#34(L) 3/13/64

Memorandum 64-18

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

The Commission's decisions relating to presumptions may be summarized as follows: Presumptions are to be classified as Morgan presumptions or Thayer presumptions. The staff was directed to consider whether some Morgan presumptions might be drafted as statements of the burden of proof. The following matters were classified as Morgan presumptions:

1. That the owner of the legal title to property is also the owner of the full beneficial title. This presumption must be overcome by clear and convincing proof.
2. That a child born of a woman who has been married, born during the marriage or within 10 months after its dissolution, is the legitimate child of that marriage. This presumption may be attacked only by the husband or wife or the descendant of either or by the people in a prosecution under Penal Code Section 270. The presumption may be overcome only by clear and convincing proof.
3. That a ceremonial marriage is valid.
4. That a person acting in a public office was regularly appointed to it.
5. That a court, or judge of any court, of this State or the United States, or a court of general jurisdiction, or a judge of such court, in any other State or nation, acting as such, was acting in the lawful exercise of its jurisdiction.

The following matters have been classified as affecting the burden of proof, but the staff does not propose to draft them as presumptions because they do not appear to arise from the proof of some other fact (which the definition of a presumption requires):

6. That a person is innocent of crime or wrongdoing.
7. That a person exercises ordinary care for his own concerns.
8. That a written contract or other instrument is supported by adequate consideration.

The following matters have been classified by the Commission as Thayer presumptions:

1. That money delivered by one to another was due to the latter.
2. That a thing delivered up by one to another belonged to the latter.
3. That an obligation delivered up to the debtor has been paid.
4. 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.
5. That an obligation possessed by the creditor has not been paid.
6. That earlier installments have been paid when a receipt for later is produced.
7. That things which a person possesses are owned by him.
8. That a person is the owner of property from exercising acts of ownership over it.
9. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties.
10. That a writing is truly dated.

11. That a trustee or other person, whose duty it was to convey real property to a particular person has actually conveyed to him, when such a presumption is necessary to perfect title of such person or his successor in interest.

From these determinations by the Commission, a pattern seems to be emerging. In Thayer's Preliminary Treatise on Evidence, pages 314-326, he explains presumptions as follows: Matter, logically evidential, is received as evidence--but only prima facie--of some fact. Over the course of years the conclusionary fact is found to be true so frequently that the process of reasoning is cut short, and a fixed rule is adopted. The fixed rule, however, is merely a preliminary assumption in the absence of any contrary evidence. "Presumption, assumption, taking for granted, are simply so many names for an act or process which aids and shortens inquiry and argument." (At page 315.) After several illustrations of this process he sums up the matter as follows:

> Many facts and groups of fact often recur, and when a body of men with a continuous tradition has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut short the process and lay down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them. . . .
>
> In this way, through rules of presumption, vast sections of our law have accumulated. It is thus, especially, that Lord Mansfield and others conspired with the merchants, and transferred their usages into the law. [At pages 326-27.]

The matters we have described as Thayer presumptions seem to fit this description. The conclusions stated in each presumption are conclusions that one would ordinarily assume to be true in the absence of any contrary evidence. The underlying inference is fairly strong. The presumption,

therefore, seems to be adopted in order to cut short argument over the matter and to facilitate disposition of the pending cause.

Morgan, however, views a presumption as an expression of public policy. If the policy is strong enough to warrant a compelled verdict in the absence of contrary evidence, it should be strong enough to survive the introduction of unbelieved contrary evidence. It should also be strong enough to compel a conclusion when the mind of the trier of fact is in equilibrium. As a general rule, the matters we have classified as Morgan presumptions seem to fit this analysis. Underlying each Morgan presumption there seems to be some public policy being served by the presumption. Whether there is an underlying rational inference is immaterial. For some of the Morgan presumptions there may be a strong rational inference, but for others there clearly is not.

We suggest, therefore, that these criteria be adopted for classifying presumptions as Morgan or Thayer presumptions:

Thayer Presumption: A presumption adopted for reasons of expediency, where the inference underlying the presumption is strong, to forestall argument about the existence of the presumed matter in the absence of any contrary evidence.

Morgan Presumption: A presumption adopted for reasons of public policy, which policy can be effectuated adequately only by imposing the burden of proof on the adverse party to prove the nonexistence of the presumed fact.

At page 335 of his Preliminary Treatise, Professor Thayer makes one more cogent point:

> I have been speaking of rules relating to specific facts or groups of facts. But sometimes the suppositions of fact in the situation dealt with are not referable to any one branch of the law, but spread through several or through all of them. Then you have a general principle or maxim of legal reasoning. There are many of these, which pass current under the name of presumptions--maxims, ground rules, constantly to be remembered and applied in legal discussion . . . . Of this nature . . . is the assumption of the existence of the usual qualities of human beings, such as sanity, and their regular and proper conduct, their honesty and conformity to duty, often these maxims and ground principles get expressed in this form of a presumption perversely and inaccurately, as when the rule that ignorance of the law excuses no one, is put in the form that everyone is presumed to know the law; and when the doctrine that everyone is chargeable with the natural consequences of his conduct, is expressed in the form that everyone is presumed to intend his consequences . . . . In whatever form they are made or ought to be made, their character is the same, that of general maxims in legal reasoning . . . .

We have decided not to classify the "presumption" of due care, of innocence, etc., as presumptions. Instead we propose to draft these "presumptions" as statutory allocations of the initial burden of proof. In the light of the foregoing, we should continue to classify any so-called "presumption" that is of a similar nature--such as the presumption of sanity--in a similar manner.

Attached to this memorandum is a tentative recommendation embodying the foregoing principles. We have included among the presumptions certain presumptions that you have not considered as yet. These will be presented to you by Memorandum 64-19. In regard to this tentative recommendation, the Commission must decide the following matters:

(1) Is the over-all scheme of the statute the proper approach to the subject?

(2) Do the statutes as drafted (without regard to the classification of specific presumptions) express correctly the over-all scheme?

(3) Are the presumptions correctly classified (excluding from consideration presumptions not yet considered)?

(4) Does Rule 16 deal adequately with the problem of inconsistent presumptions?

(5) Do you wish to give specific consideration to any of the conclusive presumptions?

(6) Should a section be added specifying certain matters that are not presumptions? See discussion below.

(7) How should the presumptions discussed in Memorandum 64-19 be classified?

In connection with Question 6, above, we believe that it might be desirable to add a section providing, for example, that identity of person from identity of name is not a presumption. In the proposed Missouri Evidence Code (1948), there is such a section. Section 4.02. It is attached to this memo on yellow paper as Exhibit I.

The value of such a section stems from the fact that there are many common law presumptions, and it seems likely that we will never identify them all. Repealing the statutory counterpart of some common law presumption may not be construed as destroying the common law presumption. The classified presumptions are illustrative only, the list is not exclusive; hence, it could be argued that such presumptions as the continuance of a condition, identity of person from identity of name, etc., have not been wiped out by the repeal of Section 1963, their classification has merely been left to the courts.

If you believe that a section should be added, we propose the section appearing on pink paper as Exhibit II.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXHIBIT I

SECTION 4.02. PRESUMPTIONS--CLASSIFICATION. EXCLUSIONS FROM PRESUMPTIONS

a. Presumptions are classified as:

1. Conclusive presumptions of law; and

2. Rebuttable presumptions of law, subdivided into two classes,

(a). Presumptions affecting burden of producing evidence, and

(b). Presumptions affecting burden of persuasion.

b. The following are not recognized as presumptions:

1. Inferences of fact (sometimes erroneously termed "Presumptions of Fact"), they having no mandatory rule of law connected therewith and being mere circumstantial evidence;

2. Rebuttable presumptions of law (so called) based on co-extensive logical fact inferences (formerly recognized as presumptions in Missouri), there being no necessity therefor; and

3. Prima facie cases based entirely on evidence (a presumption not being evidence) and logical fact inferences connected therewith.

c. Included in fact inferences and prima facie cases, referred to in paragraph b. of this section, and excluded from "presumptions," are (but not exclusively) the following:

1. Res ipsa loquitur inferences of negligence;

2. Inference of receipt of mail based on evidence of proper (a) addressing, (b) stamping and (c) mailing;

3. Inference of guilt based on evidence of possession of recently stolen property;

4. Inference of guilt based on evidence of flight or concealment of person or property;

5. Adverse inferences from destruction, alteration, suppression, spoilation, fabrication or non-production of evidence;
6. Inference of undue influence based on evidence of fiduciary relationship, benefit to fiduciary, and opportunity for undue influence;
7. Inference against truthfulness of testimony of accomplice;
8. Inference of identity of persons based on evidence of identity of names;
9. Inference of continuance of a fact, status or condition based on evidence of existence thereof when such fact, status or condition is of a continuous nature and gives rise to logical fact inferences of continuance.

EXHIBIT II

SECTION 13.7. EXCLUSIONS FROM PRESUMPTIONS

The following are not presumptions:

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

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

(3) That a person intends the ordinary consequences of his voluntary act.

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

(5) That evidence destroyed, altered, suppressed or not produced would be adverse.

(6) 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 aribtrators and passed upon by them.

(7) That private transactions have been fair and regular.

(8) That the ordinary course of business has been followed.

(9) That things have happened according to the ordinary course of nature and the ordinary habits of life.

(10) 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.

(11) That a letter duly directed and mailed was received in the regular course of mail.

(12) Identity of person from identity of name.

(13) That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact.

(14) That persons acting as copartners have entered into a contract of partnership.

(15) That a man and woman deporting themselves as husband and wife are married.

(16) That a thing once proved to exist continues as long as is usual with things of that nature.

(17) The uninterrupted use by the public of land for a burial ground, for five years, with the consent of the owner, and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose.

(18) That there was a good and sufficient consideration for a written contract.

(19) That a witness speaks the truth.

COMMENT

There are in existing California statutes many presumptions that do not meet the criteria for presumptions set forth in these rules. Some do not arise from the establishment of a preliminary fact--for example, the presumptions of due care, innocence, and that a witness speaks the truth. Others have no underlying public policy and arise under such varying circumstances that no fixed conclusion should be required in every case--for example, the presumption of marriage from common reputation.

The statutory statements of these presumptions will be repealed. Revised Rule 13.7 is included, however, to make clear that these presumptions are not continued as common law presumptions.

In particular cases, of course, the jury may be permitted to infer the existence of one of these presumed facts from the proof of the underlying fact. The repeal of these presumptions will not affect the process of drawing inferences. The repeal merely means that the presumed fact is not required to be found in all cases in which the underlying fact is found.

STATE OF CALIFORNIA

C A L I F O R N I A L A W
R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION AND A STUDY

Relating to

The Uniform Rules of Evidence

Article III. Presumptions

May 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Draft: March 13, 1964

LETTER OF TRANSMITTAL

To His Excellency, Edmund G. Brown
Governor of California
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article III (Presumptions) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultant, Professor James H. Chadbourn of the Harvard Law School. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission.

This report is one in a series of reports being prepared by the Commission on the Uniform Rules of Evidence, each report covering a different article of the Uniform Rules.

In preparing this report, the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence. The proposed Missouri Evidence Code (1948) promulgated by the Missouri Bar also was of great assistance to the Commission.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, Room 30, Crothers Hall, Stanford University, Stanford, California.

Respectfully submitted,

JOHN R. McDONOUGH, JR.
Chairman

May 1964

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article III. Presumptions

The Uniform Rules of Evidence (hereinafter sometimes designated as "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.[2]

The tentative recommendation of the Commission on Article III of the Uniform Rules of Evidence is set forth herein. This article, consisting of Rules 13 through 16, relates to presumptions.

A presumption is a rule of law requiring that a particular fact be assumed to exist when some other fact is established. Upon this proposition, all courts and writers seem to agree. But little agreement can be found as to the nature of the showing required to overcome a presumption. Some courts and writers contend that a presumption disappears upon the introduction of sufficient evidence to sustain a finding of the nonexistence of the presumed fact. Others contend that a presumption endures until the trier of fact is persuaded of the nonexistence of the presumed fact.

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1. A pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 30 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

2. Cal. Stats. 1956, Res. Ch. 42, p. 263.

In California, a presumption is regarded as evidence to be weighed with all of the other evidence. Hence, it almost always endures until the final decision in the case. Some California decisions hold that presumptions do not place the burden of proof on the adverse party to show the nonexistence of the presumed fact. But it seems clear that many presumptions in California do place the burden of proof on the adverse party, and in some instances he cannot meet that burden except by clear and convincing proof. The statutes in California sometimes specify that proof of a particular fact or group of facts is "prima facie evidence" of another fact. It is difficult to determine whether these statutes are intended to create presumptions (legally required conclusions) or whether they are intended to indicate that the conclusionary fact may, but need not, be found if the underlying fact is proved. In some instances, such statutes have been construed to require a finding of the conclusionary fact unless the trier of fact is persuaded of its nonexistence.

The URE distinguishes presumptions according to the probative value of the evidence giving rise to the presumption: if the underlying evidence has probative value, the presumption affects the burden of proof; but if the underlying evidence has no probative value in relation to the presumed fact, the presumption does not affect the burden of proof.

The Commission approves the notion that some presumptions should affect the burden of proof and that others should not, but it disagrees with the basis of the classification proposed in the URE. Moreover, the URE rules are inadequate to resolve many of the uncertainties and inconsistencies in the present California law relating to presumptions. Accordingly, the Commission has undertaken to rewrite almost completely the URE provisions on presumptions.

RULE 13. DEFINITION

A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.

COMMENT

The definition in the first sentence is substantially the same as that contained in Code of Civil Procedure Section 1959: "A presumption is a deduction which the law expressly directs to be made from particular facts."

The second sentence may not be necessary in light of the definition of "evidence" in Revised Rule 1(1). Revised Rule 1(1) defines evidence as the testimony, material objects, and other matters cognizable by the senses that are presented to a tribunal as a basis of proof. Presumptions and inferences, then, are not "evidence" but are conclusions that either are required to be drawn or are permitted to be drawn from evidence. An inference under these rules is merely a fact conclusion that rationally can be drawn from the proof of some other fact. A presumption under these rules is a conclusion the law requires to be drawn (in the absense of a sufficient contrary showing) when some other fact is proved or otherwise established in the action.

Nonetheless, the second sentence has been added here to repudiate specifically the rule of Smellie v. Southern Pacific Co., 212 Cal. 540 (1931). That case held that a presumption is evidence that must be weighed against conflicting evidence; and in Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313 (1952), the Supreme Court held that conflicting presumptions must be weighed against each other. These decisions require the jury to

perform an intellectually impossible task. It is required to weigh the testimony of witnesses and other evidence as to the circumstances of a particular event against the fact that the law requires an opposing conclusion in the absence of contrary evidence and determine which "evidence" is of greater probative force. Or else, it is required to weigh the fact that the law requires two opposing conclusions and determine which required conclusion is of greater probative force.

To avoid the confusion engendered by the doctrine that a presumption is evidence, these rules describe "evidence" as the matters presented in judicial proceedings and use presumptions solely as devices to aid in determining the facts from the evidence presented.

RULE 13.5. CLASSIFICATION OF PRESUMPTIONS

Presumptions are either conclusive or rebuttable. Rebuttable presumptions are classified as:

(1) Presumptions affecting the burden of proof.

(2) Presumptions affecting the burden of producing evidence.

COMMENT

Under existing law, some presumptions are conclusive. The court or jury is required to find the existence of the presumed fact regardless of the strength of the opposing evidence. The conclusive presumptions are specified in Section 1962 of the Code of Civil Procedure.

Under existing law, too, all presumptions that are not conclusive are rebuttable presumtpions. Code Civ. Proc. § 1961. But the existing statutes make no attempt to classify the rebuttable presumptions.

For several decades, courts and legal scholars have wrangled over the purpose and function of presumptions. The view espoused by Professors Thayer (A Preliminary Treatise on Evidence 313-352 (1898)) and Wigmore (9 Wigmore, Evidence §§ 2485-2491 (3d ed. 1940)), and accepted by most courts (see Study, p. 3), is that a presumption is a preliminary assumption of a fact that disappears from the case upon the introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact. In Professor Thayer's view, a presumption merely reflects the judicial determination that the same conclusionary fact exists so frequently when the preliminary fact is established that proof of the conclusionary fact may be dispensed with unless there is actually some contrary evidence:

> Many facts and groups of facts often recur, and when a body of men with a continuous tradition has carried on for some length of time this process of reasoning upon facts that often repeat themselves,

> they cut short the process and lay down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them. [A Preliminary Treatise on the Law of Evidence 326.]

Professors Morgan, McCormick and others argue that a presumption should shift the burden of proof to the adverse party. (See Study, infra, pp. 5-8.) They argue that if the policy underlying a presumption is of sufficient weight to require a finding of the presumed fact when there is no contrary evidence, it should be of sufficient weight to require a finding when the mind of the trier of fact is in equilibrium, and it should be of sufficient weight to require a finding if the trier of fact does not believe the contrary evidence.

The American Law Institute Model Code of Evidence adopted the Thayer view of presumptions. The URE adopted the Morgan view insofar as presumptions based on a logical inference are concerned, and adopted the Thayer view as to presumptions having no basis in reason.

The Commission has concluded that presumptions are created for a variety of reasons and that no single theory of presumptions adequately carries out the policies underlying all presumptions. This conclusion is not unique. In 1948, a committee of the Missouri Bar, which drafted a proposed Missouri Evidence Code, came to the same conclusion. In that proposed code, presumptions were classified as presumptions affecting the burden of proof and presumptions affecting the burden of producing evidence. A similar classification is recommended here.

The classification proposed in the URE is unsound. When a presumption is not based on an underlying rational inference, the public policy expressed in the presumption would be frequently thwarted if the presumption disappeared from the case upon the introduction of contrary

evidence, whether believed or not. For example, Labor Code Section 3708 provides that an employee's injury is presumed to be the direct result of the employer's negligence if the employer fails to secure the payment of workmen's compensation. Clearly, there is no rational connection between the fact to be proved--failure to secure payment of compensation--and the presumed fact of negligence. If the presumption disappeared upon the introduction of any contrary evidence sufficient to sustain a finding, even though not believed, the court would be compelled to direct a verdict against the employee unless he actually produced evidence that the employer was negligent. The directed verdict would be required because of the lack of any evidence from which it could be rationally inferred that the employer was negligent. It seems likely that the Labor Code presumption was adopted for the specific purpose of relieving the employee of the burden of proving the employer's negligence. That purpose can only be achieved if the presumption survives the introduction of contrary evidence and forces the employer to persuade the jury that he was not negligent.

Therefore, a presumption affecting the burden of proof is most needed when the logical inference supporting the presumption is weak or nonexistent but the public policy underlying the presumption is strong. Because the URE fails to provide for presumptions affecting the burden of proof at precisely the point where they are most needed, the Commission has disapproved URE Rules 14-16 and has substituted for them rules classifying presumptions according to the nature of the policy considerations upon which the presumptions are based. It is recognized that a comprehensive list of all presumptions, both statutory and common law, cannot be compiled.

(However, the most important ones can be readily identified and are classified in the following rules.) The rules, therefore, set forth certain criteria by which the courts may determine the classification of other presumptions not specifically mentioned.

Several presumptions listed in existing statutes are not listed in these rules as presumptions. Among such presumptions are the important presumptions of innocence and due care. These are not listed because they are not presumptions within the meaning of Revised Rule 13. They do not arise from the establishment of some fact, they arise from the issues in the case before anything is established. Although expressed in terms of presumption in existing law, in fact they are preliminary assignments of the burden of proof as to issues created by the pleadings. Hence, although not listed as presumptions in these rules, they are recodified as assignments of the burden of proof on particular issues.

RULE 14. [EFFECT-OF] CONCLUSIVE PRESUMPTIONS

~~[Subject to Rule 16, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the presumed fact, the presumption continues to exist and the burden of establishing the nonexistence of the presumed fact is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the nonexistence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.]~~

The following presumptions, and no others, are deemed conclusive:

(1) A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another.

(2) The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of consideration.

(3) Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.

(4) A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

(5) Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.

(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.

(7) Any other presumption which by statute is expressly made conclusive.

COMMENT

Revised Rule 14 is a recodification, without substantive change, of Section 1962 of the Code of Civil Procedure. Conclusive presumptions are not evidentiary rules so much as they are rules of substantive law. Hence, the Commission has not recommended any revision in the section. It is recodified here so that all the rules relating to presumptions might be found in one location in the code.

RULE 15. [~~INCONSISTENT~~] PRESUMPTIONS AFFECTING THE BURDEN OF PROOF

~~[If two presumptions arise which are conflicting with each other the judge shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance both presumptions shall be disregarded.]~~

(1) A presumption affecting the burden of proof is a presumption that imposes upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact. When a presumption affecting the burden of proof operates in a criminal action to establish a fact essential to the defendant's guilt, the defendant's burden of proof is to establish a reasonable doubt as to the existence of the presumed fact.

(2) A presumption affecting the burden of proof is a presumption established to effectuate some public policy, other than to facilitate the determination of the particular action in which the question arises, such as the policy in favor of the legitimacy of children, the validity of marriage, the stability of titles to property, or the security of those who trust themselves or their property to the administration of others. By way of illustration, but not by way of limitation, the following are presumptions affecting the burden of proof:

(a) That a child of a woman who has been married, born during the marriage or within 10 months after the dissolution thereof, is a legitimate child of that marriage. This presumption may be disputed only by the husband or wife, or the descendant of one or both of them, or by the people of the State of California in a criminal action brought under Section 270 of the Penal Code. In a civil action, the presumption may be overcome only by clear and convincing proof that the child is not legitimate.

(b) That the owner of the legal title to property is also the owner of the full beneficial title. This presumption may be overcome only by clear and convincing proof that the owner does not own the full beneficial title.

(c) That a ceremonial marriage is valid.

(d) That a person acting in a public office was regularly appointed to it.

(e) That official duty was regularly performed.

(f) That any court, or judge of a court, of this State or the United States, or any court of general jurisdiction, or judge of such a court, in any other state or nation, acting as such, was acting in the lawful exercise of its jurisdiction. This presumption applies only when the act of the court or judge is under collateral attack.

(g) That a transaction between a trustee or other fiduciary and his beneficiary during the existence of the fiduciary relationship, or while the influence of the trustee or fiduciary remains, by which he obtains any advantage from his beneficiary, is entered into by the beneficiary without sufficient consideration and under undue influence. This presumption may be overcome only by clear and convincing proof.

(h) That a bailee who receives undamaged goods and returns them to the bailor in damaged condition has damaged them by his wrongful act or neglect.

(i) That an arrest without a warrant is unlawful.

(j) That an employer is negligent under the circumstances described in Labor Code § 3708.

COMMENT

As indicated in the comment to Revised Rule 13.5, the differing views in regard to the function and operation of presumptions stem from differing views as to their origin and purpose. Some view presumptions as expressions of policies that will be thwarted if the presumptions do not place the burden of proof upon the adverse party. Some view presumptions merely as distillations of experience; they are adopted to dispense with the need for proof of matters little likely to be disputed and thus facilitate the disposition of actions. The Commission has concluded that both views are correct in part, that some presumptions are adopted merely for procedural convenience while others are reflections of important public policies.

Revised Rule 15 relates to those presumptions that are designed to effectuate some public policy. These presumptions require the trier of fact to find the presumed fact unless persuaded of the nonexistence of the presumed fact. Some of the public policies involved are so important that the presumption imposes on the adverse party not merely the burden of proving the nonexistence of the presumed fact but the burden of proving the nonexistence of the presumed fact by clear and convincing evidence.

The presumptions listed to indicate the kinds of presumptions that affect the burden of proof are:

(1) The presumption of legitimacy. This presumption is an expression of a strong public policy in favor of legitimacy. It is, of course, subject to the conclusive presumption of legitimacy in Revised Rule 14. The terms of the rebuttable presumption reflect the existing law as found in Section 1963-31 of the Code of Civil Procedure and Sections 194 and 195 of the Civil Code.

(2) The presumption that the holder of the legal title to property is the holder of the full beneficial title is a common law presumption that is recognized in the California cases. Rench v. McMullen, 82 Cal. App.2d 872, 187 P.2d 111 (1947). The presumption may be overcome only by clear and convincing proof. The presumption finds application in cases involving a claimed resulting trust or a deed absolute that is claimed to be a mortgage. The policy served by the presumption is the preservation of titles to property and the prevention of the circumvention of the Statute of Frauds.

(3) The presumption of the validity of a ceremonial marriage has been applied in many California cases. E.g., Estate of Hughson, 173 Cal. 448, 160 Pac. 548 (1916); Wilcox v. Wilcox, 171 Cal. 770, 155 Pac. 95 (1916); Freeman S.S. Co. v. Pillsbury, 172 F.2d 321 (9 Cir. 1949). The presumption reflects a strong public policy in favor of the stability and validity of the marriage relationship.

(4) The presumptions in paragraphs (d), (e), and (f) are those now found in subdivisions 14, 15, and 16 of Code of Civil Procedure Section 1963. The presumption of the validity of judgments and orders has been broadened. Under existing law, the presumption does not apply to courts of inferior or limited jurisdiction. Estate of Sharon, 179 Cal. 447, 177 Pac. 283 (1918); Santos v. Dondero, 11 Cal. App.2d 720, 54 P.2d 764 (1936). The presumption has been broadened to apply to all courts of this State and of the United States. It also applies, as under existing law, to courts of general jurisdiction in other states and in foreign nations.

(5) The presumption in subdivision (2)(g) appears in existing law in Civil Code Section 2235. Although the existing section is expressly applicable only to trustees, the cases applying it have held that it applies to anyone in a position of trust and confidence. Rader v. Thrasher, 57 Cal.2d 244 (1962)(attorney). Under existing law, the presumption can be overcome "only by the clearest and most satisfactory evidence." Estate of Witt, 198 Cal. 407, 419 (1926).

(6) The common law presumption of negligence of a bailee seems to reflect to a limited extent the same policy reflected in the presumption of undue influence by a trustee. A bailee who is entrusted with the goods of others must be required to account for any damage occuring if the rights of the bailor are to receive protection. Apparently, under existing California law the presumption places the burden of proof on the bailee. See dictum in Redfoot v. J. T. Jenkins Co., 138 Cal. App.2d 108, 112 (1955)(" . . . it is the law of California that proof of delivery of a vehicle to a bailee and his return of same in a damaged condition imposes upon the bailee the burden of proving that the damage occurred without any fault on his part--the burden of proof, not merely the burden of going forward with the evidence").

(8) The presumption that an arrest without a warrant is unlawful is designed to provide protection for the right to be free from arbitrary arrests. Hence, if a person arrests another without the color of legality provided by a warrant, the person making the arrest must prove the circumstances that justified the arrest without a warrant. See People v. Agnew, 16 Cal.2d 655 (1940); Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23 (1956); Dragna v. White, 45 Cal.2d 469, 471, 289 P.2d 428 (1955)("Upon proof . . . [of arrest without process] the burden is on the defendants to prove justification for the arrest.").

(9) The presumption of an employer's negligence is discussed in the comment to Revised Rule 13.5. Its apparent purpose is to provide employers with a strong incentive to secure the payment of workmen's compensation. This purpose can be achieved only if the presumption is construed to place the burden of proof on the employer who fails to secure the payment of workmen's compensation.

RULE 15.5. PRESUMPTIONS AFFECTING THE BURDEN OF PRODUCING EVIDENCE

(1) A presumption affecting the burden of producing evidence is a presumption that requires the trier of fact to find the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.

(2) Unless otherwise specifically provided, a statute providing that a fact or group of facts is prima facie evidence of another fact shall be deemed to provide a presumption affecting the burden of producing evidence.

(3) A presumption affecting the burden of producing evidence is a presumption established to facilitate the determination of the action in which the question arises by dispensing with the necessity for proof of the presumed fact unless evidence is introduced sufficient to sustain a finding of the nonexistence of the presumed fact. Such a presumption is one where the presumed fact may be logically inferred from the established fact and there may be no evidence of the presumed fact, or the evidence is more readily available to the party against whom the presumption operates, or there is little likelihood of dispute as to the presumed fact, and there is no public policy requiring the placing of the burden of proof on the party against whom the presumption operates. By way of illustration, but not by way of limitation, the following presumptions are presumptions affecting the burden of producing evidence:

(a) That money delivered by one to another was due to the latter.

(b) That a thing delivered up by one to another belonged to the latter.

(c) That an obligation delivered up to the debtor has been paid.

(d) 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.

(e) That an obligation possessed by the creditor has not been paid.

(f) That earlier rent or installments have been paid when a receipt for latter is produced.

(g) That things which a person possesses are owned by him.

(h) That a person is the owner of property from exercising acts of ownership over it.

(i) That a judgment, when not conclusive, does still correctly determine or set forth the rights of the parties; but there is no presumption that the facts essential to the judgment are correctly determined.

(j) That a writing is truly dated.

(k) That a trustee or other person, whose duty it was to convey real property to a particular person has actually conveyed to him, when such presumption is necessary to perfect title of such person or his successor in interest.

(L) That a deed or will or other writing purporting to affect an interest in real or personal property is authentic when (i) it is at least 30 years old, (ii) it is in such condition as to create no suspicion concerning its authenticity, (iii) it was, when found, in a place where such writing, if authentic, would be likely to be found, and (iv) it has been generally acted upon as authentic by persons having an interest in the matter.

(m) That a printed and published book, purporting to be printed or

published by public authority, was so printed or published.

(n) That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published, contains correct reports of such cases.

(o) Res ipsa loquitur.

COMMENT

Revised Rule 15.5 relates to those presumptions that are designed to facilitate the disposition of actions. These presumptions require the trier of fact to find the presumed fact unless there is sufficient evidence to sustain a finding of the nonexistence of the presumed fact. If the party against whom the presumption operates introduces sufficient evidence to sustain a finding of the nonexistence of the presumed fact, the presumption disappears from the case and the trier of fact decides the matter without regard to the presumption. The inference which underlies the presumption remains, of course, and the trier of fact is permitted, but not required, to find in accordance with the inference.

These presumptions thus eliminate the need for the trier of fact to reason from the proven or established fact to the presumed fact, and these presumptions forestall argument over the existence of the presumed fact, when there is no evidence tending to prove the nonexistence of the presumed fact.

To expedite the fact-finding process, therefore, is the principal reason for these presumptions. Although some reasons of policy may occasionally be found underlying some of these presumptions, the policy considerations do not predominate. In the cases, they find their most important application when the persons with knowledge of the actual facts

are dead.

Subdivision (2) is designed to indicate the construction to be given to the large number of statutes scattered through the codes that state that one fact or group of facts is prima facie evidence of another fact. See, for example, Agri. C. § 18, Comm. C. § 1202, Revenue & Tax. C. § 6714. In some instances, these statutes have been enacted for reasons of public policy that require them to be treated as presumptions affecting the burden of proof. See People v. Mahoney, 13 Cal.2d 729, 733-34 (1939); People v. Schwartz, 31 Cal.2d 59, 63 (1947). In such instances, the Commission proposes to amend the statutory language to make clear that the burden of proof is affected. But, in the absence of any specific provision indicating that the burden of proof is affected, subdivision (2) provides that such statutes are to be construed as creating presumptions affecting only the burden of producing evidence.

In the several paragraphs of subdivision (3), some presumptions are listed as illustrative of the kind of presumptions that do not affect the burden of proof but affect only the burden of producing evidence:

(1) Paragraphs (a) through (g) of subdivision (3) restate the provisions of subdivisions (7)-(13) of Code of Civil Procedure Section 1963. Paragraph (d) states a related common law presumption. Light v. Stevens, 159 Cal. 288, 113 Pac. 659 (1911).

(2) Paragraph (i) is a restatement of subdivision (17) of Code of Civil Procedure Section 1963. The qualifying clause at the end is to make clear that the presumption does not relate to the facts which necessarily had to be found by the court in arriving at its judgment, it relates only to the judgment itself. Thus, a judgment of annulment,

when not conclusive, is presumed to determine correctly that the marriage is void. Clark v. City of Los Angeles, 187 Cal. App.2d 792, 9 Cal. Rptr. 913 (1960). But the judgment may not be used to establish presumptively that one of the parties was guilty of fraud as against some third party who is not bound by the judgment.

In a few cases, a judgment may be used as evidence of the facts necessarily determined by the judgment. See Revised Rule 63(20), (21), and (21.5). But even in those cases, the judgments do not presumptively establish the facts determined; they are merely evidence.

(3) Paragraph (j) is a restatement of Code of Civil Procedure Section 1963(23). A similar presumption appears in Section 3114 of the Commercial Code.

(4) Paragraph (k) is a restatement of the presumption in Code of Civil Procedure Section 1963(37).

(5) Paragraphs (l)-(n) restate the provisions of subdivisions (34), (35), and (36) of Section 1963 of the Code of Civil Procedure. The statement of the ancient documents rule, formerly in Section 1963(34), has been revised somewhat to make clear that it relates to dispositive instruments only. Originally the presumption of authenticity applied only when possession of property was taken pursuant to the ancient document. See 7 Wigmore, Evidence 605; Mercantile Trust Co. v. All Persons, 183 Cal. 369, 380 (1920)(dictum: "The rule [requiring possession] . . . is one applicable to ancient documents."); 6 Cal. Law Revision Comm'n Reports, Recomm. and Studies 136 (1964). But recent cases have applied the rule to documents under which no one has taken possession of anything. Kirkpatrick v. Tapo Oil Co., 144 Cal. App.2d 404, 301 P.2d 274 (1946);

Estate of Nidever, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960). While possession may not be essential to show circumstantially that a document is authentic, it is essential when a finding of authenticity is to be required by the application of a presumption. It is only the fact that interested people have been acting on the document as if authentic for a substantial period of time that compels the conclusion of authenticity.

(6) Existing cases call the doctrine of res ipsa loquitur an inference. Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041 (1954). Nonetheless it is settled that if the doctrine of res ipsa loquitur is found to be applicable, the jury must find for the plaintiff unless the defendant comes forward with some evidence to show lack of negligence. Burr v. Sherwin Williams Co., supra. If the defendant does come forward with such evidence, the jury is told to find for the plaintiff only if the inference of negligence preponderates; if the defendant shows that the inference of care is as probable as the inference of negligence, the jury must find for the defendant. Burr v. Sherwin Williams Co., supra. Thus, despite the characterization of res ipsa loquitur as an inference, it is settled that it is in fact a presumption affecting the burden of producing evidence. Therefore, it is so classified in this rule.

RULE 16. ~~[BURDEN OF PROOF NOT RELAXED AS TO SOME]~~ INCONSISTENT PRESUMPTIONS

~~[A presumption, which by a rule of law may be overcome only by proof beyond a reasonable doubt, or by clear and convincing evidence, shall not be affected by Rules 14 or 15 and the burden of proof to overcome it continues on the party against whom the presumption operates.]~~

If two presumptions arise that conflict with each other, the judge shall determine the presumption to be applied in accordance with the following rules:

(1) A presumption relating to the specific facts established shall prevail over any general presumption that may be applicable.

(2) If the applicable presumption cannot be determined from the foregoing rule, the presumption shall prevail which is founded on the weightier considerations of policy.

(3) If neither of the foregoing rules can be applied, both presumptions shall be disregarded.

COMMENT

The problem with which this rule deals is not as likely to occur in the future as it has in the past. So-called presumptions such as the presumption of innocence and the presumption of due care are not classified as presumptions under these rules; hence, they cannot conflict with a presumption. A party that has the burden of proof to show lack of due care may rely on a presumption--such as the presumption of the negligence of a bailee or the presumption of res ipsa loquitur--to discharge his initial burden of proof. No conflict with the "presumption" of due care arises, for it is no longer a presumption.

In addition, the presumption of the continuance of a prior state is not continued in these rules. How long a condition continues is a matter to be inferred from all the facts in the particular case. Thus, there can be no conflict between the presumption of the continuance of a prior marriage and the presumption of the validity of a second marriage. Cf., Wilcox v. Wilcox, 171 Cal. 770 (1916). There is no presumption of the continuance of the prior marriage that can conflict.

The presumption of consideration for a written contract is not continued as a presumption. Instead, lack of consideration is a defense and the burden of proving it is on the defendant. Civ. C. § 1615; Commercial C. §§ 3306, 3404. Since there is no presumption of consideration, there can be no conflict of such a presumption with the presumption of lack of consideration and undue influence. Cf., Estate of Roberts, 49 Cal. App.2d 71 (1942).

Nonetheless, there may still be some conflicts, and Revised Rule 16 sets forth the rules for resolving these conflicts. Revised Rule 16 is based on URE Rule 15, but the provisions recommended in the URE have been expanded in the interest of clarity.

Subdivision (1) is merely a specific application of the general rule of statutory construction that the specific prevails over the general. Thus, the presumption that an arrest without a warrant is unlawful prevails over the presumption that official duty is regularly performed.

Subdivision (2) is similar to URE Rule 15. However, URE Rule 15 required application of the presumption based on weightier considerations of "policy and logic." The reference to "logic" has been deleted in recognition of the fact that a presumption founded on weightier considerations of policy may not be founded on weightier considerations of logic. Under

these rules, considerations of policy are deemed more important in determining the applicable presumption. For example, the presumption of undue influence and lack of consideration that arises when a trustee obtains any advantage from a transaction with his beneficiary will prevail over any presumption that the money paid or other thing delivered to the trustee was due to him, even though the latter presumption may have a stronger logical base. Similarly, the presumption that property acquired during marriage is community property prevails over the presumption of ownership that arises from proof of possession.

Under subdivision (3), if no preponderating policy can be found, the presumptions shall be disregarded. The trier of fact may then determine which inferences are the more logical and probable and resolve the matter accordingly.