

#63

9/7/67

Memorandum 67-55

Subject: Study 63 - Evidence Code

Some time ago, John McDonough sent me the following communication:

Judge Evans (Superior Court, Santa Clara County) tells me that Penal Code Section 1096 still remains and that it furnishes a basis for the argument by counsel that "a man is presumed to be innocent," etc., even though we take the position in the Evidence Code that a presumption never operates until another fact is established. Was this an oversight--that is, should Section 1096 logically be repealed, consistently with our scheme?

It is technically true that under the Evidence Code scheme a presumption does not arise except upon the establishment of some other fact. In drafting the Evidence Code, we phrased as burden of proof provisions those former "presumptions" that did not arise upon the establishment of some other fact. For example, Evidence Code Section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." Section 520 superseded the former "presumption" that "a person is innocent of crime or wrong."

Penal Code Section 1096 reads:

1096. A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

The use of the term presumption in this section is not technically accurate. If it is desired to revise the section to make it technically accurate, the introductory portion might be revised to read:

The state has the burden of proving the defendant guilty beyond a reasonable doubt. If the state fails to meet this burden, that is if there is a reasonable doubt as to the defendant's guilt, he is entitled to an acquittal. Reasonable doubt is defined as [no change in remainder of section] .

The staff believes that the Commission should not recommend any revision of Section 1096. The Penal Code Revision Committee is now engaged in a revision of the Penal Code and this problem can--and should--be brought to the attention of that committee. (We determined some time ago not to prepare legislation to conform the Penal Code to the Evidence Code because the Penal Code is now under study by the Penal Code Revision Committee.) Further, no harm appears to result from the improper use of the term presumption in Penal Code Section 1096. If the section is read to the jury as authorized by Penal Code Section 1096a, we believe that the jury will not be confused by the use of the term "presumption." We did not overlook Penal Code Section 1096 when we drafted the Evidence Code. See Evidence Code Section 501 and the Comment to that section.

If the Commission determines not to recommend a revision of Penal Code Section 1096, we suggest that this matter be brought to the attention of the Penal Code Revision Committee because we believe that the section should be revised--substantially as suggested above--by that Committee in preparing a new Penal Code.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary