#34(L) 2/11/65

Third Supplement to Memorandum 65-4

This supplement considers the matters raised by the Attorney General at the last meeting and certain other matters. These were not discussed in the First Supplement because we wanted to send that to you without waiting for the remainder to be prepared.

Section 600

Assemblyman Foran has informed us that he has been receiving letters complaining about the failure to include the presumption of due care in the code and about the inclusion of the provision stating that a presumption is not evidence. He stated that he wanted a fuller explanation that he might give to persons inquiring about these matters. Accordingly, we prepared the statement attached hereto as Exhibit I.

The judges also expressed some concern about the same matters. Their concern was that the dead, incompetent, or amnesic party needs something working in his favor to compensate for the fact that he cannot contradict the evidence of his negligence. We drafted a proposed section to meet this problem directly, and it is attached hereto as Exhibit II. The judges indicated, however, that they did not wish to invite the parties to comment on the evidence; and our discussion eventually satisfied them that the Evidence Code is satisfactory in these respects.

Sections 620-624

The Attorney General objected to the omission of the conclusive presumption of malice from this portion of the code. The presumption now appears as subdivision 1 of Code of Civil Procedure Section 1962,

which provides 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 . . . .

We did not perpetuate this provision for several reasons. First, it is of little value. "This 'conclusive presumption' has little meaning, either as a rule of substantive law or as a rule of evidence, for the facts of deliberation and purpose which must be established to bring the presumption into operation are just as subjective as the presumed fact of malicious and guilty intent." People v. Gorshen, 51 Cal.2d 716, 731 (1959). Says Witkin, "Intent is proved by either direct or circumstantial evidence . . . , and the statutory presumptions of intent (C.C.P. 1962(1), 1963 (2)(3)) do not play any particularly important part in the proof." WITKIN, CALIFORNIA CRIMES § 53 (1963). Witkin notes that the conclusive presumption is sometimes cited in decisions affirming first degree murder convictions, but there is a special definition of malice in the Penal Code for purposes of the definition of murder. See PENAL CODE § 188. Moreover, there is another definition of "malice" in the Penal Code for use generally in regard to the criminal law. See PENAL CODE § 7(4). Both of these Penal Code definitions seem to cover the ground covered by Section 1962(1).

Thus, insofar as the criminal law is concerned the presumption seems to be unnecessary. Moreover, the presumption seems at best to state either a definition of malice or a truism that would exist whether or not there were such a conclusive presumption. Davis v. Hearst, 160 Cal. 143 (1911), is illustrative. There the court was concerned with the malice that gives rise to a claim for punitive damages. It was also concerned with that "malice" that some courts have said is the gist of the action

for libel. It held that malice in fact must be proved to sustain a claim for punitive damages. The "malice" sometimes referred to as the gist of the action for libel, or "malice in law," is a fiction and not "malice" at all. After developing at some length the true meaning of "malice" and pointing out the essential elements thereof, the court pointed out that the conclusive presumption recited in Section 1962(1) refers to all these elements, too. See 160 Cal. at 167-168. But the court developed its rationale of "malice" wholly without reliance on the conclusive presumption.

We concluded originally that the conclusive presumption served no useful purpose. We still believe so. We see no harm that it does, either. However, we think that clearer thinking is stimulated if meaningless formulizations are removed from the law. Strictly speaking, Section 1962(1) is a definition of "malice" and not a presumption. Thus, even if we were to perpetuate it, it would seem inappropriate in the Evidence Code. Perhaps it might be placed in the preliminary provisions of the Civil Code or in that part of the Civil Code dealing with exemplary damages.

Sections 630-667

The Attorney General objected to the failure to include in the list of presumptions those appearing in subdivisions 2 and 3 of Code of Civil Procedure Section 1963--that an unlawful act was done with an unlawful intent and that a person intends the ordinary consequence of his voluntary act.

We omitted these presumptions not only because they do no good but also because they are misleading and give rise to error. Exhibit III is an extract from the memo (64-2) that was before the Commission when they were considered. Where a specific intent is required, it is error to

instruct the jury in terms of these presumptions. Nevertheless, appellate courts rely on them repeatedly to affirm judgments in specific intent cases. There is no need to rely on them in such cases, for the only question is whether there was a permissible inference of intent for the jury to draw. But, because the appellate courts cite the presumptions as makeweights to support the jury-drawn inference, trial courts rely on these decisions to formulate instructions in specific intent cases. Justice Shinn once complained:

> We are at a loss to understand why [such an instruction] was given, or why it is given in so many cases where it can serve no purpose and tends to create confusion. [People v. Booth, 111 Cal. App.2d 106, 108 (1952).]

Moreover, on the merits of these presumptions, we believed that a person's intent is better left to inference. Circumstances vary. In some cases, an inference of intent will be strong and in others it will be weak. We thought, and still think, that the trier of fact should be permitted to decide whether or not to draw the inference. Compelling a conclusion in every case through the use of presumption seems inappropriate. It is settled that an instruction to the effect that "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused" is a proper instruction. People v. Besold, 154 Cal. 363 (1908). This instruction performs the function of these presumptions without creating the danger of error that these presumptions create.

Section 788

The Commission directed the staff to present a memorandum discussing the various alternative solutions to the problem of impeaching a witness with evidence of a prior criminal conviction. The Commission was primarily concerned with subdivision (a), hence, subdivision (b) will not be mentioned in this memorandum.

Subdivision (a) presents two basic problems: (1) What, if any, should be the limitations on the criminal convictions that may be shown for impeachment purposes? (2) What are the conditions under which an examiner should be permitted to ask about prior convictions?

(1) Limitations on the convictions usable for impeachment.

The first problem involves several subsidiary problems. Should misdemeanors as well as felonies be permitted to be shown? Should any kind of crime be permitted to be shown, or only particular crimes?

To develop an approach to these problems, it is desirable to consider analytically what is being done when evidence of a conviction is introduced. Section 787 declares the general rule that evidence of specific acts is inadmissible to attack credibility. The apparent reason for this limitation is to preclude a trial within a trial to determine whether the alleged act occurred when the only relevance of the act is to show the witness' character for veracity. Despite the fact that a person's character is best revealed by what he has done, time just does not permit the full investigation of these collateral matters.

Where the witness' prior conduct has resulted in a criminal conviction, the considerations prompting exclusion of evidence of specific acts no longer apply. The conviction is easily provable and is good evidence that the acts for which the witness was convicted actually occurred. Thus,

it is not the fact of conviction that is itself important, it is the fact of the commission of the crime that reflects on the witness' veracity; and the conviction is merely used as evidence that the witness did in fact commit the crime. (Section 1300 is similar in that it permits certain convictions to be used as evidence that the crime was committed.)

The inquiry, then, is: what criminal acts bear sufficiently on a witness' credibility that they should be permitted to be shown? and what convictions are sufficiently reliable evidence that the crimes were in fact committed that they should be permitted to be shown?

(a) Felony or misdemeanor. Should all criminal convictions be permitted to be shown or only felonies or only crimes punishable as felonies?

Under existing law, felonies only may be shown. The argument for retaining the felony limitation is that the rule permitting impeachment by convictions is of dubious value anyway, and it should not be extended. The worst aspects of the rule have been ameliorated by the amendment of Penal Code § 17 which permits a judge, in granting probation without imposition of sentence, to designate the crime as a felony or misdemeanor.

The argument for broadening the rule to include crimes punishable as felonies is that the existing rule operates harshly and illogically. If two persons are convicted of burglary, one may be sentenced to one year in the county jail--and is unimpeachable because he is a misdemeanant. The other may get probation without any jail time, and he is impeachable because he is a felon. Yet, the character of the probationer is likely to be better than that of the prisoner--and that very fact may have caused probation to be granted.

The reasons for restricting convictions to serious crimes apply equally to crimes punishable as a felony and to felonies. One reason is to provide assurance that the crime was seriously litigated, and therefore the judgment of conviction can be relied upon from an evidentiary standpoint. A crime punishable as a felony is tried as a felony, and since the potential of a felony sentence exists, it will be as seriously contested as a trial that actually results in a felony sentence. The other reason for insisting on felony convictions is to provide assurance that the crime was serious. Minor violations of the law do not necessarily indicate a character that would be willing to risk a felony conviction by lying under oath. That a person bought a drink at the age of 20 by representing himself to be 21 does not indicate that such person might commit perjury. This consideration, however, is equally applicable to crimes punishable as a felony. At the time of commission, the actor has no way of knowing that the punishment will eventually be that for a misdemeanor. The crime is as serious as a felony in its potential result to the actor and is thus as indicative as a felony conviction would be of the actor's willingness to risk a felony conviction by testifying untruthfully.

The above argument summarizes the reasons for not extending the crimes permitted to be shown to misdemeanors generally. On the other hand, it may be argued that if the class of crimes is properly selected as bearing on credibility, it should not matter whether the particular crime was a felony or misdemeanor. The essential inquiry is the witness' propensities in regard to truthtelling, and any crime showing a disrespect for the truth reflects on the witness' truthtelling propensities.

(b) "Dishonesty or false statement." Section 788 now limits the convictions that may be shown for impeachment purposes to convictions of crimes involving "dishonesty or false statement." The Commission limited the showable crimes to those involving these essential elements at the recommendation of the State Bar Committee. The URE also requires that these elements be involved. The judges' committees approved this limitation; and, on July 1, 1964, the Alameda County District Attorney wrote to the Commission that "we feel that the proposed change in this regard is reasonably fair and logical."

The Alameda County District Attorney's letter went on to say, "There is no doubt that showing a prior conviction that has nothing to do with dishonesty, particularly where it is the same as the offense charged, has a high potential for unfair prejudice to the defendant. The proposed change [to limit impeaching crimes to those involving "dishonesty"] would put the attack on credibility precisely where it belongs, i.e., showing a history of dishonesty."

Although there is some uncertainty in this standard, nonetheless it is the correct one. For the only purpose of showing the conviction is to show the witness' propensity for departing from the truth--to show that he has been dishonest before and, hence, cannot be trusted now. Any uncertainty in the application of this standard to specific crimes will eventually be worked out in practice by the courts.

On the other hand, while the uncertainties in the standard are being worked out, some guilty defendants may be freed and many unnecessary appeals will probably be generated. Moreover, the difficulties are being created for no substantial improvement in the law. Any person who has so little

regard for the law or the rights of others that he will commit a crime serious enough to warrant a felony sentence will have no serious qualms about committing perjury--or at least in shading the facts--when it is to his interest to do so. Perjury prosecutions are rare, and perjury convictions are rarer; hence, it is reasonable to believe that a person who has been convicted of a serious crime would be willing to run the slight risk of a perjury prosecution if he had something substantial to gain thereby.

(c) "Intention to deceive or false statement." An alternative solution to the problem that was once approved by the Commission is to require that the crime involve false statement or an intention to deceive. This solution is premised on the argument that "dishonesty" is too vague, that "dishonesty" will create as many different standards as there are judges. In contrast, requiring that an element of the crime involve deception makes the rule relatively easy to apply. Moreover, this standard requires--even more than the "dishonesty" standard does--that the conviction involve the essential character trait that is sought to be proved--the witness' propensity for misstating facts.

The Commission abandoned this standard upon the argument that a large number of crimes involving deception could not be shown if it were approved. The theft family of crimes are all charged as "theft" even though some involve various sorts of deceit; and, because all forms of theft do not necessarily involve deceit, theft convictions would not be permitted to be shown. Hence, embezzlers, bunco artists, etc. would be unimpeachable, while others guilty of less serious crimes would be.

(d) "Perjury." A committee report to the Conference of State Bar Delegates urged the limitation of the crimes showable for impeachment

purposes to perjury. The majority of the committee cited a long list of alleged abuses in the use of prior convictions against criminal defendants. They cite, also, the fact that changes in the law occur, and, hence, some crimes that were felonies are now misdemeanors. Others would now be treated as juvenile offenses. The laws of various states vary in defining a felony. Persons are dissuaded from instituting civil suits in vindication of their rights because their pasts may be revealed. Prosecutors tend to try a defendant with priors for his previous crimes, going into detail as to the facts. They argue that inasmuch as the only issue is the witness' present credibility, only perjury should be permitted to be shown.

The contrary argument is that a person who will suborn perjury or bribe witnesses or jurors, falsify evidence, etc. is as likely to depart from the truth on the witness stand as someone who has committed perjury.

(e) Crimes against public justice. A minority report of the committee just referred to urged the limitation of the showable crimes to those defined in that part of the Penal Code dealing with crimes against public justice. These crimes would include perjury, subornation of perjury, offering false evidence, bribing jurors, judges, or witnesses, bribing officials, etc. The proposal is based on the thought that these crimes are so essentially like perjury, and so necessarily involve the very character traits in issue, that they should be permitted to be shown. (The minority report also recommended inclusion of crimes of the same nature as that being prosecuted in criminal trials.)

The contrary argument is, again, the character defect that would cause a person to lie under oath (or shade the facts) is also revealed by many other crimes that are not included in the crimes against public justice. A person who would risk felony conviction to defraud someone is not likely

to be seriously inhibited from committing perjury if he thinks that it is to his interest and that he can get away with it.

(f) Specific crimes. Another alternative is to specify the crimes that may be shown. The advantage of this alternative is the certainty that it creates. Precise value judgments can be made in regard to each crime as to the extent to which it bears on credibility.

The principal objection to the alternative is the volume of detail that it would add to the statute. Each crime would have to be separately considered and policy arguments would rage about each one. Moreover, some crimes defined in codes other than the Penal Code may be overlooked even though they inherently involve veracity.

In preparing this memorandum, we began to prepare a list of specific crimes, and it became apparent after filling two pages with references to specific sections that this was not a feasible venture. Overlooking some crime that should be included is too easy; the volume of crimes included is so great that all felonies might as well be included. It might be feasible, however, to combine a standard, that would include most crimes, with specific references to crimes that are not covered by the standard. For example, crimes involving false statement or an intention to deceive or defraud might be used for the general standard, and in addition the following specific crimes:

Bribery (in all forms--offering, soliciting, giving, receiving of public officials, sports events, etc.), Penal Code § 95 (corrupt influence of juror), § 115 (recording forged instruments), §§ 116-117 (altering jury lists), § 171a (smuggling narcotics, deadly weapons into reformatory), § 187 (murder), § 192(1) voluntary manslaughter, § 203 (mayhem), § 207

(kidnapping), § 211 (robbery), all crimes involving intentional infliction of personal injury, § 237 (felony false imprisonment), theft in all forms, § 459 (burglary), §§ 466-467 (possession of burglar tools or a deadly weapon with intent to use the same), §§ 518-527 (extortion), attempts or conspiracy to commit any listed crime, Health and Safety Code § 11503 (narcotics sales).

(g) Limited rule as to criminal defendant. Another alternative solution to the problem of impeachment is to limit the crimes that may be shown insofar as a criminal defendant only is concerned. The principal abuse of the present impeachment rule that is pointed out in the Committee report to the Conference of State Bar Delegates is the abusive use of convictions in criminal actions. The Commission's original recommendation on Witnesses adopted this approach. There we recommended that the defendant-witness could not be impeached with convictions unless he had placed his character in issue.

It may be argued that such a rule gives the defendant too much of an advantage and deprives the jury of information essential to weigh his testimony accurately. If it is important for the jury to hear such evidence in regard to other witnesses, it is just as important when the defendant is a witness.

The contrary argument is that the defendant's position is unique. The other witnesses are not in a position to be convicted because they are bad actors. Restricting impeachment in such a way is really not harmful to the prosecution in any fair sense, for the jury will realize that the defendant has the greatest of motives for deception in the case at hand--he does not wish to be convicted. All that such a rule would do, therefore, would be to prevent the trial of a defendant for past offenses

instead of the offense charged.

As a possible modification of this rule, perjury only, or crimes against public justice such as bribery and falsification of evidence, might be permitted to be shown. The drafting task is simple, because the language is in the Commission's published recommendation relating to witnesses.

The argument in support of this modification is that these crimes have such great relevance to the witness' capacity for truth telling that they should be permitted to be shown in all cases. The contrary argument is the same as that in opposition to any limitation so far as the defendant is concerned and, in addition, the complexity such a provision would add to trials.

(2) Conditions for asking about prior convictions

(a) The in camera hearing. Section 788 now requires that the court hold a hearing out of the presence of the jury in which he determines whether the crime sought to be shown involves the necessary elements and that either the defendant has admitted the conviction or the examiner has competent evidence of the conviction.

Existing law does not require this in camera proceeding. However, a judge will sometimes hold an in camera hearing after questions have been asked to see if they were properly asked. See, e.g., People v. Darnold, 219 Cal. App.2d 561, 582-283 (1963). The argument in favor of the pre-question hearing is that a determination of the examiner's good faith after the asking of the question is insufficient to protect the witness' rights. The judge must either instruct the jury to disregard the question and the implications arising therefrom--which may be ineffective to cure

the harm--or declare a mistrial. The judge will naturally be extremely reluctant to declare a mistrial because of the delay, inconvenience to witnesses and parties, etc. Hence, the likelihood is that he will give the somewhat ineffective instruction to the jury to disregard the examiner's question. The pre-question hearing by the judge permits the judge to determine the propriety of the question and to provide adequate protection to the witness without having to make a choice between two undesirable solutions to the problem that is created by the asking of the question.

On the other hand, the requirement of a pre-question hearing forces a hearing to be held in all cases whether needed or not. In most cases, the witness will admit the conviction, and in such cases the hearing will be superfluous. Not only will the hearing be superfluous, it will be undesirable; for it interrupts the flow of the trial, it prevents the examiner from confronting the witness with the conviction, and it prevents the examiner from conducting his cross-examination in the most effective way. The hearing of issues in secret is time consuming, and it is disturbing to the jury, who must speculate on what information is so secret that it must be kept from them. Thus, an undesirable trial procedure is proposed to remedy a problem that actually exists in very few cases.

(b) "Competent evidence" or "good faith." For many years, the California courts have held that a prosecutor must act in "good faith" if he asks a witness about prior convictions. In People v. Perez, 58 Cal.2d 229 (1962) the Supreme Court strongly intimated that good faith requires that the examiner have competent evidence of the conviction. The court said:

> "The usual manner of making proof of a prior [felony] conviction is to ask the witness who has suffered such a conviction if he

> has been theretofore convicted of a felony, and if he denies that he has been so convicted, to produce a copy of the judgment of conviction." (Emphasis added.) The clear implication of the latter statement in Craig is that the questioner should be prepared to show by documentary evidence that the witness has suffered a prior conviction, in the event of a denial thereof. [Citations omitted.] . . . It has also been announced in other jurisdictions that an interrogator, in order to avoid a charge of misconduct, must be prepared to follow up with proof questions of a witness concerning prior felony convictions. [58 Cal.2d at 238-239.]

In People v. Darnold, 219 Cal. App.2d 561 (1963)(hg. den.), however, the court affirmed a determination that a prosecutor acted in good faith in asking the defendant's character witnesses about prior convictions when the prosecutor's questioning was based on information obtained from another deputy district attorney. The defendant was also a witness, and the questioning was justified in part upon that ground. The reported decision does not indicate whether the deputy who was the source of the information had personal knowledge of the conviction and could have testified thereto if required.

Section 788 now requires the examiner to have evidence of the conviction. The evidence may be an admission by the witness or competent evidence in any other form.

The requirement of Section 788 is objected to on the ground that the only requirement should be the good faith of the examiner. He may be in possession of a "rap sheet" showing a conviction or other reliable information which is not admissible evidence. It is difficult to obtain documentary evidence of convictions from other states. Hence, to refuse an examiner the right to ask about convictions when he has no competent evidence thereof will prevent him from asking such questions in many instances when there has been in fact a conviction. Moreover, the

prosecution is likely to be aware of the need for evidence of convictions only where a defendant is concerned. Other witnesses may appear without prior notice to the prosecution, and there is no time in such cases to obtain documentary evidence of a conviction.

On the other hand, nothing in Section 788 prevents an examiner from utilizing the in camera hearing to ask the witness if he has been convicted. At the last meeting of the Commission, we were told that rarely, if ever, does a witness deny a conviction if he has been in fact convicted. A defendant on trial for a more serious offense than perjury might be tempted to deny a conviction if he did not think the prosecution could immediately prove otherwise, but it seems unlikely that a witness not in custody would deny under oath a fact so easily and conclusively provable, and the possibility that a defendant would do so also seems remote. We were told at the meeting of the judges' committees that questioning in regard to prior felonies is "devastating" to a defendant. That being so, the concern should not be with whether the prosecutor is acting fairly. He is not on trial. The defendant is the one on trial, and the concern should be whether he is being unfairly prejudiced in the eyes of the jury--regardless of the prosecutor's good faith or lack thereof. Requiring the prosecutor to have evidence, either in the form of an admission or other competent evidence, of a conviction before he may ask a witness about it in front of the jury is the only way in which a fair trial can be assured.

Conclusion

We are persuaded by the comments of the Assembly committee, the representatives of the prosecuting agencies, and Mr. B. E. Witkin that the "dishonesty" standard is unworkable. It will create as many different standards as there are judges. Limiting the crimes to perjury or crimes

against public justice is too limiting, for the character traits bearing on a witness' veracity are also demonstrated by many other crimes. A person who has spent a lifetime as a "bunco" artist should be as subject to impeachment as a person who committed perjury once. When the crimes that bear on credibility are compiled, however, the list is so long that virtually all crimes might as well be included. The prosecutor's good sense will require that convictions based on negligent conduct be excluded. And, even if the prosecutor uses such a conviction, it is unlikely to have much influence with the jury insofar as the witness' credibility is concerned. Hence, we believe that any crime serious enough to result in a felony conviction should be usable for impeachment purposes.

We also believe that convictions of crimes punishable as felonies should be usable. No rational reason exists for permitting the person granted straight probation to be impeached while precluding impeachment of the person sentenced to a year in jail for such crimes as grand theft, burglary, extortion, etc.

We further recommend that the Commission restore the limitation relating to criminal defendants that was contained in the tentative recommendation relating to witnesses. All of the comments that we have received in support of restrictions on the impeachment rule have focussed on the criminal defendant. They all point to abuses of the right of impeachment through which the defendant is tried for crimes other than the one charged. Since this is the source of the complaints over the impeachment rule, the problem should be met directly by a provision dealing with that specific problem. The Code should prohibit the impeachment of a criminal defendant with evidence of prior convictions unless the defendant first introduces

evidence of his good character. We retreated from this position because of the criticisms received from the prosecuting agencies. The staff believes that the retreat was in part because we believed we might be able to meet their objections. That is now obviously impossible, since the prosecuting agencies oppose any change of any sort in the existing law and even resist codifying existing case law that is not favorable to them. Therefore, we recommend a return to the Commission's original position in this regard.

Finally, we recommend the retention of both the in camera hearing procedure and the requirement that the examiner have evidence of the prior conviction. The water is over the dam when the question is asked, whether or not the examiner was acting in good faith. As the damage cannot be effectively undone except by the extreme expedient of a mistrial, protection against the damage must be provided before the question is asked. At the in camera hearing, the examiner may ask the witness if he has sustained a conviction and may use any admission there given.

A draft to carry out the foregoing recommendations is as follows:

788. (a) Subject to subdivisions (b) and (c), evidence of a witness' conviction of a ~~felony~~ crime is admissible for the purpose of attacking his credibility if the court, in proceedings held out of the presence of the jury, finds that:

~~(1)--An essential element of the crime is dishonesty or false statement; and~~ (1) The crime is a felony or, if committed in this State, is a crime punishable as a felony; and

(2) The witness has admitted his conviction of the crime or the party attacking the credibility of the witness has produced

competent evidence of the conviction.

(b) In a criminal action, evidence of the defendant's conviction of a crime is inadmissible for the purpose of attacking his credibility as a witness unless he has first introduced evidence of his character for honesty or veracity for the purpose of supporting his credibility.

~~(b)~~ (c) Evidence of a witness' conviction of a ~~felony~~ crime is inadmissible for the purpose of attacking his credibility if:

(1) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.

(2) A certificate of rehabilitation and pardon has been granted the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.

(3) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4 or 1203.4a.

(4) The record of conviction has been sealed under the provisions of Penal Code Section 1203.45.

~~(4)~~ (5) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in paragraph (2) ~~or~~ , (3) , or (4).

~~(5)~~ (6) A period of more than 10 years has elapsed since the date of his release from confinement, or the expiration of the period of his parole, probation, or sentence, whichever is the later date.

Section 1153

The District Attorney's Association and the Attorney General objected to the codification of the rule that a withdrawn plea of guilty is inadmissible.

Apparently, the hope is that the enactment of the Evidence Code would repeal the holding of People v. Quinn, 61 Cal.2d ___, 39 Cal. Rptr. 393 (1964). Quinn held that a withdrawn plea of guilty is inadmissible. If Section 1153 were modified to omit the reference to a withdrawn plea of guilty, it would be arguable (probably with merit) that evidence of such a withdrawn plea is admissible under the general provisions of Section 351 ("Except as otherwise provided by statute, all relevant evidence is admissible").

The argument in favor of the deletion is that a plea of guilty is made only under the most stringent conditions for assuring that the defendant really means what he says. Since that is so, there are no doubts concerning the trustworthiness of the admission such as there are concerning an offer to plead guilty. The evidence is highly reliable and is deserving of consideration on the issue of guilt.

The contrary argument is that permitting such evidence to be introduced virtually destroys the value of the right to withdraw a plea. Penal Code Section 1018 provides "On application of the defendant at any time before judgment the court may, and in the case of a defendant who appeared without counsel at the time of the plea to court must, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." Numerous cases have made it clear that the "good cause" mentioned does not include disappointment with the result of the plea. The "good cause" refers to "mistake, ignorance, or inadvertence or any other factor overreaching defendant's free and clear judgment." People v. Butler, 70 Cal. App.2d

553, 561 (1945). The defendant may not understand that he is not in fact guilty and that he has a good defense, for few laymen understand what elements are essential to a determination of guilt. If a plea of guilty has been mistakenly or ignorantly made and is for that reason permitted to be withdrawn, the defendant should be entitled to a trial unprejudiced by evidence that he pleaded guilty.

Section 1230

The District Attorney's Association also objected to the codification of the Spriggs rule, which permits a declaration against penal interest to be admitted over a hearsay objection despite the availability of the declarant. Their argument is that the rule is new and the courts should be permitted to work with it for a while, perhaps qualifying it if it proves necessary, before the rule is hardened into statutory form.

Here, of course, the court is not confined to the terms of the hearsay division . It can fashion new hearsay rules. It might consider, however, that the declaration against interest area is covered by statute and the court is precluded from holding declarations against penal interest to be admissible unless provision for admission appears in the code.

In a note appearing in 17 Stanf. L. Rev. 322, 324 (1965), it is pointed out that other states that admit declarations against penal interest impose conditions on admissibility that were not imposed by the court in Spriggs. Future cases, however, might develop similar limitations on admissibility if the courts were permitted to work with the rule for a while. For example, Maryland will exclude such a declaration if there appears to have been collusion, and the trial judge has discretion to exclude obviously spurious confessions. Virginia admits such declarations if there is anything

substantial other than the bare confession to connect the declarant with the crime. More stringent limitations appear in the decisions of other states. The note also reports that California is the first state where a court has eliminated the unavailability of the declarant condition. Therefore, argue the prosecutors, the courts should be left free to work with the rule for a while to determine whether some limitation is necessary.

The contrary argument is that a declaration against penal interest is as trustworthy as a declaration against pecuniary interest. Says Professor McCormick:

> Wigmore, however, is probably right in believing that the argument of the danger of perjury is a dubious one since the danger is one that attends all human testimony, and in concluding that "any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent." [McCORMICK, EVIDENCE § 255.]

Says Professor Wigmore:

> But, furthermore, [the exclusion of declarations against penal interest] cannot be justified on grounds of policy. The only plausible reason of policy that has ever been advanced for such a limitation is the possibility of procuring fabricated testimony to such an admission if oral. This is the ancient rusty weapon that has always been brandished to oppose any reform in the rules of Evidence, viz., the argument of danger of abuse. This would be a good argument against admitting any witnesses at all, for it is notorious that some witnesses will lie and that it difficult to avoid being deceived by their lies. . . .
>
> . . . Those who watched (in 1899) with self-righteous indignation the course of proceedings in Captain Dreyfus' trial should remember that, if that trial had occurred in our own Courts, the spectacle would have been no less shameful if we, following our own supposed precedents, had refused to admit what the French Court never for a moment hesitated to admit,-- the authenticated confession of the absconded Major Esterhazy, avowing himself the guilty author of the treason there charged, and now known beyond a doubt to have been the real traitor. [5 WIGMORE, EVIDENCE § 1477.]

It must, of course, be conceded that Wigmore assumed that unavailability was a condition for the admission of all declarations against interest, including declarations against penal interest. But, if the declarant is available, he may be called and examined concerning the declaration, and the truth or falsity of the statement thoroughly explored. The reliability of the statement is in no way improved by the declarant's unavailability. In fact, it would seem that the dangers of abuse and fabrication would be less if the declarant were available for examination concerning the matter.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

ELIMINATION OF PRESUMPTION OF DUE CARE

AS EVIDENCE UNDER THE EVIDENCE CODE

Under existing law, when a person's negligence or exercise of due care is in issue, that person's death, incompetence, or other incapacity (such as amnesia) to testify concerning the facts gives rise to a presumption that he exercised due care. The courts instruct juries that this presumption is a form of evidence that must be considered with all of the other evidence in the case. See, e.g., Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313 (1952); Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16 (1942). Under the Evidence Code, there is no presumption of due care that arises upon proof of death or incapacity, and no presumption is evidence.

To the extent that this presumption of due care affects the burden of proof in negligence cases, it is superseded by Evidence Code Section 521, which provides that a party claiming that some person did not exercise a requisite degree of care has the burden of proof on the issue. Thus, in a simple negligence case where the only issue is the defendant's negligence, the plaintiff has the burden of persuading the trier of fact by a preponderance of the evidence that the defendant was negligent. This is the plaintiff's burden in all negligence cases, not merely those cases where the defendant is dead or incapacitated from testifying concerning the accident. Providing a presumption of due care that arises from the defendant's death or incapacity would be idle, for the presumption would not add to the plaintiff's burden of proof (nor should it). The plaintiff would still be required merely to prove the defendant's negligence by a preponderance of the evidence.

Similarly, in a contributory negligence case, Section 521 requires the defendant to prove the plaintiff's contributory negligence by a preponderance of the evidence. Providing the plaintiff, in addition, with a presumption of due care that arises upon the plaintiff's death or incapacity would not add to the defendant's burden of proof (nor should it). The defendant would still be required to prove the plaintiff's contributory negligence by a preponderance of the evidence.

Thus, adding to the Evidence Code a presumption of due care that arises upon proof of a person's death or incapacity to testify would be idle, for such a presumption would merely duplicate in a narrow area the provisions of Section 521. Moreover, the presumption would create the undesirable implication that a party claiming negligence does not have the burden of proof on the issue in those cases where the person claimed to be negligent is not dead or incapacitated.

The doctrine that a presumption is evidence is omitted from the Evidence Code because there is no way in which the jury can be informed under that doctrine precisely how the presumption affects the fact-finding process. Hence, it introduces into the fact-finding process an element of irrationality and chance that has no proper place in the serious conduct of a lawsuit.

Illustrative of the problems created by the doctrine that a presumption is evidence is the case of Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313 (1952). That was a simple negligence case arising out of a one-car accident: the only issue was whether the defendant driver was negligent. The defendant was held to be entitled to an instruction on the presumption of due care because of the fact that he claimed to have amnesia. The plaintiffs were held to be entitled to an instruction on res ipsa loquitur and on the presumption of negligence that arises when a person violates the rules of the

road. After instructing the jury on res ipsa loquitur, the court instructed:

> These instructions direct your attention to two conflicting rebuttable presumptions relating to the conduct of the defendant (one) that he exercised due care at the time of the accident which presumption arises in the event that you find that as a result thereof he is unable to remember the facts pertaining to the same, and (two) that he was negligent if you find that he was driving on the wrong side of the road, or that he permitted the automobile to leave the road in question entirely, or that he fell asleep at the wheel. If you find the facts to exist which give rise to these presumptions, then these conflicting presumptions constitute evidence, the effect of which is to be determined by you, not by the court; they are to be weighed and considered by you in the light of and in connection with all of the other evidence, and you are to give to them, and each of them, such weight as you deem proper.

As pointed out in Justice Traynor's dissenting opinion, this instruction gives the jury no clue as to how it should resolve the factual issues from the evidence presented. Under the Evidence Code, the case would be submitted to the jury in the manner suggested by Justice Traynor:

> The facts and issues in these cases are simple and could easily have been presented to the jury in an intelligible manner. . . .
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> [T]he jury should have been instructed to find defendant liable if it concluded that he had the ability to explain the accident and failed to do so. It should also have been instructed that if it found that defendant had no memory of the accident because of amnesia, it should base its verdict solely on the evidence presented and find defendant liable only if it concluded that the accident was more probably than not the result of negligence on his part. Under such instructions the mental processes involved in reaching a verdict would not have been difficult. If the jury disbelieved defendant's evidence that he was suffering from amnesia, his liability would be established. If it believed that evidence, it would then have to decide only whether or not to draw the inference from the occurrence of the accident and the surrounding circumstances that defendant was negligent. If it could not decide whether or not to draw that inference it would find for the defendant because of plaintiffs' failure to discharge their burden of proof.

The instructions suggested by Justice Traynor inform the jury precisely the findings they should make on the basis of their beliefs concerning

plaintiffs' evidence and defendant's evidence. The instructions given, however, virtually require the jury to determine the verdict by chance; for no hint is given as to how the facts should be determined from the evidence. The Evidence Code provisions on presumptions have been drafted with the objective of eliminating incomprehensible instructions, such as that given in Scott v. Burke, from California practice.

If it seems necessary in a particular case to call to the jury's attention that a person's death, incompetency, or other disability has prevented him from contradicting or explaining the evidence of his negligence, that fact may be readily called to the jury's attention in argument. The existence of such a disability, however, is no justification for perpetuating the practice of giving instructions that cannot be intelligently applied by the laymen who sit on juries.

§ 414. Incapacity of person to deny or explain evidence of misconduct

414. If evidence is received that a person was negligent or guilty of crime or other wrongdoing, the fact that such person is dead, incompetent, or otherwise incapable of giving testimony to explain or deny the evidence against him may be commented upon by the court and by counsel and may be considered by the court or jury.

Comment. Under existing law, when a person's negligence or exercise of due care is in issue, the court instructs the jury such person's death, incompetence, or other incapacity to testify concerning the facts gives rise to a presumption that he excercised due care. The court also instructs that this presumption is a form of evidence that must be considered with all of the other evidence in the case. See, e.g., Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313 (1952); Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16 (1942).

The doctrine that a presumption is evidence is not contained in the Evidence Code for the reasons discussed in the Comment to Section 600. Nonetheless, the instructions given in the cases where the presumption of due care has been applied are helpful to the extent that they impress upon the jury that the person charged with negligence cannot contradict the evidence against him or otherwise impress the jury with his innocence, and that this incapacity may be properly considered in evaluating the evidence of negligence.

Section 414 accomplishes directly what the instructions on the presumption of due care accomplished indirectly. Under Section 414, the jury may be informed directly that the fact that the person charged with misconduct is incapable of testifying to contradict or explain the

evidence against him may be considered in evaluating that evidence.

Section 414 applies only when the person charged with misconduct is physically incapable of testifying concerning the events in question. He may be dead or incompetent, or he may be suffering from amnesia. Cf. Scott v. Burke, 39 Cal.2d 388, 247, P.2d 313 (1952). Unavailability of the person because of privilege would not warrant application of Section 414. Compare EVIDENCE CODE § 240 and the Comment thereto.

Third Supp. Memo 65-4 EXHIBIT III

C.C.P. § 1963

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

Class: This so-called presumption should be repealed.

This statutory rebuttable presumption is virtually indistinguishable from the conclusive presumption stated in C.C.P. § 1962 of "a malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another". But, "This 'conclusive presumption' has little meaning, either as a rule of substantive law or as a rule of evidence, for the facts of deliberation and purpose which must be established to bring the presumption into operation are just as subjective as the presumed fact of malicious and guilty intent." People v. Gorshen, 51 Cal.2d 716, 731, 336 P.2d 492 (1959). We do not propose to alter the conclusive presumption, however.

The rebuttable presumption expressed in § 1963(2), when correctly construed, means no more than that a person is presumed to have intended what he in fact did. (Cf. C.C.P. § 1963(3), "That a person intends the ordinary consequences of his voluntary act ".) Hence, if some specific intent, other than that inherent in the voluntary doing of the act involved, is a necessary element of a crime, the presumption is inapplicable and it is error to instruct upon it. People v. Snyder, 15 Cal.2d 706, 104 P.2d 639 (1940); People v. Maciel, 71 Cal. App. 213, 234 Pac. 877 (1925); cf., People v. Neal, 40 Cal. App.2d 115, 104 P.2d 555 (1940). The Maciel case stated the rule to be that ". . . whenever a specific intent is an essential ingredient of the offense no presumption of law can arise as to the existence of such intent, for it is a fact to be proved like any other fact in the case." 71 Cal. App. at 217. Holding that an instruction based on § 1963(2) was prejudicially erroneous in a prosecution for assault with intent to kill. the

court said:

> If the court had charged the jury that when the act committed by an accused is unlawful the law raises a disputable presumption that the act was intended, and that the person doing it, if he did it voluntarily, also intended the ordinary consequences of his act, the instruction would have stated a rule of evidence substantially as declared in subdivisions 2 and 3 of section 1963 of the Code of Civil Procedure. . . . Had the court worded its instruction so as to state the law substantially as it is declared in these code provisions, it would have been properly applicable to the lesser offense of an assault with a deadly weapon; and in that event, appellant, if he had desired to limit the instruction to a declaration that it did not apply to the greater offense of an assault with intent to commit murder, would have been obliged to request the court so to declare.
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> . . . Instead, [the court] gave an instruction the vice of which lies in the fact that it goes beyond the rule that an accused who has done an unlawful act is presumed to have intended to do that act, and broadly asserts that when the act committed by an accused is unlawful the law presumes 'the criminal intent,' without telling the jury what is the criminal intent which the law presumes in such cases. . . .
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> . . . It is only when the intent is not made an affirmative element of the crime that the law presumes that the act, if knowingly done, was done with a criminal intent. (16 C.J., p. 81) When a specific intent is an element of the offense it presents a question of fact which must be proved like any other fact in the case. It is none the less a question of fact though it cannot be proved by direct and positive evidence. All the circumstances surrounding the act furnish the evidence from which the presence or absence of the specific intent may be inferred by the jury; and no presumption of law can ever arise that will decide it. [71 Cal. App. at 217-18.]

Thus, the presumption is at best but a reiteration of the presumption in § 1963(3) that a person intends to do what he voluntarily does. At worst, it is nonsense. It forces one to assume a preliminary fact (that an unlawful act was done) that one cannot determine without relying on the presumed fact (that there was an unlawful intent). If the intent was not unlawful, there was no unlawful act.

Therefore, the staff recommends the repeal of this presumption.

C.C.P. § 1963

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

Class: Repeal.

Says Witkin, "This [presumption] appears to be a simple truism, which accords with logic and human experience . . . ." Witkin, California Crimes 58. But it is settled that it is error in a criminal case to instruct in the language of this presumption when specific intent is a necessary element of the crime. People v. Snyder, 15 Cal.2d 706, 104 P.2d 639 (1940); People v. Brown, 27 Cal. App.2d 612, 81 P.2d 463 (1938). The rule is stated in People v. Mize, 80 Cal. 41, 44-45, 22 Pac. 80 (1889) (quoted in both Snyder and Brown, supra) as follows:

> It is doubtless true that, as a general rule, a man is presumed to have intended that which he has done, or that which is the immediate and natural consequence of his act, but where an act becomes criminal only when it has been performed with a particular intent, that intent must be alleged and proved. It is for the jury, under all the circumstances of the case, to say whether the intent required by the statute to constitute the offense existed in the mind of the defendant. . . . In homicide cases, where the killing is proved, it rests on the defendant to show justification, excuse, or circumstances of mitigation, subject to the qualification that the benefit of the doubt is to be given to the prisoner; but this is because the statute expressly shifts the burden of proving circumstances of mitigation upon the defendant in homicide cases. The rule is confined to murder trials. (Pen. Code, sec. 1105; People v. Cheong Foon Ark, 61 Cal. 527.)

The cited cases also make clear, however, that the requisite intent may be inferred from the commission of the act and the surrounding circumstances. The strength of the inference--whether in a civil case it should be permissive or mandatory--would seem to depend on the nature of the circumstances. Hence, it seems improper to give the conclusive effect of a presumption to the evidence. The matter should be left to inference. And, because circumstances may vary, we do not believe that a statutory inference should be enacted permitting the inference to be drawn in every case. Whether the inference is permissible should be left to the ordinary rules governing circumstantial evidence.

It is settled that it is proper to instruct the jury that an inference of intent may properly be drawn from proof of the voluntary doing of an act. "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused." Instruction approved in People v. Besold, 154 Cal. 363, 97 Pac. 871 (1908).

Repeal of the presumption may possibly forestall instructions to the jury based on the presumption and resulting reversals. Justice Shinn once commented on an instruction based on this presumption as follows:

> We are at a loss to understand why it was given, or why it is given in so many cases where it can serve no purpose and tends to create confusion. To be sure it states the law as declared in the Penal Code, but that is no reason for giving an instruction which expounds legal principles that are wholly irrelevant to the issues. In every case involving specific intent an instruction on specific intent is sufficient for all purposes. It embraces all the elements of general intent. When instructions are given on both general and specific intent a third instruction is necessary which states that the instruction on general intent does not relate to crimes which require proof of specific intent. The instruction on general intent should not be given at all in a prosecution for violation of section 288. In fact it is only in rare cases that it will serve any purpose. Occasionally the question will arise as an issue for the jury whether the act charged was committed knowingly and voluntarily. But unless the evidence presents that question the rule on general intent is irrelevant and redundant. [People v. Booth, 111 Cal. App.2d 106, 108-09, 243 P.2d 872 (1952).]

Justice Shinn's failure to understand why the instruction is so frequently given in specific intent cases may be because he is unaware that the appellate courts still erroneously rely on the presumption in specific intent cases in affirming convictions. See, e.g., People v. Hulings, 211 Cal. App.2d 218, 27 Cal. Rptr. 446 (1962); People v. Williams, 186 Cal. App.2d 420, 8 Cal. Rptr. 871 (1960); People v. Chapman, 156 Cal. App.2d 151, 319 P.2d 8 (1957). In each of these cases, it was unnecessary to mention the presumption because the inference of the defendant's intent arising from his acts was fully sufficient to support the conviction.