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Memorandum 64-2

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

The Commission requested the staff to classify as many presumptions as possible. We have begun with the presumptions in C.C.P. § 1963 and will continue to classify as many as we can identify. We will prepare supplements to this memorandum as we complete the work on additional presumptions.

BACKGROUND

In order to simplify classification and Commission discussion of the classifications, we have adopted some arbitrary definitions. The persons whose names we have attached to the various categories may not agree with us in full; but the presumptions identified by their names generally follow the theories they have advocated. The terms we will use are as follows:

Morgan presumption. This refers to a presumption that, in a civil case, imposes the burden on the party against whom it operates to persuade the trier of fact of the nonexistence of the presumed fact. In the usual case, the burden of persuasion imposed upon the party against whom it operates will be that the nonexistence of the presumed fact is more probable than its existence. In isolated cases that will be specifically identified, the burden imposed will be to persuade the trier of fact that the probability of the nonexistence of the presumed fact is substantially greater than the probability of its existence. And in certain other cases which will be specifically identified, the burden imposed will be to persuade the trier of fact of the nonexistence of the presumed fact beyond a reasonable doubt.

In criminal cases, when the presumptions here classified operate against the defendant, they will impose upon him the burden of persuading the trier of fact that a reasonable doubt exists as to the existence of the presumed fact. If a heavier burden is imposed upon the defendant by a particular presumption, that presumption will be specifically identified.

Traynor presumption. This refers to a presumption that performs the same function as a Morgan presumption (defined above). The only difference between a Traynor presumption and a Morgan presumption is that in a civil case the burden usually imposed by the presumption is to persuade the trier of fact that the nonexistence of the presumed fact is as probable as its existence.

Thayer presumption. This refers to a presumption that provides a preliminary assumption to be made only in the absence of evidence. If sufficient evidence to warrant a finding is introduced upon the issue to which the presumption relates, the presumption disappears and the trier of fact must decide the case on the basis of the evidence presented. All Thayer presumptions then become statutory inferences, defined below.

In a criminal case, a Thayer presumption will entitle the prosecution to an instruction that the presumed fact is deemed established unless the defendant has presented evidence controverting the presumed fact, in which case the court may instruct the jury that it may infer the presumed fact from the proved fact.

Statutory inference. This refers to facts declared by statute to be sufficiently proved to sustain a finding from the proof of some other fact. The jury is not required, however, to draw the inference in all cases. Whether the inference must be drawn depends on the nature of the evidence

giving rise to the inference. For example, the inference of the continuance of a prior state--life--might be required if the subject were shown to be alive and sleeping in his own bed 10 minutes before the crucial time, but might not be required if the subject were shown to be sinking in deep water for the third time when he was seen.

Prima facie evidence. This is another term for a Thayer presumption.

SPECIFIC PRESUMPTIONS

C.C.P. § 1963

1. That a person is innocent of crime or wrong.

Class: Morgan presumption.

Thus, a party asserting that another has committed a crime or wrong has the burden of proving that fact. In a suit on an insurance policy, the insurance company has the burden of proving suicide. Postler v. Travelers Ins. Co., 173 Cal. 1, 158 Pac. 1022 (1916); Long v. Calif.-Western States Life Insur. Co., 111 Cal. App.2d 254, 244 P.2d 488 (1952). Generally, the party asserting fraud has the burden of persuading the trier of fact that a fraud was committed. Arakelian v. Sears, 53 Cal. App. 646, 200 Pac. 757 (1921); Sanstrum v. Gonser, 140 Cal. App.2d 732, 295 P.2d 532 (1956).

This is a presumption that does not arise from the proof of a preliminary fact. There are other similar presumptions that do not arise from the proof of a preliminary fact. They arise whenever there is an issue concerning the existence of the presumed fact raised by the pleadings. Some have asserted that these are not presumptions at all, others have called them "hortatory" presumptions. In any event, it seems clear enough that the burden of proof they impose on the adverse party may be satisfied by reliance upon a presumption arising from proof. See People v. Agnew, 16 Cal.2d 655, 107 P.2d 601 (1940).

This presumption is classified as a Morgan presumption because of a policy in favor of innocence--which in insurance cases benefits the beneficiaries; because the ultimate burden of proof is not likely to be fragmented by the presumption; and because it assigns the burden of proof in a manner that is consistent with the existing California cases.

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.

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.

C.C.P. § 1963

4. That a person exercises ordinary care for his own concerns.

Class: Morgan presumption.

Thus, whenever a party contends that another has acted negligently, he will have the burden of persuasion on that issue.

This presumption, like the one in subdivision 1, does not arise from the proof of a preliminary fact; and like the presumption in subdivision 1, the burden of proof imposed by this presumption may be satisfied by reliance on a presumption arising from proof. Thus, a person starting with the burden of proof under this presumption may satisfy that burden and impose the burden on the other party by relying on the presumption of negligence arising from proof that goods were damaged in the hands of a bailee.

This presumption is classified as a Morgan presumption because of a policy in favor of innocence of any wrongdoing, because the ultimate burden of proof is not fragmented, and because it assigns the burden of proof in a manner consistent with the existing California cases.

C.C.P. § 1963

5. That evidence willfully suppressed would be adverse if produced.

6. That higher evidence would be adverse from inferior being produced.

Class: Statutory inference.

These two presumptions are considered together because they are essentially the same.

These presumptions need not only reclassification as inferences but also a redrafting to express more accurately the nature of the rules involved.

In a line of cases with which we became familiar in connection with the problem of comment on the privilege against self-incrimination, the Supreme Court made clear that these presumptions will supply no deficiency in the prosecution's proof in a criminal case. All that these presumptions mean is that a defendant's failure "to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." People v. Adamson, 27 Cal.2d 478, 489, 165 P.2d 3 (1946). "But the failure to testify will not supply a lacuna in the prosecution's proof. . . . In criminal cases, after the prosecution has made a prima facie case, the failure of the defendant to testify is not affirmative evidence of any fact, and any inference that can, in the circumstance, be justly drawn therefrom is persuasive rather than probative, lending weight to the evidence presented by the prosecution." People v. Ashley, 42 Cal.2d 246, 268-69, 267 P.2d 271 (1954).

A dictum in the Ashley case indicates that the rule is the same in civil cases. "The rule is analogous to that in civil cases where the failure to produce evidence on the part of the defendant may not be considered until a prima facie case has been made by the plaintiff." 42 Cal.2d at 269. The holdings in the civil cases justify this dictum. In Hampton v. Rose, 8 Cal. App.2d 447, 56 P.2d 1243 (1935) (hearing denied), the court said while reversing a judgment for the plaintiff which was sought to be sustained on the basis of this presumption:

> While courts look with suspicion on the failure after demand to produce evidence which ought to be in the possession of a defendant, such suspicion will not operate to relieve the plaintiff of the burden of proof nor supply requisite facts to support findings and judgment. [8 Cal. App.2d at 450.]

In Girvetz v. Boys' Market, Inc., 91 Cal. App.2d 827, 206 P.2d 6 (1949), a judgment for defendant notwithstanding a verdict for plaintiff was sustained against an attack based in part upon this presumption. The court said:

> This argument is unsound, since the burden rested upon the plaintiff to present evidence warranting an inference of negligence before any unfavorable inference could be drawn from the failure of the defendant to present evidence in rebuttal. [91 Cal. App.2d at 830.]

Possibly these presumptions are unnecessary. Section 2061 of the Code of Civil Prodedure provides in part:

> 2061. The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:
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> 6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

These provisions clearly cover the presumption in Section 1963(6), but they do not clearly cover the presumption in subdivision 5. The staff suggests that both presumptions be reclassified as statutory inferences and redrafted so that it is clear that whatever inferences are to be drawn must be drawn from the evidence in the case--that failure of a party to produce the best evidence does not produce evidence for the other side.

If the principle is approved, we will so draft these provisions.

Respectfully submitted,

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