First Supplement to Memorandum 64-2

In this memorandum we continue our analysis of various presumptions.

C.C.P. § 1963

7. That money paid by one to another was due to the latter.

8. That a thing delivered by one to another belonged to the latter.

9. That an obligation delivered up to the debtor has been paid.

Common law: That an obligation possessed by the creditor has not been paid.

10. That former rent or installments have been paid when a receipt for latter is produced.

13. That a person in possession of an order on himself for the payment of money or the delivery of a thing has paid the money or delivered the thing accordingly.

Class: Thayer presumptions.

These presumptions contained in Section 1963, and the one common law presumption (Light v. Stevens, 159 Cal. 288, 113 Pac. 659 (1911)), are all similar. They seem to be based on probability. No great public policy seems involved. Since the inference underlying the presumptions seems strong, and there is no strong policy reason for imposing upon the party against whom they operate the burden of persuasion, the staff recommends that they be classified as Thayer presumptions.

The presumption rule will probably result in correct decisions where there is no evidence other than the facts giving rise to the presumptions; and where there is conflicting evidence, the jury should be able to weigh the inferences arising from the facts underlying these presumptions as well as other evidence in the case. We know of no reason why greater weight should be assigned to the evidence specified above than is given to any other evidence.

11. That things which a person possesses are owned by him.

12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership.

Class: Thayer presumptions.

The reference to "common reputation" should be deleted. This section notwithstanding, common reputation is not admissible to prove private title to property. Berniaud v. Beecher, 76 Cal. 394, 18 Pac. 598 (1888); Simons v. Inyo Cerro Gordo Co., 48 Cal. App. 524, 192 Pac. 144 (1920). The Simons case held that reputation evidence is admissible, and the reference to reputation in the above section is applicable, only to prove a public interest in property or to prove a private interest in derogation of a public interest in property. The decision also stated that reputation may be admissible to prove private ownership if title is only collaterally involved in the case. In any event, the admissibility of reputation evidence is a matter for consideration in connection with hearsay, and there seems to be no reason to give such evidence the effect of a presumption when it is admissible.

Although it seems proper to assume that a person in possession of property is the owner when there is no evidence to the contrary, when the matter is actually contested by opposing evidence, the staff believes that possession should be but a circumstance to be considered with all of the other circumstances in the case. In Olson v. Olson, 4 Cal.2d 434, 49 P.2d 827 (1935), the presumption seems to have been treated as a Thayer presumption. There, Mrs. Olson, a native of Sweden, decided to return home for a visit. After paying for her passage, some difficulty in connection with her passport

and reentry arose because her husband was a Canadian and not a United States citizen. An attorney advised her to get an annulment (for lack of authority of official performing marriage) which would make her a Swedish national and would simplify obtaining a passport; then she could remarry Olson on her return. She obtained the annulment, and before she remarried Olson, he died. Olson's mother claimed all of his property as his heir. She relied on the presumption of ownership from his possession. The wife proved that the property was jointly acquired while they were both married. The Supreme Court reversed a judgment awarding all of the property to the mother and said:

> In view of the fact that there is no real dispute as to the actual ownership of the personal property by virtue of the unequivocal nature of the evidence . . . no occasion arises for the application of the disputable presumption that a person is the owner of property from exercising acts of ownership over it. [4 Cal.2d at 439.]

We think the most that can be said of possession is that it raises an inference of ownership that should be permitted to be dispelled like any other inference--as in the above case. Hence, we recommend the Thayer presumption classification.

It should be noted that the Legislature amended Civil Code Section 1006, in 1915, to provide that possession alone does not establish sufficient title to sustain a quiet title action.

Common law: That the owner of the legal title to property is also the owner of the full beneficial title.

Class: Morgan presumption that in a civil case imposes upon the adverse party the burden of persuading the trier of fact that the probability of the nonexistence of the presumed fact is substantially greater than the probability of its existence.

The above presumption is mentioned here because of its close relationship to the presumptions just discussed.

The presumption was mentioned in Olson v. Olson, 4 Cal.2d 434, 437, 49 P.2d 827 (1935), where the court said that the presumption had to be overcome with "clear and convincing" evidence. See also Rench v. McMullen, 82 Cal. App.2d 872, 187 P.2d 111 (1947) and the cases there cited.

The presumption places a heavy burden of persuasion upon a party who is seeking to establish a resulting trust or similar right. Rench v. McMullen, 82 Cal. App.2d 872, 187 P.2d 111 (1947).

The presumption has to be classed as a Morgan presumption because it affects the burden of persuasion. Such a classification seems justified because the presumption would not be meaningful unless it did affect the burden of persuasion--the inference is not particularly strong; public policy is interested in preserving the security of titles; the ultimate burden of proof is not likely to be fragmented; and the assignment of the burden of proof is in accordance with existing California cases.

C.C.P. § 1963

14. That a person acting in a public office was regularly appointed to it.

Class: Thayer presumption.

This presumption has been relied on to support deeds from public bodies (City of Monterey v. Jacks, 1939 Cal. 542, 73 Pac. 436 (1903)) and to support judicial actions by judges not proven to have been regularly appointed to the courts in which they were sitting (People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933 (1897); In re Corralitos etc. Co., 130 Cal. 570, 62 Pac. 1076 (1900)). It has been relied on in a condemnation case where the allegation that the persons initiating the action were the trustees of the school district was denied by the answer and the trial court found that they were acting as such trustees but there was no evidence that they were elected and qualified. Delphi School District v. Murray, 53 Cal. 29 (1878).

The presumption has been held not to apply, however, when the right to the office is contested in an action for salary. In Burke v. Edgar, 67 Cal. 182, 7 Pac. 488 (1885), certain deputy county clerks brought a mandate action to compel the payment of salary fixed by state law for court-room clerks. They had been paid a lesser salary established for other deputy county clerks. The trial court found that they had been acting as court-room clerks, but denied them relief. The Supreme Court affirmed.

> The finding that each of the parties referred to, acted in the capacity and only performed services as the court-room clerk of a department . . . is not a finding that they and each of them were assigned . . . . It is consistent with the finding as made, that each of the parties were de facto officers, and it is well settled in this State that a de facto officer cannot recover the compensation or salary annexed to such office . . . .
>
> Conceding that the presumption invoked by appellant stated in section 1963, subd. 14, of the Code of Civil Procedure applies here, still the fact of assignment should be found. But we are of opinion

> that such presumption does not apply to the case of an officer prosecuting an action to recover his salary. In such case he must establish his title by proof of an appointment made as required by law. [67 Cal. at 184.]

The decision seems somewhat hypertechnical. Because of the great likelihood that a person acting in a public office was regularly appointed to it, a Thayer presumption, at least, seems appropriate. Then, if there is a real dispute, the matter will be decided on the basis of the evidence and not on the basis of a presumption.

C.C.P. § 1963

15. That official duty has been regularly performed.

Class: Thayer presumption.

The annotations indicate that this presumption is usually applied to sustain some official action the validity of which is dependent upon some preceding official action and there is no evidence as to whether the preceding action was taken or not. The presumption is that, since someone had the duty to take action, such action was taken.

At times, however, it is applied in the face of conflicting evidence. For example, in City of National City v. Dunlop, 86 Cal. App.2d 380, 194 P.2d 788 (1948), the city brought an ejectment action to compel the defendant to leave a portion of a city street. The defendant asserted that the property was not a city street, and relied on a resolution vacating the street adopted by the city a few years before. The city contended the resolution was void for lack of proper posting of notice of hearing on the resolution. It produced an official who testified that it was his duty to do all of the legal posting for National City, and to his knowledge the requisite posting was not done. The court, relying on the presumption, held that the city had the burden of proof and that the evidence it produced was not sufficient to negative the presumption that some other official did the necessary posting. The appellate court affirmed a judgment of the trial court, made without a jury verdict; hence, the case gives no real indication whether presumption affects the burden of proof.

In People v. Siemsen, 153 Cal. 387, 95 Pac. 863 (1908), the defendant attacked the information on the ground that it was filed before he had been held to answer by a magistrate. His attorney testified that he had

seen the complaint on the day the information was filed and that no commitment order was affixed to it at that time; although, at the time of trial such an order, dated two days prior to the information, was affixed to the complaint. The judge testified that he had no independent recollection but thought he signed the order two days prior to the information because the order bore that date. The appellate court sustained the trial court's refusal to set aside the information in reliance on the presumption. Again, however, since the trial court was affirmed, little clue is given as to the effect of the presumption on the burden of proof. Moreover, the burden would probably have been placed on the defendant anyway, for he was the moving party on the motion to set aside the information.

In People v. Metropolitan Surety Co., 164 Cal. 174, 180, 128 Pac. 324 (1912), the Supreme Court said:

> The presumption that an officer has performed his official duty is, at best, "weak and inconclusive" . . . , and whatever force it possesses would seem to vanish upon proof that the particular duty in question . . . had in fact been violated.

The foregoing tends to indicate that the presumption should be classified as a Thayer presumption, disappearing from the case when any contrary evidence sufficient to warrant a finding is introduced.

There are, however, considerations pointing the other way. The presumption is used to sustain resolutions (the National City case, above), ordinances (San Diego County v. Seifert, 97 Cal. 594, 32 Pac. 644 (1893)), bond issues (District Bond Co. v. Hilliker, 37 Cal. App.2d 81, 98 P.2d 782 (1940)), tax assessments (Crowell v. Harvey Inv. Co., 128 Cal. App. 241, 17 P.2d 189 (1932)), and similar matters of great public concern. The

public interest in the stability of the listed matters would tend to indicate that the person attacking the official action should have the burden of persuasion on the issue--that official action should not be upset unless the trier of fact is persuaded that it should be. Then, too, the inference that an action was taken because there was a duty to take action does not seem too strong. Hence, there seems to be considerable justification for classifying the presumption as a Morgan presumption.

The Commission should be aware of some of the other applications of the presumption, too. The presumption has been applied to sustain the validity of arrests when there has been no evidence that the officers were proceeding without a warrant or without reasonable cause. People v. Farrara, 46 Cal.2d 269, 294 P.2d 23 (1956); People v. Beard, 46 Cal.2d 278, 294 P.2d 29 (1956); People v. Citrino, 46 Cal.2d 284, 294 P.2d 32 (1956). Perhaps these cases can be explained, however, on the ground that the defendant in the situation was the moving party--moving to dismiss an information or indictment as based on illegally obtained evidence, moving to supress evidence, or objecting to the admissibility of evidence. Hence, he would have the burden of proof anyway and would lose in the absence of any evidence. In Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23 (1956), the court held that proof by the defendant of an entry or arrest without a warrant was prima facie evidence of an illegal entry or illegal arrest, and was conclusive in the absence of prosecution evidence showing reasonable cause. Thus, the defendant's proof completely dispelled the presumption and, in effect, invoked a presumption operating against the prosecution.

In People v. Perry, 79 Cal. App.2d Supp. 906, 180 P.2d 465 (1947), it was held that the prosecution could not rely on the presumption to supply

an element in its burden of proof. That was a prosecution for interfering with an arrest, and it was held that the prosecution must prove the lawfulness of the arrest without relying on presumptions. The presumption that an arrest is unlawful (People v. Agnew, 16 Cal.2d 655, 107 P.2d 601 (1940)) prevails over the presumption of performance of a legal duty.

In Caminetti v. Guaranty Union Life Insur. Co., 52 Cal. App.2d 330, 126 P.2d 159 (1942), the insurance company applied for an order terminating a conservatorship. The insurance commissioner, on ex parte application, had taken over the company because of a "hazardous condition" to the policy holders. The company objected to the fact that the trial court placed the burden of proof on the company to show that the ground for takeover did not exist or had been removed. The appellate court affirmed the allocation of the burden of proof partly because of the presumption and partly because the company was the moving party.

In People v. James, 5 Cal. App. 427, 90 Pac. 561 (1907), the defendant in a murder prosecution sought to discharge the burden of proof on justification that is placed by statute on the defendant. The court refused to instruct "that the law presumes that if the defendant was an officer and acting as such at the time of the alleged homicide that he was doing his duty." On appeal, this ruling was affirmed, the court commenting that a homicide by a peace officer is not presumed justifiable merely because of his official position.

In County of Sutter v. McGriff, 130 Cal. 124, 62 Pac. 412 (1900), a condemnation action, the court held that the plaintiff had to prove compliance with a statute requiring a tender as a prerequisite to the action, and it would not rely on this presumption to discharge its burden of proof.

In Estate of Stobie, 30 Cal. App.2d 525, 86 P.2d 883 (1930), the guardian appealed from an order requiring him to pay $40 per month to the State for the maintenance of his ward in a state mental hospital. The State had petitioned for the order and did not prove that the amount fixed by the State was equal to the cost of upkeep--the limit of the amount the State was entitled to receive. The court held that the presumption could be relied on and that the guardian had the burden of introducing evidence showing that the figure was arbitrary and unreasonable.

In Hollander v. Denton, 69 Cal. App.2d 348, 159 P.2d 86 (1945), the court held that a party with the burden of proof who relies on an ordinance need not prove due publication--the presumption sufficed.

These cases are cited to show some of the variety of holdings involving this presumption. Some of the cases indicate that there should be no presumption at all. The ordinary burden of proof allocates the burden of proof properly and the party with that burden cannot rely on the presumption to discharge it. People v. James, supra; People v. Perry, supra; County of Sutter v. McGriff, supra. Others indicate that the presumption should apply in the absence of evidence in favor of the party with the burden of proof. Estate of Stobie, supra. There is some indication that the presumption has been relied on to assign the burden of proof. Caminetti v. Guaranty Union Life Insur. Co., supra.

Although we are not free from doubt, we are inclined to give the presumption a Thayer classification. Although there should be a policy favoring the regularity of official action, we think that policy is sufficiently served by an assumption that will be made only in the absence of evidence.

C.C.P. § 1963

16. That a court or judge, acting as such, whether in this State or any other state or country, was acting in the lawful exercise of his jurisdiction;

Class: Morgan presumption.

The above presumption is similar to the one in subdivision 15 and they are frequently cited together. It has been held that the above presumption cannot be relied on to supply lack of proof of jurisdiction (lack of proof of necessary service) in a direct attack by appeal on a judgment. City of Los Angeles v. Glassell, 203 Cal. 44, 262 Pac. 1084 (1928). It has also been held that the presumption does not apply to courts of limited or inferior jurisdiction. Santos v. Dondero, 11 Cal. App.2d 720, 54 P.2d 764 (1936). Hence, a party who relies on a judgment of a justice's court, or asserts a right thereunder, must affirmatively allege and prove all facts necessary to confer jurisdiction. It has also been held that the presumption does not apply to courts of general jurisdiction when they are acting in a special or limited capacity--as in an adoption matter. Estate of Sharon, 179 Cal. 447, 177 Pac. 283 (1918). There are other cases, however, indicating that the presumption applies to all judgments and orders of the superior court, but the Sharon case explained these on the ground that extrinsic evidence sustained the validity of the judgment under attack. All of the cases cannot be so reconciled, however, and the conflict was shown to the Supreme Court in Burge v. City & County of San Francisco, 41 Cal.2d 608, 262 P.2d 6 (1953). But the court avoided a decision on the question by pointing out that the jurisdictional facts were there established by extrinsic evidence.

The staff recommends that the presumption be modified so that it applies only to courts of general jurisdiction and only when the action of the court or judge is under collateral attack. As modified, we recommend that the presumption be classified as a Morgan presumption because of the public policy in favor of the stability of orders and judgments.

C.C.P. § 1963

17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties;

Class: Morgan presumption.

The function of the above presumption is best illustrated in Clark v. City of Los Angeles, 187 Cal. App.2d 792, 9 Cal. Rptr. 913 (1960). There Mrs. Clark had become entitled to a widow's pension from the defendant which was to last until her death or remarriage. She remarried, the pension stopped, then she obtained an annulment (by default judgment) of her marriage. She brought action to compel the city to restore her widow's pension. The city claimed that it was not bound by the judgment of annulment as it was not a party. Civ. C. § 86. The court held, however, that the judgment, though not conclusive, was presumptively correct under the above presumption, was correctly introduced in evidence, and was not overcome by defendant's evidence.

We recommend the Morgan classification because we do not think that the plaintiff in the above case should have to bear the burden of persuading the court a second time that she was entitled to the annulment.

C.C.P. § 1963

18. That all matters within an issue were laid before the jury and passed upon by them, and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them;

Class: Repeal.

We have been unable to find a case in which the above presumption has been relied on to change the result. It is frequently mentioned as an additional ground for court action after that action has been fully justified on the principle of res judicata. For example:

> And the judgment as rendered in [the former] action is conclusive upon all questions involved in the action and upon which it depends or upon matters which, under the issues, might have been litigated and decided in the case . . . ; and the presumption of law is that all such issues were actually heard and decided. (Subd. 18, § 1963, C.C.P.) [Parnell v. Hahn, 61 Cal. 131, 132 (1882).]

The presumption relied on in the case was without meaning, for the issue was barred by res judicata because it might have been litigated, whether it actually was or not.

The effect of judgments is covered in several other code sections as follows:

> C.C.P. § 1908. Judgment or final order; effect; conclusiveness
> The effect of a judgment or final order in an action or special proceeding before a Court or Judge of this State, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:
>
> One--In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.
>
> Two--In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and

their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.

C.C.P. § 1909. Judicial orders; disputable presumption

Effect of Other Judicial Orders, When Conclusive. Other judicial orders of a Court or Judge of this State, or of the United States, create a disputable presumption, according to the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity.

C.C.P. § 1911. Judgment; items adjudged

What Deemed Adjudged in a Judgment. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

C.C.P. § 1962. The following presumptions, and no others, are deemed conclusive:

* * * * *

6. The judgment or order of a Court, when declared by this Code to be conclusive; but such judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence;

We conclude, therefore, that there is no need for subdivision 18 insofar as judgments are concerned.

We think it is also unnecessary insofar as arbitrations are concerned. The only time the presumption has been cited has been in post award proceedings where the burden would normally be upon the party attacking the award anyway. C.C.P. §§ 1286, 1286.2, 1286.4. Moreover, the doctrine of res judicata is applicable to arbitration awards just as it is to judgments. Jarvis v. Fountain Water Co., 5 Cal. 179 (1855); Robinson v. Templar Lodge, I.O.O.F., 97 Cal. 62, 31 Pac. 609 (1892).

Therefore, we recommend repeal of this presumption.

C.C.P. § 1963

19. That private transactions have been fair and regular;

Class: Morgan presumption.

This presumption is comparable to the presumption of innocence in subdivision 1 and is frequently cited in conjunction with that presumption. Like the presumption of innocence, the burden of proof it imposes on the other party may be discharged by reliance on a presumption arising from proof of a fact in the case--such as the presumption of undue influence arising from proof of an advantage obtained from a fiduciary relationship. Faulkner v. Beatty, 161 Cal. App.2d 547, 327 P.2d 41 (1958); Estate of Bourquin, 161 Cal. App.2d 289, 326 P.2d 604 (1958). Because of its similarity to the presumption in subdivision 1 and to the presumptions in subdivisions 20 and 28, perhaps it should be repealed.

Cases rely on the presumption to place the burden of proof on the party against whom it operates to show that a contract conflicts with some law or regulation. Grimes v. Nicholson, 71 Cal App.2d 538, 162 P.2d 934 (1945); Barrios & Co. v. G. V. Pettigrew Co., 68 Cal. App. 139, 228 Pac. 676 (1924). It has also been cited in support of a holding that evidence that a telephone call was made to Western Union and that the person answering said Western Union was answering is sufficient to warrant a finding that an agent of Western Union was answering the call. Union Constr. C. v. Western Union Tel. Co., 163 Cal 298, 125 Pac. 242 (1912).

Although cases like the Western Union case indicate that the presumption should be classified as a Thayer presumption, we recommend the Morgan classification because it seems to be applied principally in cases like Grimes and Barrios. In such cases, the presumption operates like the presumption of innocence and, hence, should receive a similar classification.

C.C.P. § 1963

20. That the ordinary course of business has been followed;

28. That things have happened according to the ordinary course of nature and the ordinary habits of life;

Class: Statutory inference.

The presumption in subdivision 20, together with that in subdivision 19, has been relied on for a holding that a telephone call was received by an agent of the party to whom the call was made. Union Constr. Co. v. Western Union Tel. Co., 163 Cal. 298, 125 Pac. 242 (1912). A variety of cases may be found holding that evidence of a business custom is sufficient proof that the custom was followed in a particular instance. American Can Co. v. Agricultural Insur. Co., 27 Cal. App. 647, 150 Pac. 996 (1915) (custom of sending out insurance expiration notices soliciting renewal is evidence that particular expiration notice was sent in regard to fire insurance policy expiring at noon, April 18, 1906); Robinson v. Puls, 28 Cal.2d 664, 171 P.2d 430 (1946)(ordinary course of business was evidence that book entries were made contemporaneously); Von Breton v. Hicks, 55 Cal. App.2d 909, 131 P.2d 560 (1942)(that a claim placed in the mail receptacle of the attorney for the executor was received by him).

Many of the applications of presumption in subdivision 20 are little different than some of the presumptions we have recommended be classified as Thayer presumptions. However, where we have recommended the Thayer classification, the proven fact is usually so simple and uniform that a fixed conclusion may be required in the absence of contrary evidence. But the presumption in subdivision 20 is stated so generally that the proven facts may not always point clearly to the presumed fact. Hence, we believe

that this presumption should be classified as an inference only, because in some cases we think the jury should be free to find against the party relying on the presumption, even in the absence of contrary evidence, when the inference pointing to the presumed conclusion is not strong.

The presumption in subdivision 28 is so similar to that in subdivision 20 that it is considered here, too.

This presumption has been cited in cases involving gestation periods. Estate of McNamara, 181 Cal. 82, 183 Pac. 552 (1919); People v. Swiggy, 69 Cal. App. 574, 232 Pac. 174 (1924); People v. Richardson, 161 Cal. 552, 120 Pac. 20 (1911). In 1907, it has been presumed that a manufacturing plant would not operate at night. Mackintosh v. Agricultural Fire Insur. Co., 150 Cal. 440, 89 Pac. 102 (1907). The presumption has also been cited for the proposition that a testatrix is presumed to have read her will. Estate of Johanson, 62 Cal. App.2d 41, 144 P.2d 72 (1943). And, too, for the proposition that a decedent is presumed to have left heirs closer than the fifth degree. Estate of Henrichs, 180 Cal. 175, 179 Pac. 883 (1919).

Again because of the variety of factual situations that can give rise to the presumption, we do not believe that it should be given the fixed effect of a presumption in all cases. Rather, it should be classified as a statutory inference.

C.C.P. § 1963

21. That a promissory note or bill of exchange was given or endorsed for a sufficient consideration;

Class: Repeal.

The matter covered by this presumption is now fully covered by the Commercial Code. Under the Commercial Code, a person who is not a holder in due course takes commercial paper subject to the defense of lack of consideration. § 3306. Want or failure of consideration is a defense (§ 3408) that the defendant has the burden of establishing (§ 3307). "Burden of establishing" is defined in Section 1201 as the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence. Comment #2 to Section 3307 states: "The defendant has the burden of establishing any and all defenses, not only in the first instance but by a preponderance of the total evidence."

These provisions have the same effect that classifying the above presumption as a Morgan presumption would have. Since the matter is already fully covered in the Commercial Code, we recommend the repeal of the above presumption.

C.C.P. § 1963

22. That an endorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill;

Class: Morgan presumption.

Only two cases have relied on this presumption since it was enacted in 1872. There is no comparable presumption in the Commercial Code.

In Gullick v. Interstate Drilling Co., 111 Cal. App. 263 (1931), suit was brought on a note and the plaintiff was nonsuited. The note was signed by the president and secretary of the defendant and endorsed by them as individuals. The nonsuit was granted on the ground that there was no evidence of the authority of the persons executing the note. Citing the above presumption, the appellate court said, "It having been stipulated that the defendants . . . indorsed the note it must be inferred that the note was signed by the makers at the same time. . . . It is hardly conceivable that the defendant . . . would have indorsed a note purporting to be signed by him as president of the corporation unless he had in fact executed it." Hence, the nonsuit was reversed.

In Pacific Portland Cement Co. v. Reinecke, 30 Cal. App. 501, 158 Pac. 1041 (1916), suit on a note was brought against an indorser. Defendant defended on the ground that he indorsed as an accomodation indorser after delivery and without consideration. The court relied on the above presumption, as well as some incompetent--but not objected to--evidence, to find that the indorsement was before delivery despite defendant's direct testimony to the contrary. The court also relied on the presumption of consideration and some cross examination of the defendant from which it might be inferred that he indorsed in accomodation of the maker, not the payee.

Commercial Code Section 3503 provides the times within which commercial paper should be presented. It provides, with respect to the liability of secondary parties, that presentment must be made within a reasonable time after the party becomes liable on the note unless a different time is expressed in the instrument. A schedule of presumptive reasonable times is set forth so far as checks are concerned. With respect to the liability of an indorser, presentment must be made within 7 days after his indorsement.

We are not sure who has the burden of proof under the Commercial Code on whether commercial paper was presented at the proper time. But we think the plaintiff is required to persuade the trier of fact that presentment was made within the necessary time, because Section 3503(2) creates certain presumptions which, under the original U.C.C., could only operate in favor of the party with the burden of proof. If this is correct, the above presumption is unnecessary on the issue of timely presentment, for neither a Thayer nor a Morgan presumption has any operative effect against the party with the burden of proof.

In the situation involved in the Reinecke case, the presumption in effect forced the defendant to assume the burden of proof that he was an accomodation party for the payee, for he was forced to prove that he signed the note after delivery to the payee. We do not know how this burden would be assigned under the Commercial Code, although it seems likely that accomodation is a defense which the defendant must establish. Comm. C. §§ 3415(5), 3307.

To eliminate any doubts concerning the matter of assignment of burden of proof, however, we recommend that the above presumption be classified as a Morgan presumption.

C.C.P. § 1963

23. That a writing is truly dated;

Class: Thayer presumption.

Section 3114 of the Commercial Code states the same presumption in regard to commercial paper:

> Where the instrument or any signature thereon is dated, the date is presumed to be correct.

All of the Commercial Code presumptions were intended to be Thayer presumptions. In the original version, Section 1-201(31) provided:

> (31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

This subdivision was omitted from the California version. The staff will recommend at a later time that the subdivision be restored in substance to the Commercial Code. To avoid any inconsistency between the Commercial Code and the above presumption, we recommend that the above presumption be classified as a Thayer presumption also.

The inference underlying the presumption seems strong--sufficiently strong to warrant a required finding in the absence of contrary evidence. Yet, no public policy seems to us to be involved, nor does any other reason occur to us, warranting a shift in the burden of proof on the issue.

C.C.P. § 1963

24. That a letter duly directed and mailed was received in the regular course of the mail;

Class: Thayer presumption.

Like the preceding presumption, the inference underlying this one is strong--sufficiently strong, we believe, to warrant a required conclusion in the form of a presumption in the absence of contrary evidence. We perceive no public policy involved in the situation, though, nor do we know of any other reason, warranting a shift in the burden of proof on the issue. Hence, we recommend that this presumption be classified as a Thayer presumption.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary