimate issue.

If one accepts the proposition that the burden of proof as to the existence or non-existence of a fact is determinable when the question is first presented and that that burden does not shift, it would seem feasible to give Section 510 much more precise content as suggested in subparagraph 2 above. As the Section agrees, the basic principle is that the burden of proof falls on the party to whom it is assigned by rule of law. When, by such rule of law, it falls on the party who does not have the affirmative as to the existence of the fact in issue, such assignment is based on considerations of policy (readily recognizable from the examples cited in the last paragraph on page 501 of the Comment). Such considerations of policy may be and usually are based on factors of the sort set forth in the fourth sentence of the fourth paragraph on page 500 of the Comment. Absent such expression of policy in a rule of law, the Section believes that the burden of proof ought to fall on the party who has the affirmative as to the existence of the fact in issue. Such an approach will be in the long run fairer to litigants than vague concepts that the burden of proof shifts during trial and is subject to final determination at the close of the evidence as the ends of justice may require.

Turning attention to the burden of producing evidence, the preceding discussion suggests that the burden of producing evidence may be much more simply dealt with than in proposed Section 500. The first sentence of that section, which the committee approves, embraces the concept that, under some rules of law, the burden of producing evidence may not lie on the party who has the burden of proof as to the existence or nonexistence of a fact. The Section disagrees that the burden of producing evidence should be left to the determination of the particular trier of fact if there is no rule of law in this regard. If the considerations suggested by the fourth sentence of the fourth paragraph on page 500 of the Comment are compelling, a rule of law assigning the burden of producing evidence will exist. Absent such a rule of law, the general proposition that the

initial burden of producing evidence rests on the party having the burden of proof would seem to be fair, certain and workable.

Section 511

The Section approves the purpose of Section 511. However, since Division 5 does not otherwise deal with the quantum of proof necessary to discharge the burden of proof, the query is raised whether this purpose might not best be served by appropriate amendment of Penal Code Section 1096.

The Section also takes the view that Section 511 leaves something to be desired in draftsmanship. The first sentence would be superfluous if the purpose were accomplished by amendment of Penal Code Section 1096. The following defects are noted in the second sentence:

1. The phrase "Except as provided in Section 522" is inept and confusing because Section 522 contains nothing as to the quantum of proof required to sustain the burden stated therein.

2. The words "or innocence" in the next to the last line are inappropriate since the question in a criminal case is the existence of facts necessary to prove guilt - not innocence.

3. The phrase "as to his guilt" in the last line is too broad. At most, a defendant's burden of proof is to raise a reasonable doubt as to the existence or nonexistence of a fact as to which he has the burden of proof - not as to his guilt.

After extended discussion, the Section suggests (without pride of authorship) the following as a substitute for the second sentence of Section 511:

"When the burden of proof as to the existence or non-existence of a fact is assigned to a defendant in a criminal case by rule of law, such burden if only to raise a reasonable doubt as to the existence or nonexistence of such fact except as otherwise specifically provided by such rule of law."

Article 2

Some difficulty is encountered with the sections under this article because they refer to the burden of proof "on that issue," whereas Section 115 relates the burden of proof to "the existence or nonexistence of a fact." This difficulty might be overcome by substituting "the existence or nonexistence of the facts essential to a determination of that issue." The Section queries whether the enumeration of specific issues under this article is sufficiently exhaustive but has no specific suggestions in this regard.

CHAPTER 3

Section 600

The Section approves the first sentence of Section 600, but is in disagreement as to the second sentence and related provisions of Chapter 3. This controversy is undoubtedly so well known to the Commission as to require no development. One possible compromist is to qualify the second sentence of Section 600 by the addition of the clause "except when the presumption is in favor of a deceased person or persons claiming through a deceased person." The situation to which this qualification is directed was present in the Smellie case. Whether such a qualification goes too far in favor of a decedent or person claiming through a decedent is a question on which there is also a division of opinion in the Section, but it is believed that it would make this provision more acceptable to the bar at large.

Sections 601-607

The Section concurs in Section 601 and particularly expresses the view that the classification of rebuttable presumptions in terns of public policy as expressed in Sections 603 and 605 is sound and desirable. The Section also concurs in Section 602. Section 604 is approved subject to the divergence of views expressed in the preceding paragraph and with the thought that the "in which" clause is superfluous. Section 606 is approved. Section 607 is approved, subject to the qualification hereinabove expressed that provisions as to the quantum of proof in criminal cases might better be dealt with in the Penal Code.

Section 608

Section 608 is an unusual provision as to which the Section's view was not developed because of the lack of available time. However, the writer suggests that Section 608 points up the omission of a significant concept from Division 5: the definition and operation of inferences. The Comment (third paragraph, page 504) points out that presumptions and inferences are not evidence and states that an "inference under this code . . . a conclusion of fact that rationally can be drawn from the proof of some other fact." Inferences are distinguished from presumptions only in that they are permitted but not required to be drawn. Presumptions and inferences can be confused (see e.g. Witkin, Evidence, pp. 122-125), and it would seem wise to eliminate the possibility of such confusion by a definition of an inference in Article 1 of Chapter 3, and provision as to the operation of an inference. In this connection, it is clear that an inference can never affect the burden of proof. Moreover, an inference can not affect the burden of producing evidence in the same way as a presumption does (see Section 604) because it is permitted but not required to be drawn. It can affect the burden of producing evidence in the same way that evidence does, and that burden is met either by producing evidence negativing the inferred fact or negativing the facts upon which the inference is based. However, the production of evidence negativing the inference directly or indirectly

does not require the trier of fact to disregard the inference: it still may be drawn if the trier of the fact is persuaded that it is in accord with the weight of the evidence.

Some such development of the subject of inference in Article 1 of Chapter 3 would permit the addition of an Article 5 paralleling the treatment of presumptions in Articles 2, 3 and 4 and including those provisions of present CCP 1963 which are not included as presumptions. Section 608 could then be eliminated.

Articles 2, 3 and 4

The Section did not have time for detailed review of the provisions contained in these Articles but approves them generally with the following suggestions:

1. The word "deny" would be clearer and more appropriate then the word "falsify" in Section 623.

2. The addition of the word "rebuttable" before the word "presumptions" in the title of Articles 3 and 4 and in the second lines of Sections 630 and 660 would make for greater clarity.

Very truly yours,

S/ Philip F. Westbrook, Jr.