A REPLY TO JUDGE PALMER'S CRITICISM OF THE EVIDENCE CODE

The January 11, 1966, issue of the Metropolitan News contained an article by Judge William J. Palmer criticizing the scheme of the new California Evidence Code in its definition of "evidence" and its provisions relating to burden of proof and presumptions. The following reply to Judge Palmer has been prepared by and is printed at the request of Mr. Joseph A. Ball of the Long Beach Bar, a member of the California Law Revision Commission and a former president of the State Bar of California.

-- EDITOR'S NOTE

In a highly critical article appearing in a recent issue of the Metropolitan News, Judge William J. Palmer takes the draftsmen of the new Evidence Code to task because the Code now makes clear that a presumption is not evidence. Judge Palmer asserts that the Evidence Code authorizes a court "to deliver an adverse judgment against a person without receiving or having by law any evidence to support the judgment." Moreover, he asserts, the Evidence Code commands courts to do so in many instances. He then characterizes this revision of the California law as a "preposterously unreasonable" trespass by the Legislature upon the judicial domain, and gives the impression that the existing law has had the unqualified blessing of all "great jurists of the past."

Nothing could be farther from the fact. The doctrine that a presumption is evidence is followed by only a small minority of the courts in this country (see anno., 95 A.L.R. 878; see cases collected in 9 Wigmore,

Evidence (3d ed. 1940) § 2491) and has been roundly criticized by eminent jurists and legal scholars. In a report to the Law Revision Commission, Professor James H. Chadbourn of the Harvard Law School, consultant to the Commission, wrote:

> This California doctrine has been severely and persistently criticized by writers in textbooks and law reviews and by two judges of the California Supreme Court. Summarily stated, the main points of the criticism are: (1) The doctrine calls upon the jury to perform an impossible task; (2) It confuses the jury; (3) It enlarges the burden of proof; (4) It is derived from an erroneous interpretation of certain sections of the Code of Civil Procedure. . . .
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> A presumption is a rule of law. As such, it cannot be weighed as evidence. It can no more be balanced against evidence "than ten pounds of sugar can be weighed against half-past two in the afternoon." Justice Traynor [the present Chief Justice, Roger J. Traynor] expresses his criticism as follows:
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> > It is a mental impossibility to weigh a presumption as evidence. Juries can decide upon the probable existence of a fact only by a consideration of actual probative evidence bearing thereon. A rule of law that the fact will be presumed to exist in the absence of evidence cannot assist them in determining from an examination of evidence whether or not the fact exists. It is impossible to weigh a rule of law on the one hand against physical objects and personal observations on the other to determine which would more probably establish the existence or non-existence of a fact.

To the criticism of Mr. Justice Traynor can be added that of Thayer, Wigmore, Morgan, and McCormick, as well as the opinions of judges such as Mansfield, Lummus, Butler, and Field. And from California has come the criticism of Professors Hale, McBaine, and Prosser, as well as Justices Edmonds, Richards and Seawell.

When it drafted the Evidence Code, the Law Revision Commission sought to meet these criticisms of the existing law by defining more precisely the distinction between the evidence presentation process, on the one hand, and the evidence considering process, on the other. In any trial, these are two

quite distinct processes that must be performed before findings can be made in accordance with the law.

The evidence presentation process involves the calling of witnesses and the eliciting of their testimony, the presentation of exhibits, jury views, visual demonstrations such as the exhibition of an infant to a jury in a paternity case, auditory demonstrations such as the demonstration of the sound of a voice, and the presentation of other matters that can be perceived by the senses. As this evidence is being offered, the court must rule on its admissibility and, in accordance with the law of evidence, exclude that which is improperly offered while permitting that properly offered to be presented to the trier of fact.

The evidence considering process involves the application of human intelligence to the evidence so that, by the exercise of reason, the trier of fact may determine what the actual facts are. To guide this second process, the law has certain rules that prescribe for the trier of fact what facts should be found in the light of the evidence properly adduced during the evidence presentation process and the inferences that may reasonably be drawn from that evidence. For example, the law prescribes that the plaintiff in a negligence case must persuade the trier of fact by a preponderance of the evidence that the defendant was negligent. If the plaintiff fails to do this, the trier of fact is required to find that the defendant was not negligent even though the trier of fact may not be persuaded of the defendant's freedom from

negligence either. If the plaintiff has failed to produce evidence during the evidence presentation process from which anyone could reasonably conclude that the defendant was negligent, then the court is required to render judgment against the plaintiff even though there may have been no evidence presented tending to show that the defendant was not negligent.

The definition of "evidence" contained in Section 140 of the Evidence Code refers only to the matters that are offered during the evidence presentation process. It defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." "Evidence" is defined in this manner to distinguish the matters that may be presented during the evidence presentation process from the rules governing the process of reasoning from the evidence to determine the facts. It is only evidence in the defined sense of the word that is subject to the hearsay rule, the best evidence rule, the opinion rule, the rules of privilege, and the rules of extrinsic evidentiary policy that are gathered and codified in the Code.

The rules that guide the process of finding the facts from the evidence presented are termed by the Evidence Code as the rules of burden of proof, burden of producing evidence, and presumptions. That the Code has distinguished these rules from evidence that may be offered during the evidence presentation process does not mean that the Code denies the existence of these rules. On the contrary, the Code confirms their existence by defining them and describing how they affect the situations to which they apply.

Varying meanings have been given in times past to "burden of proof" and "burden of producing evidence." To eliminate ambiguity, the Evidence Code defines these terms in Sections 110 and 115. The burden of proof, under

the Code, is the burden of establishing by evidence a particular degree of belief concerning a fact in the mind of the trier of fact. The California cases have recognized four different degrees of belief that a party may be required to establish, and these four degrees are specified in Section 115. In civil cases, a party is usually required to prove a fact by a preponderance of the evidence, which means that the trier of fact must believe that it is more probable than not that the fact exists. However, at times in a civil case, a party may be required to prove a fact by "clear and convincing proof," which means that the trier of fact must believe that there is a high probability of the existence of the fact. In criminal cases, the prosecution's evidence must leave no reasonable doubt in the mind of the trier of fact concerning those facts that the prosecution must establish. But the defendant, too, is sometimes called on to produce proof of certain facts in a criminal case. For example, in In re Corey, 230 Cal. App.2d 813, 41 Cal. Rptr. 379 (1964), Justice Molinari points out that on the issue of alibi, "It devolves upon [the defendant] to prove the alibi to such a degree of certainty as will, upon a consideration of all the evidence, leave a reasonable doubt of his guilt in the mind of the trier of fact." Because the burden referred to by Justice Molinari is that of establishing a reasonable doubt in the mind of the trier of fact, it is a burden of proof within the meaning of the Evidence Code, although the degree of proof is very light.

Evidence Code Section 115 provides that, unless the law specifically requires otherwise, proof by a preponderance of the evidence is required to discharge the burden of proof. The situations where some other degree of belief is required by the burden of proof are not specified by the Evidence Code; nor are they specified by the Code of Civil Procedure. Penal Code

Section 1096 has governed and will continue to govern criminal actions, and it requires proof of guilt beyond a reasonable doubt. Those situations where the law requires clear and convincing proof are not specified in either the existing statutes or the Evidence Code; they are left by the Code, as by the existing statutes, to definition by court decision. There is no reason to suppose that the law will be any more uncertain in the future because of a failure to specify in the Evidence Code where clear and convincing proof is required than it was in the past because of the failure to so specify in the Code of Civil Procedure.

Section 502 requires the court to instruct the jury as to which party bears the burden of proof on each issue. The court is also required to instruct the jury as to the degree of proof required. Judge Palmer's article suggested that this section gives a court arbitrary authority to assign the burden of proof and to determine the degree of proof required. The fact is, however, that in this as in other matters, the court is required to instruct the jury in accordance with the law as declared by statute or appellate decision. The court has discretion only to the extent that the law is not settled, and its exercise of discretion in such cases is subject to appellate review and revision. Section 502 merely requires the court to give instructions; it confers no authority to make up the law to be stated in such instructions.

Unless the court instructs the jury as required by Section 502, the jury cannot know what it is supposed to find in the light of the evidence. Suppose for example that, in a negligence case, the evidence is so conflicting that the jury cannot decide whether the defendant was negligent or not. Without an appropriate instruction as to where the law places the burden of proof, the jury cannot know that it is required by the law to decide for the defendant. In a criminal case, unless

the jury is given an appropriate instruction, the jury cannot know that it must assume that the defendant was sane in the absence of proof to the contrary. For all the jury may know, the prosecution may be required by the law to prove the defendant's sanity beyond a reasonable doubt. All that Section 502 requires is that the court instruct the jury as to the proper incidence of the burden of proof and the proper degree of proof required.

Section 500 of the Evidence Code provides that a party has the burden of proof as to each fact essential to his claim or defense. What facts are essential to a particular claim or defense is determined by the substantive law, and there is no simple formula for making the determination that is applicable to all situations. The substantive law in California prescribes that proof of the exercise of care is not essential to a plaintiff's claim for negligence. In some other states, the rule is otherwise, but in California, the substantive law prescribes that contributory negligence must be shown as a defense. Lack of probable cause must be shown to make out a claim for malicious prosecution. But lack of probable cause need not be shown in an action for false arrest. In a false arrest case, the plaintiff need prove only an arrest without a warrant and the facts showing probable cause must then be proved by the defense. Since there is no magic formula for determining when the law is going to place the burden of proof on the plaintiff and when the law is going to place the burden of proof on the defendant, the Evidence Code has not attempted to state one. This does not mean, however, that the substantive law will not continue to determine what facts are essential to a claim for judicial relief and what facts are essential to a defense that is being asserted. Nor does it mean that a trial judge may change the legally required allocations of the burden of proof whenever he sees fit.

The burden of producing evidence is, under the Evidence Code, the burden of producing sufficient evidence to go to the jury on a factual dispute. Without enough evidence to warrant a jury decision that a particular fact exists, the judge must rule that as a matter of law the fact does not exist for purposes of the litigation. For example, if a defendant (who has the burden of producing evidence of contributory negligence) produces no evidence from which a jury could find the plaintiff contributively negligent, the judge must assume--and require the jury to assume--for the purposes of the litigation that the plaintiff was not contributively negligent.

At the outset of a case, a plaintiff will have the burden of proof and the burden of producing evidence as to some facts and the defendant will have these burdens as to others. For example, a plaintiff child in a paternity case begins the litigation with the burden of proving that the defendant is his father. He may attempt to discharge this burden with evidence that the defendant was the only person to have sexual relations with his mother at or about the time of conception. On the other hand, he may prove merely that his mother was married to the defendant at or about the time of conception. Under existing California law and under the Evidence Code as well, proof of such a marriage lifts the burden of proving paternity from the plaintiff child and places the burden of proving nonpaternity on the defendant. Moreover, nonpaternity must be proven by clear and convincing proof.

The rules that thus reallocate the burden of proof and burden of producing evidence after certain facts have been established by the evidence are defined in the Evidence Code as presumptions. Presumptions are not evidence under the Evidence Code because they are rules that govern the fact finding process of a trial; they are not matters that can be offered, admitted, or excluded during the evidence presentation process of a trial. Under the Evidence

Code, presumptions--like the rules relating to burden of proof and burden of producing evidence--are merely rules of law designed to tell the trier of fact what facts should be found in the light of the evidence and the inferences to be drawn from the evidence.

A presumption is defined by the Code to be an assumption of fact the law requires to be made when some other fact or group of facts is established in the action. § 600. About the only difference between this definition and that appearing in Code of Civil Procedure Section 1959 is that the Code of Civil Procedure uses the word "deduction" instead of the word "assumption." The Evidence Code uses the word "assumption" because it is more accurate. A conclusion reached by the trier of fact as a result of a presumption is arrived at through the compulsion of law, not through the exercise of the trier of fact's reason. The presumed conclusion must be assumed by the trier of fact whether or not it is also deduced.

As under existing law, some presumptions are conclusive and some are rebuttable. The conclusive presumptions in the Evidence Code are the same as those contained in the Code of Civil Procedure. Judge Palmer points out that the conclusive presumption of legitimacy in Section 621 may require a finding of a husband's paternity even in the face of blood test evidence that shows that he could not be the father of the child. Section 621 is no innovation in the law, however. That precise result was reached in Wareham v. Wareham, 195 Cal. App.2d 64, 15 Cal. Rptr. 465 (1961), as the result of Code of Civil Procedure Section 1962.

The rebuttable presumptions contained in the Evidence Code are also taken from existing law. In the absence of contrary evidence, too, they function exactly as do presumptions under the Code of Civil Procedure. They arise only after certain facts are established, and in the absence of

contrary evidence they conclusively establish the presumed fact. Compare BAJI No. 22: "If [a presumption] is not controverted, the jury is bound to find in accordance with the presumption."

Because the Evidence Code presumptions are recodifications of existing presumptions, and because in the absence of contrary evidence they function precisely as do presumptions under existing law, it is difficult to understand Judge Palmer's assertion that the presumptions provisions of the Evidence Code authorize and even command a court "to deliver an adverse judgment against a person without receiving or having by law any evidence to support the judgment."

Of course, a court can at times give an adverse judgment against a party without receiving any evidence. But this is true under existing law. A court is required to do so whenever the plaintiff fails to produce any evidence. But before a court can render a judgment on the basis of a presumption, the facts giving rise to the presumption must be established. Usually, the facts giving rise to the presumption will have to be established by proof, and in such cases there will be evidence of those facts. Proof of the facts giving rise to a presumption may not be required, however, if they have been established by the pleadings, by stipulation, or by admission. This is true under existing law as well as under the Evidence Code, and the Evidence Code makes no change in this regard.

The only substantive difference between the existing law relating to presumptions and the Evidence Code provisions on presumptions relates to the showing required to dispel a rebuttable presumption. Under existing law, such a presumption is evidence which can virtually never be dispelled. Under the Evidence Code, however, presumptions are not evidence, because they cannot be offered and admitted in evidence or excluded therefrom. They are not subject to a claim of privilege,

to the hearsay rule, the opinion rule, or any other rule regulating the presentation of evidence. Presumptions are not evidence because they are rules of law designed to guide the fact finding process after the evidence has been admitted. Rebuttable presumptions are merely rules of law allocating the burden of proof or the burden of producing evidence.

The Evidence Code classifies rebuttable presumptions as either presumptions affecting the burden of proof or presumptions affecting the burden of producing evidence. A presumption affecting the burden of proof requires that the trier of fact assume the existence of the presumed fact until its nonexistence is proved. The degree of proof necessary to overcome such a presumption will depend on the particular presumption involved and on whether the case is a criminal or civil case. For example, the rebuttable presumption of legitimacy can be overcome in a civil case only by clear and convincing proof. But this heavy degree of proof is required by existing law; the Evidence Code provision on this presumption makes no change in that regard. In civil litigation, however, most presumptions affecting the burden of proof can be overcome merely by a preponderance of evidence, for Section 115 provides that the burden of proof requires proof by a preponderance of the evidence except in those instances where the law--not a particular judge--specifically requires a different degree of proof.

A presumption affecting the burden of producing evidence merely requires the trier of fact to assume the presumed fact until contrary evidence is introduced. The presumption then ceases to operate altogether. For example, the presumption that a mailed letter was received ceases to have any force at all as soon as there is any evidence that the addressee did not receive the letter. But the Evidence Code makes it abundantly clear that even though the presumptive force of the evidence of mailing is lost, the rational

inference that flows from the fact that most mailed letters are received may still have sufficient force to overcome a denial of receipt and warrant a finding that the letter was received. See § 604.

Thus, the Evidence Code's provisions on presumptions do not authorize a court to render a judgment not based on competent evidence to any greater extent than do the existing statutory provisions on presumptions. The Evidence Code does not define a presumption as "evidence," as the existing law does, but this change will not give presumptions more force than they have under existing law. On the contrary, they frequently will have less, for under the Evidence Code a presumption may be dispelled by proof or by evidence while under existing law a presumption can be dispelled by neither.

The Code's definition of evidence is not "preposterously unreasonable." It is merely another instance of the law's continuing process of clarification by distinction. There can be no constitutional objection to the distinguishing of the evidence presentation process from the evidence considering process. The two processes, though related, are nonetheless quite distinct in substance. The Code's definition of "evidence" will make the distinction clear and will thus eliminate much of the confusion that has existed in the California law because of past failures to recognize the substantive difference between these two stages of the judicial fact finding process.