

34(L)

4/22/64

Memorandum 64-27

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article VII.  
Expert and Other Opinion Testimony)

At the March meeting of the Commission, the staff was directed to draft language in Rule 56 that would codify existing California law in regard to the permissible matter upon which an expert may base his opinion within the scope of his expertise. The Commission approved a statement in regard to when an expert can testify in the form of opinion, approved the substance of the New Jersey revision to paragraph (a) of subdivision (2), approved the principle that an expert should be able to base his opinion upon his special knowledge, skill, experience, training, and education, and directed the staff to draft language that would continue the existing law concerning when an expert may base his opinion upon hearsay statements.

The staff has examined the existing case law and has found no single rule capable of statutory expression that would satisfactorily solve all of the problems involved in stating the various bases upon which an expert's opinion may be founded. Though the courts frequently repeat the rule that an expert cannot base his opinion upon the opinions or statements of others, there are a variety of situations in which this is permitted, notably with respect to physicians, engineers, and, particularly, valuation experts whose opinions are based primarily upon matter that is technically hearsay. The exceptions to the rule are based on practical considerations that apply in the particular type of case and have been developed on a case by case basis. We find no case where the court attempts to state a general rule for all cases.

C

In practice, the existing law appears to be satisfactory in regard to permitting opinions to be expressed where it is reasonable to base the opinion upon the statements of others and not permitting such opinions where it is not reasonable to do so. For example, compare the eminent domain cases permitting the valuation expert to base his opinion almost entirely upon hearsay with the personal injury cases that preclude the police officer's opinions based upon the statements of bystanders. From its review of the existing California law, the staff is convinced that a single rule that attempts to spell out the line of demarcation between admissible and inadmissible bases for an opinion would produce considerably more harm than good, for it undoubtedly would exclude expert opinion in some cases where it should be admitted (and is admitted today) while it would permit such opinions in some cases where it should not be permitted (and is not permitted today).

C

Attached as Exhibit I (pink page) is a suggested draft of subdivision (2) of Rule 56 designed to accomplish the more desirable result of simply codifying the existing case law and permitting the courts to continue to develop appropriate rules in this field. Aside from its simplicity, the suggested text has the merit of being about the only accurate statement that can be made in regard to opinion testimony on the basis of the existing law.

C

Attached as Exhibit II (yellow page) is a draft of subdivisions (2) and (3) of Rule 56 in a form designed to accomplish the precise matter approved at the last meeting. As an alternative to this form, there also is attached as Exhibit III (green page) the text of subdivision (2) of Rule 56 redrafted to incorporate the substance of the matter approved at

the last meeting. Although both of these forms attempt to incorporate the substance of the existing law, while at the same time reflecting the Commission's decisions in regard to this matter, each was found to be quite difficult to apply to the varying situations that have arisen in California. In short, they generally reflect the existing California law but at the same time produce results in some situations that are different from the existing law. Therefore, the staff recommends that no attempt be made to statutorily state a general rule in regard to the matters upon which expert opinion may be based and, instead, recommends the approval of the draft set out herein as Exhibit I.

Respectfully submitted,

Jon D. Smock  
Associate Counsel

Memo. 64-27

EXHIBIT I

Rule 56, subdivision (2)

(2) If the witness is testifying as an expert, his opinions are limited to such opinions as are (a) related to a subject that is beyond the competence of persons of common experience, training, and education and (b) based primarily upon matter that is a proper basis for his opinions.

EXHIBIT II

Rule 56, subdivisions (2) and (3)

(2) If the witness is testifying as an expert, his opinions are limited to such opinions as are:

(a) Based primarily on matter (including his special knowledge, skill, experience, training, and education) personally known to the witness or made known to him at or before the hearing; and

(b) Related to a subject that is beyond the competence of persons of common experience, training, and education.

(3) Subject to subdivision (2), a witness testifying as an expert may base his opinions in part on the statements of others, whether or not admissible, only if it is expedient for the witness to do so and the statements are of a type commonly relied upon by experts in forming an opinion upon the subject to which his testimony relates.

EXHIBIT III

Rule 56, subdivision (2)

(2) If the witness is testifying as an expert, his opinions are limited to such opinions as are:

(a) Related to a subject that is beyond the competence of persons of common experience, training, and education; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, but his opinions can be based on the statements of others, whether or not admissible, only if it is expedient for the witness to do so and the statements are of a type commonly relied upon by experts in forming an opinion upon the subject to which his testimony relates.

STATE OF CALIFORNIA

CALIFORNIA LAW  
REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

The Uniform Rules of Evidence

Article VII. Expert and Other Opinion Testimony

March 1964

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

Draft: December 12, 1963  
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LETTER OF TRANSMITTAL

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

The California Law Revision Commission was directed 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 VII (Expert and Other Opinion Testimony) 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.

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, School of Law, Stanford University, Stanford, California.

Respectfully submitted,

JOHN R. McDONOUGH, JR.  
Chairman

March 1964

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article VII. Expert and Other Opinion Testimony

BACKGROUND

The Uniform Rules of Evidence (hereinafter sometimes designated as "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.<sup>1</sup> 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.

The tentative recommendation of the Commission on Article VII of the Uniform Rules of Evidence is set forth herein. This article, consisting of Rules 56 through 61, relates to expert and other opinion testimony.

As used in this article, an "opinion" of a witness is an inference or conclusion of the witness drawn from certain data that he has observed or that has been related to him. Tyree, The Opinion Rule, 10 RUTGERS L. REV. 601, 603 (1956). Article VII of the URE sets forth the rules governing the admissibility of this kind of evidence in some detail. In contrast, no clear statement of the law governing the admissibility of opinion evidence can be found in existing statutes. Existing statutes do recognize that opinions are admissible under some circumstances (see CODE(CIV. PROC. §§ 1845, 1870(9),

<sup>1</sup> 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.

1872), but the conditions of admissibility have been left almost entirely for the courts to determine. In some instances, the decisional law governing opinion testimony is fairly clear; in other instances, there are conflicting decisions and the law is uncertain.

The Commission, therefore, tentatively recommends that URE Article VII,<sup>2</sup> revised as hereinafter indicated, be enacted as the law in California.

#### REVISION OF URE ARTICLE VII

In the material that follows, the text of each rule proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Commission are shown in ~~strikeout~~ and italics. New rules are shown in italics. Each rule is followed by a Comment setting forth the major considerations that influenced the recommendation of the Commission and explaining those revisions that are not purely formal or otherwise self-explanatory. For a detailed analysis of the various rules and the California law relating to expert and other opinion testimony, see the research study beginning on page 000.

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<sup>2</sup> The final recommendation of the Commission will indicate the appropriate code section numbers to be assigned to the rules as revised by the Commission.

RULE 55.5. QUALIFICATION AS EXPERT WITNESS

(1) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.

(2) Evidence of special knowledge, skill, experience, training, or education may be provided by the testimony of the witness himself.

(3) In exceptional circumstances, the judge may receive conditionally the testimony of a witness, subject to the evidence of special knowledge, skill, experience, training, or education being later supplied in the course of the trial.

COMMENT

Proposed Rule 55.5 is new. It is based on URE Rule 19, which has been revised to delete the material relating to the foundation necessary to qualify a person as an expert witness. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701, 711 (1964).

Subdivision (1). Subdivision (1) requires that a person offered as an expert witness have special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the particular matter. This subdivision states existing law. CODE CIV. PROC. § 1870(9).

The judge must be satisfied that the proposed witness is an expert. People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8 (1953); Pfingsten v. Westenhaver, 39 Cal.2d 12, 244 P.2d 395 (1952); Bossert v. Southern Pac. Co., 172 Cal. 504, 157 Pac. 597 (1916); People v. Pacific Gas & Elec. Co., 27 Cal. App.2d 725, 81 P.2d 584 (1938). The judge's determination that a witness qualifies as an

expert witness is binding on the trier of fact, but the trier of fact may consider the witness' qualifications as an expert in determining the weight to be given his testimony. Pfingsten v. Westenhaver, 39 Cal.2d 12, 244 P.2d 395 (1952); Howland v. Oakland Consol. St. Ry., 110 Cal. 513, 42 Pac. 983 (1895); Estate of Johnson, 100 Cal. App.2d 73, 223 P.2d 105 (1950).

Subdivision (2). This subdivision states that the requisite special qualifications required of an expert witness may be provided by the witness' own testimony. This is the usual method used to qualify a person as an expert.

Subdivision (3). This subdivision provides that the judge may receive testimony conditionally, subject to the necessary foundation being supplied later in the trial. This provision is merely an express statement of the broad power of the judge under Code of Civil Procedure Section 2042 with respect to the order of proof. Unless the foundation is subsequently supplied, the judge should grant a motion to strike or should order the testimony stricken from the record on his own motion. The introductory phrase is intended to suggest that the discretionary power to depart from established practices should be sparingly exercised.

RULE 55.7. TESTIMONY OF EXPERT WITNESS

A person who is qualified to testify as an expert may testify:

(1) To any matter of which he has personal knowledge to the same extent (including testimony in the form of opinion) as a person who is not an expert.

(2) To any matter of which he has personal knowledge if such matter is within the scope of his special knowledge, skill, experience, training, or education.

(3) Subject to Rule 56, in the form of opinion upon a subject that is within the scope of his special knowledge, skill, experience, training, or education.

COMMENT

Proposed Rule 55.7 has been added to this article to clarify any ambiguity that may exist with respect to the type of testimony permitted a person who is qualified to testify as an expert.

Subdivision (1) permits an expert witness to testify to any matter to the same extent as an ordinary witness not testifying as an expert. Thus, as to those matters that are outside the scope of his special expertise, the expert witness is treated the same in all respects as an ordinary witness. In such cases, the witness is, of course, not testifying as an expert.

Subdivisions (2) and (3) relate to those matters as to which an expert witness may testify within the scope of his special expertise. Generally speaking, expert testimony is required for either or both of two reasons. First, the facts involved in a particular lawsuit may be beyond the competence of ordinary persons, and expert testimony is needed to translate these special facts into language that can be readily understood by the

trier of fact. The chemical properties of particular substances is an example of such special facts as may not be within the competence of persons of common experience. Second, expert testimony also may be required to interpret common facts whose significance to the particular litigation cannot be fully appreciated without the aid of expert testimony. Thus, the color of a paint chip or the shape of a fragment of glass recovered at the scene of an accident may have significance to an expert with respect to the type of vehicle involved that cannot be appreciated by the trier of fact without the aid of expert testimony. Subdivisions (2) and (3) cover both of these situations.

Subdivision (3) does not specify the precise matters upon which expert opinion may be based; the subdivision merely indicates that an expert may testify in the form of opinion upon a subject that is within the scope of his special expertise. The form of his testimony, therefore, will be governed by the character of the matters upon which his opinion is based. See Revised Rule 56, subdivisions (2) and (3), and the Comment thereto, infra. Thus, when an expert witness testifies from his personal knowledge of the facts, data, or other matter upon which his opinion is based, there is no necessity that his examination be conducted through hypothetical questions designed to elicit specific details concerning the basis for his opinion. Nor are hypothetical questions necessarily required when the expert bases his opinion in part upon otherwise inadmissible hearsay. See People v. Wilson, 25 Cal.2d 341, 153 P.2d 720 (1944). On the other hand, where an expert witness testifies in the form of opinion based upon assumed facts not personally known to him, it may be essential to examine the expert by using hypothetical questions. The assumed facts must be stated as an hypothesis upon which the opinion is based in order to permit the trier of

fact to weigh the opinion in the light of its findings as to the existence or nonexistence of the assumed facts. See Lemley v. Doak Gas Engine Co., 40 Cal. App. 146, 180 Pac. 671 (1919)(hearing denied). It is largely in the discretion of the judge to control the extent to which the hypothetical nature of the assumed facts needs to be shown, i.e., the extent to which the examiner's questions need be classically "hypothetical" in form.

Graves v. Union Oil Co., 36 Cal. App. 766, 173 Pac. 618 (1918). See also Estate of Collin, 150 Cal. App.2d 702, 310 P.2d 663 (1957)(hearing denied).

RULE 56. TESTIMONY IN FORM OF OPINION

(1) If the witness is not testifying as an expert, his ~~[testimony-in-the-form-of]~~ opinions ~~[or-inferences-is]~~ are limited to such opinions ~~[or inferences]~~ as ~~[the-judge-finds]~~ are:

(a) ~~[may-be]~~ Rationally based on the perception of the witness; and

(b) ~~[are]~~ Helpful to a clear understanding of his testimony or to the determination of the fact in issue.

~~[(2)--If-the-witness-is-testifying-as-an-expert,-testimony-of-the-witness-in-the-form-of-opinions-or-inferences-is-limited-to-such-opinions-as-the-judge-finds-are-(a)-based-on-facts-or-data-perceived-by-or-personally-known-or-made-known-to-the-witness-at-the-hearing-and-(b)-within-the-scope-of-the-special-knowledge,-skill,-experience-or-training-possessed-by-the-witness.]~~

(2) If the witness is testifying as an expert, his opinions are limited to such opinions as are:

(a) Related to a subject that is beyond the competence of persons of common experience, training, and education; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type commonly relied upon by experts in forming an opinion upon the subject to which his testimony relates, unless under the decisional or statutory law of this State such matter may not be used by an expert as a basis for his opinion.

(3) ~~[Unless-the-judge-excludes-the-testimony-he-shall-be-deemed-to-have-made-the-finding-requisite-to-its-admission.]~~ The opinion of a witness may be held inadmissible or may be stricken if it is based in whole or in

significant part on matter that is not a proper basis for such an opinion.  
In such case, the witness may then give his opinion after excluding from  
consideration the matter determined to be improper.

(4) Testimony in the form of opinions [~~or inferences~~] otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of [the] fact.

#### COMMENT

Two matters of general application in this rule and elsewhere in this article on expert and other opinion testimony should be noted. First, the phrase "if the judge finds" and words of similar import have been deleted as being unnecessary in light of Rule 8.<sup>3</sup> Second, the word "opinion" is used consistently in the revised rules in place of the URE phrase "opinions or inferences." The single word "opinion" embraces the same matters that would be covered by the longer phrase and includes all opinions, inferences, conclusions, and other subjective statements made by the witness.

Subdivision (1). This subdivision deals with the opinion testimony of a witness who is not testifying as an expert. Paragraph (a) permits such a

<sup>3</sup> Rule 8 is the subject of a separate study and recommendation by the Commission. The rule as contained in the URE is as follows:

Rule 8. Preliminary Inquiry by Judge. When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

witness to give his opinion only if the opinion is based on his own perception. This is a restatement of a requirement of existing California law. Stuart v. Dotts, 89 Cal. App.2d 683, 201 P.2d 820 (1949). See discussion in Manney v. Housing Authority, 79 Cal. App.2d 453, 459-460, 180 P.2d 69, 73 (1947). Paragraph (b) permits the witness to give such opinions as "are helpful to a clear understanding of his testimony or to the determination of the fact in issue." This, too, is a restatement of existing California law. See the Study, infra, pp. 8-10.

Subdivision (2). Subdivision (2) deals with opinion testimony of a witness testifying as an expert; it sets the standard for admissibility of such testimony. Though the language of the URE subdivision has been substantially changed, much of its substance is retained in the subdivision as revised.

Paragraph (a) of this subdivision relates to when an expert may give his opinion upon a subject that is within the scope of his expertise. It provides a rule substantially the same as the existing California law, namely, that expert opinion is limited to those subjects that are beyond the competence of persons of common experience, training, and education. See People v. Cole, 47 Cal.2d 99, 103, 301 P.2d 854, 856 (1956). For examples of the variety of subjects upon which expert testimony is admitted, see WITKIN, CALIFORNIA EVIDENCE §§ 190-195 (1958).

Paragraph (b) of this subdivision deals with the difficult problem of stating a general rule in regard to the permissible bases upon which the opinion of an expert may be founded. The California courts have made it clear that the nature of the matter upon which an expert may base his opinion varies from case to case. In some fields of expert knowledge, an

expert may rely on statements made by and information received from other persons; and in some other fields of expert knowledge, an expert may not do so. For example, a physician may rely on statements made to him by the patient concerning the history of his condition. People v. Wilson, 25 Cal.2d 341, 153 P.2d 720 (1944). A physician may also rely on reports and opinions of other physicians. Kelley v. Bailey, 139 Cal. App.2d 728, 11 Rptr. 448 (1961); Hope v. Arrowhead & Puritas Waters, Inc., 174 Cal. App.2d 222, 344 P.2d 428 (1959). An expert on the valuation of real or personal property, too, may rely on inquiries made of others, commercial reports, market quotations, and relevant sales known to the witness. Betts v. Southern Cal. Fruit Exchange, 144 Cal. 402, 77 Pac. 993 (1904); Hammond Lumber Co. v. County of Los Angeles, 104 Cal. App. 235, 285 Pac. 896 (1930); Glantz v. Freedman, 100 Cal. App. 611, 280 Pac. 704 (1929). On the other hand, an expert on automobile accidents may not rely on the statements of others as a partial basis for an opinion as to the point of impact, whether or not the statements would be admissible evidence. Hodges v. Severns, 201 Cal. App.2d 99, 20 Cal. Rptr. 129 (1962); Ribble v. Cook, 111 Cal. App.2d 903, 245 P.2d 593 (1952). See also Behr v. County of Santa Cruz, 172 Cal. App.2d 697, 342 P.2d 987 (1959)(report of fire ranger as to cause of fire held inadmissible because it was based primarily upon statements made to him by other persons).

Likewise, under existing law, irrelevant or speculative matters are not a proper basis for an expert opinion. See Roscoe Moss Co. v. Jenkins, 55 Cal. App.2d 369, 130 P.2d 477 (1942)(expert may not base opinion upon a comparison if the matters compared are not reasonably comparable); People v. Luis, 158 Cal. 185, 110 Pac. 500 (1910)(physician may not base opinion

as to person's feeble-mindedness merely upon his exterior appearance); People v. Dunn, 46 Cal.2d 639, 297 P.2d 964 (1956)(speculative or conjectural data); Long v. Cal.-Western States Life Insurance Co., 43 Cal.2d 871, 279 P.2d 43 (1955)(speculative or conjectural data); Eisenmayer v. Leonardt, 148 Cal. 596, 84 Pac. 43 (1906)(speculative or conjectural data). Compare People v. Wochnick, 98 Cal. App.2d 124, 219 P.2d 70 (1950) (expert may not give opinion as to the truth or falsity of certain statements on basis of lie detector test) with People v. Jones, 42 Cal.2d 219, 266 P.2d 38 (1954)(psychiatrist may consider an examination given under the influence of sodium pentathol--the so-called "truth serum"--in forming an opinion as to the mental state of the person examined).

The variation in the permissible bases of expert opinion is unavoidable in light of the wide variety of subjects upon which such opinion can be offered. In regard to some matters of expert opinion, an expert must, if he is going to give an opinion that will be helpful to the jury, rely on reports, statements, and other information that might not be admissible evidence. A physician in many instances cannot make a diagnosis without relying on the case history recited by the patient or on reports from various technicians or other physicians. Similarly, an appraiser must rely on reports of sales and other market data if he is to give an opinion that will be of value to the jury. In the usual case where a physician's or an appraiser's opinion is required, the adverse party also will have its expert who will be able to check the data relied upon by the adverse expert. On the other hand, a police officer can analyze skid marks, debris, and the condition of vehicles that have been involved in an accident without relying on the statements of witnesses; and it seems likely that the jury would be

as able to evaluate the statements of others in the light of the physical facts, as interpreted by the officer, as would the officer himself.

It is not practical to formulate a detailed statutory rule that lists all of the matters upon which an expert may properly base his opinion, for it would be necessary to prescribe specific rules applicable to each field of expertise. This is clearly impossible; the subjects upon which expert opinion may be received are too numerous to make statutory prescription of applicable rules a feasible venture. It is possible, however, to formulate a general rule that specifies the minimum requisites that must be met in every case, leaving to the courts the task of determining particular detail within this general framework. This standard is expressed in paragraph (b) of subdivision (2), which states a general rule that is applicable whenever expert opinion is offered on a given subject.

Paragraph (b) provides that an expert's opinion must be based on matter that is of a type commonly relied upon by experts in forming an opinion upon the subject to which his testimony relates and that either is perceived by or personally known to the witness or is made known to him at or before the hearing at which the testimony is offered. Notwithstanding the satisfaction of these requirements, the opinion may not be based upon any matter that is determined by the decisional or statutory law of this State to be an improper basis for an opinion upon the subject to which the expert's testimony relates. Thus, the matter upon which an expert's opinion is based must meet each of three separate but related tests. First, the matter must be perceived by or personally known to the witness or must be made known to him at or before the hearing at which the opinion is expressed. This requirement assures the expert's acquaintance with the facts of a

particular case either by his personal perception or observation or by means of assuming facts not personally known to the witness. Second, and without regard to the means by which an expert familiarizes himself with the matter upon which his opinion is based, the matter relied upon by the expert in forming his opinion must be of a type commonly relied upon by experts in forming an opinion upon the subject to which the expert's testimony relates. In large measure, this assures the reliability and trustworthiness of the information used by experts in forming their opinions. Third, an expert may not base his opinion upon any matter that is declared by the decisional or statutory law of this State to be an improper basis for an opinion. For example, the statements of bystanders as to the cause of a fire may be considered reliable by an investigator of the fire insofar as his report is concerned, particularly when coupled with physical evidence found at the scene, but the courts have determined this to be an improper basis for an opinion since the trier of fact is as capable as the expert of evaluating such statements in light of the physical facts as interpreted by the expert. Behr v. County of Santa Cruz, 172 Cal. App.2d 697, 342 P.2d 987 (1959). The extent to which an expert may base his opinion upon the statements of others is far from clear. It is at least clear, however, that it is permitted in a number of instances. See Young v. Bates Valve Bag Corp., 52 Cal. App.2d 86, 96-97, 125 P.2d 840, 846 (1942), and cases therein cited. Cf. People v. Alexander, 212 Cal. App.2d 84, 27 Cal. Rptr. 720 (1963). The revised subdivision thus permits an expert to base his opinion upon reliable matter, whether or not admissible, of a type normally used by experts in forming an opinion upon the subject to which his expert testimony relates. In addition, the rule stated in this paragraph provides

assurance that the courts and the Legislature are free to continue to develop specific rules regarding the proper bases for particular kinds of expert opinion in specific fields. See, e.g., CODE CIV. PROC. § 1845.5 (valuation expert in eminent domain cases). The revised rule thus provides a sensible standard of admissibility while, at the same time, it continues in effect the discretionary power of the courts to regulate abuses, thereby retaining in large measure the existing California law.

Subdivision (3). Under subdivision (3) of the revised rule, as under existing law, an opinion may be held inadmissible or may be stricken if it is based wholly or in substantial part upon improper considerations. Whether or not the opinion should be held inadmissible or stricken will depend in a particular case on the extent to which the improper considerations have influenced the opinion. "The question is addressed to the discretion of the trial court." People v. Lipari, 213 Cal. App.2d 485, 493, 28 Cal. Rptr. 808, 813 (1963). If a witness' opinion is stricken because of reliance upon improper considerations, subdivision (3) will assure the witness the opportunity to express his opinion after excluding from his consideration the matter determined to be improper.

Subdivision (4). Subdivision (4) of the revised rule provides that opinion evidence is not inadmissible because it relates to an ultimate issue. It is declarative of existing law, although some of the older cases indicated that an opinion could not be received on an ultimate issue. People v. Wilson, 25 Cal.2d 341, 349-350, 153 P.2d 720, 725 (1944); Wells Truckways, Ltd. v. Cebrian, 122 Cal. App.2d 666, 265 P.2d 557 (1954); People v. King, 104 Cal. App.2d 298, 231 P.2d 156 (1951).

RULE 57. [PRELIMINARY-EXAMINATION] STATEMENT OF BASIS OF OPINION

(1) A witness testifying in the form of opinion may state on direct examination the reasons for his opinion and the matter upon which it is based.

(2) [The judge may require that a witness] Before testifying in [terms] the form of opinion [or inference] , the witness shall first be [first] examined concerning the [data] matter upon which the opinion [or inference] is [founded] based unless the judge in his discretion dispenses with this requirement.

COMMENT

Subdivision (1) of the revised rule, together with subdivision (1) of Proposed Rule 58.5, is a restatement of the provisions of Code of Civil Procedure Section 1872.

Subdivision (2) requires a witness to give the basis for his opinion before stating it, but also permits the judge in his discretion to dispense with this requirement. Under existing California law, a witness testifying from his personal observation of the facts upon which his opinion is based need not be examined concerning such facts before testifying in the form of opinion; his personal observation is a sufficient basis upon which to found his opinion. Lumbermen's Mut. Cas. Co. v. Industrial Acc. Comm'n, 29 Cal.2d 492, 175 P.2d 823 (1946); Hart v. Olson, 68 Cal. App.2d 657, 157 P.2d 385 (1945); Lemley v. Doak Gas Engine Co., 40 Cal. App. 146, 180 Pac. 671 (1919) (hearing denied). On the other hand, where a witness testifies in the form of opinion not based upon his personal observation, the witness must first state the assumed facts upon which his opinion is based. Eisenmayer

v. Leonardt, 148 Cal. 596, 84 Pac. 43 (1906); Lemley v. Doak Gas Engine Co., supra. No California case has been found in which a witness was permitted to state his opinion based on facts not observed by him without also specifying the assumed facts upon which his opinion is based, i.e., stating such facts hypothetically for the purpose of allowing the trier of fact to weigh the applicability of the opinion in light of the existence or nonexistence of such facts. See Lemley v. Doak Gas Engine Co., supra. Under revised subdivision (2), the requirement that the facts upon which an opinion is based must be stated before giving an opinion is tempered with the discretionary authority of the judge to dispense with this requirement in appropriate cases.

RULE 57.7. EXPERT OPINION BASED ON OPINION OR STATEMENT OF ANOTHER

(1) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called as a witness by the adverse party and examined as if under cross-examination concerning the subject matter of his opinion or statement.

(2) Nothing in this rule makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

(3) An expert opinion otherwise admissible is not inadmissible because it is based on the opinion or statement of a person who is unavailable as a witness.

COMMENT

Proposed Rule 57.5 is designed to provide protection to a party who is confronted with an expert witness who is relying on the opinion or statement of some other person. See the Comment to Revised Rule 56 for a discussion of opinions that may be based on statements and opinions of others. In such a situation, a party may find that cross-examination of the witness will not reveal the weakness in his opinion, for the crucial parts are based on the observations or opinions of someone else. And, under existing law, if that other person is called, he is the witness of the party calling him and, therefore, that party may not subject him to cross-examination.

Proposed  
/ Rule 57.5 will permit a party to extend his cross-examination into the underlying bases of the opinion testimony introduced against him by calling the authors of opinions and statements relied on by adverse witnesses and cross-examining them concerning the subject matter of their opinions and statements.

RULE 58. HYPOTHESIS FOR EXPERT OPINION NOT NECESSARY

~~[Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and the reasons therefor without first specifying the data on which it is based as a hypothesis or otherwise, but upon cross examination he may be required to specify such data.]~~

COMMENT

The Commission disapproves URE Rule 58 because it fails to differentiate between the varying bases upon which expert opinion may be founded, some of which may require the use of hypothetical questions. See discussion of this distinction in the Comment to Proposed Rule 55.7, supra. Where an expert's opinion is based upon his personal knowledge, the judge should have no discretion to require that his examination be conducted only by hypothetical questions; the witness' testimony within the scope of his special expertise is no different in form from the testimony of any other witness. On the other hand, where an expert's opinion is based upon facts assumed by him to exist, it must be made clear from his testimony that the facts upon which his opinion is based are only assumed to exist. Hence, examination of the expert witness by hypothetical questions may be essential; it being in the judge's discretion to regulate the extent to which the hypothetical nature of the assumed facts needs to be shown in the form of the questions asked. Graves v. Union Oil Co., 36 Cal. App. 766, 173 Pac. 618 (1918). See Estate of Collin, 150 Cal. App.2d 702, 310 P.2d 663 (1957) (hearing denied). Proposed Rule 55.7 sufficiently covers the extent to which an expert may testify in the form of opinion; the form of the expert's testimony

and the questions asked of him will necessarily depend upon whether or not his opinion is based upon facts known to him. See Revised Rule 56(2) and the Comment thereto, supra.

The last clause of URE Rule 58 has been deleted because cross-examination of an expert witness is covered in Proposed Rule 58.5.

RULE 58.5. CROSS-EXAMINATION OF EXPERT WITNESS

(1) Subject to subdivision (2), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to his qualifications and as to the subject to which his expert testimony relates.

(2) A witness testifying as an expert may not be cross-examined in regard to the content or tenor of any publication unless he referred to, considered, or relied upon such publication in arriving at or forming his opinion.

COMMENT

Subdivision (1). This subdivision restates the substance of the last clause of Code of Civil Procedure Section 1872 and supersedes the last clause of URE Rule 58. These provisions have been stated in this rule so that the subject of cross-examination of an expert witness might be covered in one rule, which states the existing California law.

"Once an expert offers his opinion, however, he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness. The expert invites investigation into the extent of his knowledge, the reasons for his opinion including facts and other matters upon which it is based (Code Civ. Proc. § 1872), and which he took into consideration; and he may be "subjected to the most rigid cross examination" concerning his qualifications, and his opinion and its sources [citation omitted]." Hope v. Arrowhead & Puritas Waters, Inc., 174 Cal. App.2d 222, 230, 344 P.2d 428, 433 (1959).

In addition to permitting full cross-examination of an expert witness in regard to his qualifications as an expert and such matters as the reasons

for any opinion expressed and the matters upon which it is based, subdivision (1) of the proposed rule provides that an expert witness may be cross-examined to the same extent as any other witness. In this respect, the substance of Rules 20-22 as revised by the Commission<sup>4</sup> is made applicable to expert witnesses.

Subdivision (2). Subdivision (2) clarifies a matter concerning which there is considerable confusion in the California decisions. It is at least clear that an expert witness may be cross-examined in regard to the same books relied upon by him in forming or arriving at his opinion. Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99 (1939); People v. Hooper, 10 Cal. App.2d 332, 51 P.2d 1131 (1935). Dictum in some decisions indicates that the cross-examiner is strictly limited to such books as those relied upon by the expert witness. Baily v. Kreutzmann, 141 Cal. 519, 75 Pac. 104 (1904). Other cases, however, suggest that the cross-examiner is not thus limited, and that an expert witness may be cross-examined in regard to any books of the same character as the books relied upon by the expert in forming his opinion. Griffith v. Los Angeles Pac. Co., 14 Cal. App. 145, 111 Pac. 107 (1910). See Salgo v. Leland Stanford etc. Bd. Trustees, 154 Cal. App.2d 560, 317 P.2d 170 (1957); Gluckstein v. Lipsett, 93 Cal. App.2d 391, 209 P.2d 98 (1949) (reviewing California authorities). There may be a limitation on the permissible scope of such cross-examination, however, restricting the cross-examiner to the use of such books as "are not in harmony with the testimony of the witness." Griffith v. Los Angeles Pac. Co., supra, 14 Cal. App. 145, 147, 111 Pac. 107 (1910).

<sup>4</sup>See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701 (1964).

Language in several earlier cases indicated that the cross-examiner also could use books to test the competency of an expert witness, whether or not the expert relied upon books in forming his opinion. Fisher v. Southern Pac. R.R., 89 Cal. 399, 26 Pac. 894 (1891); People v. Hooper, 10 Cal. App.2d 332, 51 P.2d 1131 (1935). More recent decisions indicate, however, that the opinion of an expert witness must be based either generally or specifically upon books before the expert can be cross-examined concerning them. Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99 (1939); Salgo v. Leland Stanford etc. Bd. Trustees, 154 Cal. App.2d 560, 317 P.2d 170 (1957); Gluckstein v. Lipsett, 93 Cal. App.2d 391, 209 P.2d 98 (1949). The conflicting California cases are gathered in Annot., 60 A.L.R.2d 77 (1958).

Subdivision (2) of Proposed Rule 58.5 limits the cross-examiner to those publications that have been referred to, considered, or relied upon by the expert in forming his opinion. If an expert has relied upon a particular book, it is necessary to permit cross-examination in regard to that book to show whether the expert correctly read, interpreted, and applied the portions he relied on. Similarly, it is an important adjunct of cross-examination technique to question an expert witness as to those publications referred to or considered by him in forming his opinion. An expert's reasons for not relying upon particular publications that were considered by him may reveal important information bearing upon the credibility of his testimony. However, a broader rule--one that would permit cross-examination on works not referred to, considered, or relied upon by the expert--would permit the cross-examiner to place the opinions of absentee authors before the jury without the safeguard of cross-examination. Although the court would be required upon request to caution

the jury that the statements read are not to be considered evidence of the truth of the propositions stated, there is a danger that at least some jurors might rely on the author's statements for this purpose. Yet, the statements in the book might be based on inadequate background research, might be subject to unexpressed qualifications that would be applicable in the case before the court, or might be unreliable for some other reason that could be revealed if the author were subject to cross-examination. Therefore, such statements should not be permitted to be brought before the jury under the guise of testing the competence of another expert.

C  
RULE 59. APPOINTMENT OF EXPERTS

[If the judge determines that the appointment of expert witnesses in an action may be desirable, he shall order the parties to show cause why expert witnesses should not be appointed, and after opportunity for hearing may request nominations and appoint one or more such witnesses. If the parties agree in the selection of an expert or experts, only those agreed upon shall be appointed. -- Otherwise the judge may make his own selection. -- An expert witness shall not be appointed unless he consents to act. -- The judge shall determine the duties of the witness and inform him thereof at a conference in which the parties shall have an opportunity to participate. -- A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the judge or any party. -- He may be examined and cross-examined by each party. -- This rule shall not limit the parties in calling expert witnesses of their own selection and at their own expense.]

COMMENT

C  
URE Rule 59 has been disapproved because the existing California law relating to the appointment of expert witnesses is superior to the comparable provisions of the URE contained in Rules 59 and 60. CODE CIV. PROC. § 1871; see the Study pp. 27-28.

RULE 60. COMPENSATION OF EXPERT WITNESSES

[Expert-witnesses-appointed-by-the-judge-shall-be-entitled-to reasonable-compensation-in-such-sum-only-as-the-judge-may-allow---Except as-may-be-otherwise-provided-by-statute-of-this-state-applicable-to-a specific-situation,-the-compensation-shall-be-paid-(a)-in-a-criminal-action by-the-{county}-in-the-first-instance-under-order-of-the-judge-and-charged as-costs-in-the-case,-and-(b)-in-a-civil-action-by-the-opposing-parties in-equal-portions-to-the-clerk-of-the-court-at-such-time-as-the-judge shall-direct,-and-charged-as-costs-in-the-case.--The-amount-of-compensation--paid-to-an-expert-witness-not-appointed-by-the-judge-shall-be-a proper-subject-of-inquiry-as-relevant-to-his-credibility-and-the-weight of-his-testimony.]

COMMENT

URE Rule 60 has been disapproved because the existing California law relating to the appointment and compensation of expert witnesses is superior to the comparable provisions of the URE contained in Rules 59 and 60. CODE CIV. PROC. § 1871; see the Study pp. 27-28.

The last sentence of Rule 60 has been restated in Rule 61 as revised.

RULE 61. CREDIBILITY OF [APPOINTED] EXPERT WITNESS

(1) The fact of the appointment of an expert witness by the judge may be revealed to the trier of ~~[the-facts]~~ fact as relevant to the credibility of such witness and the weight of his testimony.

(2) The amount of compensation and expenses paid or to be paid to an expert witness not appointed by the judge is a proper subject of inquiry as relevant to his credibility and the weight of his testimony.

COMMENT

Subdivision (1) of Revised Rule 61 states a rule recognized in the California decisions. People v. Cornell, 203 Cal. 144, 263 Pac. 216 (1928); People v. Strong, 114 Cal. App. 522, 300 Pac. 84 (1931).

The substance of subdivision (2) of Revised Rule 61 originally appeared in the URE as the last sentence of Rule 60. It is a restatement of the existing California law applicable in condemnation cases. CODE CIV. PROC. § 1256.2. Whether the California law in other fields of litigation is as stated in Revised Rule 61 is uncertain. At least one California case has held that an expert could be asked whether he was being compensated, but could not be asked the amount of the compensation. People v. Tomalty, 14 Cal. App. 224, 111 Pac. 513 (1910). However, the decision may have been based on the discretionary right of the trial judge to curtail collateral inquiry.

In any event, the rule enunciated in Section 1256.2 and in Revised Rule 61 is the desirable rule. The tendency of some experts to become advocates for the party employing them has been recognized. 2 WIGMORE, EVIDENCE § 563 (3d ed. 1940); Friedenthal, Discovery and Use of an Adverse

Party's Expert Information, 14 STAN. L. REV. 455, 485-486 (1962). The jury can better appraise the extent to which bias may have influenced an expert's opinion if it is informed as to the amount of his fee--and, hence, the extent of his obligation to the party calling him.

AMENDMENTS AND REPEALS OF EXISTING STATUTES

Set forth below are three provisions in the Code of Civil Procedure that should be revised or repealed in light of the Commission's tentative recommendation concerning Article VII (Expert and Other Opinion Testimony) of the Uniform Rules of Evidence. The reason for the suggested revision or repeal is given after each section. References to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

Section 1256.2 provides:

1256.2. In any condemnation proceeding, either party shall be allowed to question any witness as to all expenses and fees paid or to be paid to such witness by the other party.

This section should be repealed. It is superseded by Rule 61(2).

Subdivision 9 of Section 1870 should be revised to read:

1870. ~~[FACTS WHICH MAY BE PROVED ON TRIAL.]~~ In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

\* \* \* \* \*

9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting. ~~[; his opinion on a question of science, art, or trade, when he is skilled therein;]~~

The deleted language of subdivision 9 of Section 1870 is superseded by the provisions of Rule 56.

Section 1872 provides:

1872. Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state the reasons for such opinion, and he may be fully cross-examined thereon by opposing counsel.

This section should be repealed. It is superseded by Rules 57(1) and 58.5(1).

Agricultural Code

18. In all matters arising under this code, the fact of possession by any person engaged in the sale of a commodity is prima facie evidence that such commodity is for sale. This presumption is a presumption affecting the burden of proof.

COMMENT

Section 18 is a general provision applicable to all the Agricultural Code. Some other sections in the code, however, duplicate its provisions. See for example Section 1105. Its purpose is to shift to the person in possession of fruits, nuts, or vegetables not in compliance with applicable law the burden of proving that possession was for a lawful purpose and not for purposes of sale. 17 Ops. Cal. Atty. Gen. 154.

152.

All plants within a citrus white fly district which are infested with citrus white fly or eggs, larvae or pupae thereof, or which there is reasonable cause to [~~presume~~] believe may be infested with citrus white fly, are declared a public nuisance. The existence of any known host plant of citrus white fly within the boundaries of the district shall be deemed reasonable cause to [~~presume~~] believe said host plant to be infested with citrus white fly.

340.4 Possession or ownership of cattle with an unrecorded, forfeited, or canceled brand is prima facie evidence that the person in possession or the owner of the cattle has branded them with such brand. This presumption is a presumption affecting the burden of proof.

751. The director may investigate and certify to shippers or other financially interested parties the analysis, classification, grade, quality or condition of fruit, vegetable or other agricultural products, either raw or processed, under such rules and regulations as he may prescribe, including the payment of reasonable fees.

Every certificate relating to the analysis, classification, condition, grade or quality of agricultural products, either raw or processed, and every duly certified copy of such certificate, shall be received in all courts of the State of California as prima facie evidence of the truth of the statements therein contained, if duly issued either:

- (1) By the director under authority of this code; or
- (2) In cooperation between federal and state agencies, authorities, or organizations under authority of an act of Congress and an act of the Legislature of any state; or
- (3) Under authority of a federal statute.

This presumption is a presumption affecting the burden of proof.

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772. The certificates provided for in this chapter shall be prima facie evidence before any court in this State of the true average soluble solids test of all of the grapes in the lot or load under consideration. This presumption is a presumption affecting the burden of proof.

782. The director and the commissioners of each county of the State, their deputies and inspectors, under the supervision and control of the director shall enforce this chapter. The refusal of any officer authorized under this chapter to carry out the orders and directions of the director in the enforcement of this chapter is neglect of duty.

The director by regulation may prescribe methods of selecting samples of lots or containers of fruits, nuts and vegetables on a basis of size or other specific classification, which shall be reasonably calculated to produce by such sampling fair representations of the entire lots or containers sampled; establish and issue official color charts depicting the color standards and requirements established in this chapter; and make such other rules and regulations as are reasonably necessary to secure uniformity in the enforcement of this chapter.

Any sample taken under the provisions of this chapter shall be prima facie evidence, in any court in this State, of the true conditions of the entire lot in the examination of which said sample was taken. A written notice of violation, issued by a duly qualified representative of the director or by commissioners, their deputies and inspectors holding valid standardization certificates of eligibility as enforcing officers of this chapter, stating that a certain lot of produce is in violation of the provisions of this chapter and based upon the examination of such sample, shall be prima facie evidence, in any court in this State, of the true condition of the entire lot. These presumptions are presumptions affecting the burden of proof.

841. The director and the commissioners of each county of the State, their deputies and inspectors, under the supervision and control of the director shall enforce this chapter. The refusal of any officer authorized under this chapter to carry out the orders and directions of the director in the enforcement of this chapter is neglect of duty.

The director by regulation may prescribe methods of selecting samples of lots or containers of honey, which shall be reasonably calculated to produce by such sampling fair representations of the entire lots or containers sampled; establish and issue official color charts depicting the color standards and requirements established in this chapter; and make other rules and regulations as are reasonably necessary to secure uniformity in the enforcement of this chapter.

Any sample taken under the provisions of this chapter shall be prima facie evidence, in any court in this State, of the true condition of the entire lot in the examination of which said sample was taken. This presumption is a presumption affecting the burden of proof.

892.5. The director may investigate and certify to shippers or other financially interested parties the grade, quality and condition of barley. Said certificates shall be based upon the United States standards for barley and shall be prima facie evidence of the truth of the statements contained therein. This presumption is a presumption affecting the burden of proof.

893. The director shall inspect and grade upon request and certify to any interested party the quality and condition of any field crop or other agricultural product under such rules and regulations as he may prescribe. Certificates issued by authorized agents of the director shall be received in the courts in the State as prima facie evidence of the truth of the statements therein contained. This presumption is a presumption affecting the burden of proof. Such inspection shall not be made or such certificates issued by any person not specifically authorized by the director in reference to any field crop product for which State standards have been established. Any person so authorized shall comply with the rules and regulations issued by the director relative to the certification of field crop products.

1040. In any action, civil or criminal, in any court in this State, a certificate of the director stating the results of any analysis, purported to have been made under the provisions of this act, shall be prima facie evidence of the fact that the sample or samples mentioned in said analysis or certificate were properly analyzed; that such samples were taken as herein provided; that the substance analyzed contained the component parts stated in such certificate and analysis; and that the samples were taken from the lots, parcels or packages mentioned in said certificate. This presumption is a presumption affecting the burden of proof.

1105. It shall be presumed from the fact of possession by any person, firm or corporation engaged in the sale of eggs that such eggs are for sale. This presumption is a presumption affecting the burden of proof.

COMMENT

See comment to Section 13.

1272.5. Any sale of farm products made by a commission merchant for less than the current market price to any person with whom he has any financial connection, directly or indirectly as owner of its corporate stock, as copartner, or otherwise, or any sale out of which said commission merchant receives, directly or indirectly, any portion of the purchase price, other than the commission named in licensee's application or in a specific contract with the consignor, shall be prima facie evidence of fraud within the meaning of this chapter. This presumption is a presumption affecting the burden of proof.

No commission merchant, dealer, or broker who finances, lends money, or otherwise makes advances of money or credits to another commission merchant, dealer, or broker may deduct from the proceeds of farm products marketed, sold, or otherwise handled by him on behalf of or for the account of the commission merchant, dealer, or broker to whom such money, loans, advances or credits are made, an amount exceeding a reasonable commission or brokerage together with the usual and customary selling charges and/or costs of marketing, and may not otherwise divert to his own use or account or in liquidation of such loans, advances or credits the moneys, returns, or proceeds accruing from the sale, handling or marketing of farm products handled by him on behalf of or for the account of the commission merchant, dealer, or broker to whom or for whom such loans, advances, or credits are made.

Business and Professions Code

552. Any case of ophthalmia neonatorum or of blindness resulting from it upon which one accused of a violation of this article has been in attendance constitutes prima facie evidence of knowledge of the case by the one accused. This presumption is a presumption affecting the burden of proof.

COMMENT

Section 551 requires a physician or other person in attendance at a birth to treat the eyes of the infant within two hours after birth with a prophylactic efficient treatment. If, within two weeks after the birth, the child develops ophthalmia neonatorum the person in attendance is required to report the case to the local health department within 24 hours after acquiring knowledge of the case. Failure to administer the prescribed treatment or failure to report a case of ophthalmia neonatorum is a misdemeanor (§ 556), and repeated violations may result in a revocation of the license of the attending physician or other person (§ 557).

2114. The directory shall be prima facie evidence of the right of the persons named in it to practice, unless such right has been revoked or suspended by the board subsequent to the publication of such directory. The secretary-treasurer shall mail a copy of the directory, and all new issues and copies of all supplements of it, to the last known address of each person listed in it. This presumption is a presumption affecting the burden of producing evidence.

COMMENT

The directory referred to is a directory compiled and published annually by the Board of Medical Examiners containing a list of all persons licensed to practice under the Medical Practice Act. § 2111.

2376. The record of suspension or revocation made by the county clerk in accordance with sections 2374 and 2375, is prima facie evidence of the fact thereof and of the regularity of all the proceedings of the board in the matter of the suspension or revocation. This presumption is a presumption affecting the burden of producing evidence.

#### COMMENT

Section 2340 requires each person licensed under the Medical Practice Act to register his certificate with the county clerk of every county in which he is practicing his profession. When a certificate to practice under the Medical Practice Act is suspended or revoked by the Board of Medical Examiners, the Board is required to certify that fact to the county clerk of the county where the certificate is recorded. § 2374. The county clerk is required to enter the fact of suspension or revocation upon the margin or across the face of his register of the certificate. § 2375. It is this record made by the county clerk which is made prima facie evidence by Section 2376.

3040. It is unlawful for any person to engage in the practice of optometry or to display a sign or in any other way to advertise or hold himself out as an optician or optometrist without having first obtained a certificate of registration from the board under the provisions of this chapter or under the provisions of any former act relating to the practice of optometry.

In any prosecution for a violation of this section, the use of test cards, test lenses, or of trial frames is prima facie evidence of the practice of optometry. This presumption is a presumption affecting the burden of proof.

4809. The board shall keep an official record of its meetings, and it shall also keep an official register of all applicants for licenses.

The register shall be[prima-facie]evidence of all matters contained therein.

4881. The secretary in all cases of suspension or revocation of licenses shall enter on his register the fact of suspension or revocation, as the case may be. The record of such suspension or revocation so made by the county clerks shall be prima facie evidence of the fact thereof, and of the regularity of all the proceedings of the board in the matter of the suspension or revocation. This presumption is a presumption affecting the burden of producing evidence.

5271. No person shall place any advertising display unless there is securely fastened upon the front thereof a permit number plate of the character specified in Section 5272. The placing of any advertising display without having affixed thereto a permit number plate is ~~[prima facie evidence that the advertising display has been placed and is being maintained]~~ in violation of the provisions of this chapter, and any such display shall be subject to removal as provided in Section 5312.

#### COMMENT

The deleted portion of the section is inconsistent with the first sentence. The first sentence makes it a violation of the chapter to place advertising displays without the permit number plate. The second sentence made such a placing prima facie evidence of a violation.

6049.1. In all disciplinary proceedings in this State, certified or duly authenticated copies of findings, conclusions, orders or judgments made or entered in any court of record, or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys, of the United States, or of any State or Territory of the United States or of the District of Columbia in any disciplinary proceeding therein against the same person, shall be admissible in evidence, and so far as relevant and material shall be prima facie evidence of the facts, matters and things set forth therein. This presumption is a presumption affecting the burden of proof.

The duly authenticated transcript of the testimony taken in such out-of-state proceedings shall be admissible in evidence in any disciplinary proceeding against the same person in this State.

This section, except to the extent that it states or declares the law in effect prior to the effective date of this section, shall not apply in any disciplinary proceeding pending on said date in this State or thereafter commenced in this State against any attorney based on charges which were the subject of a disciplinary proceeding in this State against the same attorney prior to said date.

8752. An unrevoked, unsuspended and unexpired license, or renewal certificate, issued by the board is presumptive evidence in all courts and places that the person named is legally licensed under this chapter. This presumption is a presumption affecting the burden of producing evidence.

COMMENT

Section 8752 relates to land surveyors licenses issued by the State Board of Registration for Civil and Professional engineers.

C

9510. Any advertisement of the service of dry cleaning, spotting, sponging, or pressing constitutes prima facie evidence that the premises, business, building, room, shop, store, or establishment in or upon which it appears, or to which it refers, is a dry cleaning agency. This presumption is a presumption affecting the burden of proof.

12312. In any prosecution for a violation of any of the provisions of this division any copy of the standards of weights and measures of the State furnished, procured, and certified to under the provisions of this division, shall be admitted in evidence upon the trial as prima facie true and correct. This presumption is a presumption affecting the burden of proof.

12510. Any person, who by himself, or through or for another, does any of the following is guilty of a misdemeanor:

(a) Uses, in the buying or selling of any commodity, or retains in his possession a false weight or measure or weighing or measuring instrument.

(b) Sells any weight or measure or weighing or measuring instrument which has not been sealed within one year, except weighing or measuring instruments required to be assembled prior to use.

(c) Uses any condemned weight or measure or weighing or measuring instrument contrary to law.

(d) Uses in the buying or selling of any commodity, or for determining the charge for a service, any weight or measure or weighing or measuring instrument which is not kept at a fixed location, which does not bear a current or previous year's seal and which, upon test by the sealer is found to be incorrect, unless a written request for an inspection of the weighing or measuring instrument has been made to the county sealer; provided, however, the use of any weight or measure or weighing or measuring instrument in connection with any business activity subject to the jurisdiction of the California Public Utilities Commission shall be exempt from the requirements herein.

(e) Sells or uses any device or instrument to be used or calculated to falsify any weight or measure.

(f) So locates or positions a weighing or measuring device used in retail trade, except as used exclusively in preparation of packages put up in advance of sale, that its indications cannot be accurately read or the weighing or measuring operation cannot be observed by the purchaser under ordinary circumstances.

Possession of a false weight or measure or weighing or measuring instruments or records thereof is prima facie evidence of intention to violate the law. This presumption is a presumption affecting the burden of proof.

14271. Every trade-mark registration on the records of the Secretary of State is prima facie evidence of the ownership of the mark. This presumption is a presumption affecting the burden of proof.

14431.

The use by any

person other than the registrant, or owner of the brand and other than the members of the registrant of any container, supplies or equipment, without the written consent provided for in this article, or the possession by any junk dealer, or dealer in secondhand articles, of any containers, supplies or equipment, is presumptive evidence of unlawful use of or traffic in such containers, supplies, or equipment. This presumption is a presumption affecting the burden of proof.

#### COMMENT

Section 14431 relates to containers, equipment, and supplies bearing a brand name or mark that has been registered with the Secretary of State. Section 14430 prohibits anyone from using, selling, buying or otherwise dealing with any container, equipment, or supplies bearing such a brand unless a written consent has been obtained, or the container, equipment or supplies have been purchased from the brand owner.

Thus, the presumption in Section 14431 requires the person using branded materials to prove that he purchased them from the brand owner.

14486.

The use by any person, other than the registrant of any supplies without the written consent provided in this article or the possession of supplies so marked by any junk dealer or dealer of secondhand articles is presumptive evidence of unlawful use of or traffic in such supplies. This presumption is a presumption affecting the burden of proof.

#### COMMENT

Section 14486 appears in an article relating to registered laundry supply designations. It is similar in purpose to Section 14431.

14495.                               The use of the name of any organization by any person, firm, or corporation not entitled to use the same under the constitution, by-laws, rules or regulations of the organization which owns the name or by the written consent of such organization, is presumptive evidence of the unlawful use or traffic in such name. This presumption is a presumption affecting the burden of proof.

**COMMENT**

Section 14495 appears in an article relating to names of lodges, associations, unions, and societies whose names have been registered with the Secretary of State. Section 14495 is similar in purpose to Sections 14431 and 11486.

Bus. & Prof.

14702. The certificate of filing or a certified copy together with a certified copy of the document filed shall be admitted in any court as prima facie evidence of the facts recited therein. This presumption is a presumption affecting the burden of proof.

COMMENT

Section 14702 appears in an article permitting any person to file with the Secretary of State a printed or typewritten lecture, sermon, story, scenario, et cetera, together with an affidavit that the person filing is the author. Upon receipt of the matter, the Secretary of State issues a certificate showing the date of filing, name of the claimant, and the title of the printed or typewritten matter. Section 14702 provides that the certificate, together with a certified copy of the document file, is prima facie evidence of the date of filing and the identity of the person filing.

22130. In any action relating to the enforcement of any provision of this article, a certificate duly issued by an assay office of the Treasury Department of the United States, certifying the weight of any article, or any part thereof, or of the kind, weight, quality, fineness or quantity of any ingredient thereof, shall be receivable in evidence as constituting prima facie ~~[proof]~~ evidence of the matter or matters so certified. This presumption is a presumption affecting the burden of proof.

17071.

In all actions brought under this chapter proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition. This presumption is a presumption affecting the burden of proof.

COMMENT

Section 17071 appears in the Unfair Practices Act, which relates to unfair trade practices. Its purpose is to implement Section 17043 which prohibits sales at less than cost for the purpose of injuring competitors or destroying competition.

17071.5.

In all actions brought under this chapter proof of limitation of the quantity of any article or product sold or offered for sale to any one customer to a quantity less than the entire supply thereof owned or possessed by the seller or which he is otherwise authorized to sell at the place of such sale or offering for sale, together with proof that the price at which the article or product is so sold or offered for sale is in fact below its invoice or replacement cost, whichever is lower, raises a presumption of the purpose or intent to injure competitors or destroy competition. This section applies only to sales by persons conducting a retail business the principal part of which involves the resale to consumers of commodities purchased or acquired for that purpose, as distinguished from persons principally engaged in the sale to consumers of commodities of their own production or manufacture. The presumption created by this section is a presumption affecting the burden of proof.

17073.

Proof of average overall cost of doing business for any particular inventory period when added to the cost of production of each article or product, as to a producer, or invoice or replacement cost, whichever is lower, of each article or product, as to a distributor, is presumptive evidence of cost of each such article or product involved in any action brought under this chapter. This presumption is a presumption affecting the burden of proof.

17074.

Proof

of transportation tariffs when fixed and approved by the Public Utilities Commission of the State of California is presumptive evidence of delivery cost. This presumption is a presumption affecting the burden of proof.

17077.

In any action or prosecution

for sales below cost in violation of this chapter, if the defendant acquires his raw materials for a consideration not wholly or definitely computable in money, the cost of the raw materials shall be presumed to be the prevailing market price for similar raw materials in the ordinary channels of trade in the locality or vicinity in which such raw materials were acquired, at the time of the acquisition. This presumption is a presumption affecting the burden of proof.

18404. Any threat, expressed, or implied, made to a retailer by a manufacturer that the manufacturer will cease to sell, or refuse to contract to sell, or will terminate the contract to sell, motor vehicles to the retailer, unless such retailer finances the purchase or sale of motor vehicles only with or through a designated person or class of persons or sells and assigns the conditional sales contracts, chattel mortgages, or leases arising from his retail sales of motor vehicles only to a designated person or class of persons is prima facie evidence that the manufacturer has sold or intends to sell motor vehicles on the condition or with the agreement or understanding prohibited by this chapter. This presumption is a presumption affecting the burden of proof.

COMMENT

Section 18404 appears in the Automobile Dealers Anticoercion Act. Under this act, it is unlawful for manufacturer to sell automobiles to retailers on the condition or with an agreement or understanding that a designated person is to handle the financing when the effect of such condition or agreement may be to lessen competition or tend to create a monopoly.

18405.

Any

threat, express or implied, made to a retailer by any person, or any agent of any such person, who is engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages or leases on motor vehicles in this State and is affiliated with or controlled by a manufacturer that such manufacturer will terminate his contract with or cease to sell motor vehicles to such retailer unless such retailer finances the purchase or sale of motor vehicles only with or through a designated person or class of persons or sells and assigns the conditional sales contracts, chattel mortgages or leases arising from his retail sale of motor vehicles only to such person so engaged in financing the purchase or sale of motor vehicles or in buying conditional sales contracts, chattel mortgages or leases on motor vehicles, shall be presumed to be made at the direction of and with the authority of such manufacturer, and is prima facie evidence that the manufacturer has sold or intends to sell the motor vehicles on the condition or with the agreement or understanding prohibited by this chapter. This presumption is a presumption affecting the burden of proof.

22131. In any action relating to the enforcement of any provision of this article, proof that an article has been marked in violation of the provisions of this article shall be deemed to be prima facie ~~proof~~ evidence that such article was manufactured after this article became effective. This presumption is a presumption affecting the burden of proof.

25607.

It is unlawful for any person or licensee to have upon any premises for which a license has been issued any alcoholic beverages other than the alcoholic beverage which the licensee is authorized to sell at the premises under his license. It shall be presumed that all alcoholic beverages found or located upon premises for which licenses have been issued belong to the person or persons to whom the licenses were issued. This presumption is a presumption affecting the burden of proof. Every person violating the provisions of this section is guilty of a misdemeanor. The department may seize any alcoholic beverages found in violation of this section.

#### COMMENT

Section 25607 appears in the Alcoholic Beverage Control Act. Its purpose is to facilitate enforcement of the Alcoholic Beverage Control Act by requiring a licensee to explain the presence of alcoholic beverages which he is not licensed to sell on his premises.

Civil Code

166. The filing of the inventory in the recorder's office is notice and prima facie evidence of the title of the party filing such inventory. This presumption is a presumption affecting the burden of producing evidence.

Civil

831. [BOUNDARIES BY WAYS.] An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown. This presumption is a presumption affecting the burden of producing evidence.

853. When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made. This presumption is a presumption affecting the burden of producing evidence.

1055.

[DATE.] A grant duly

executed is presumed to have been delivered at its date. This presumption is a presumption affecting the burden of producing evidence.

1105.

[~~WHEN-FEE-SIMPLE-TITLE-IS~~

~~PRESUMED-TO-PASS.~~] A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended. This presumption is a presumption affecting the burden of proof and may be overcome only by clear and convincing proof.

#### COMMENT

The higher standard of proof necessary to overcome the presumption is required under the existing case law. Beeler v. American Trust Company, 24 Cal.2d 1, 7 (1944); Wehle v. Price, 202 Cal. 394, 397 (1927); Sheehan v. Sullivan, 126 Cal. 189, 193, 58 Pac. 543 (1899); Spaulding v. Jones, 117 Cal. App.2d 541, 545, 256 P.2d 637 (1953).

The requisite burden of proof may be met in some cases by proof of facts giving rise to a presumption of a resulting trust under Civil Code Section 853.

1150.

~~[GIFT PRESUMED TO~~

~~BE IN VIEW OF DEATH.]~~ A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death. This presumption is a presumption affecting the burden of producing evidence.

1190.1. The certificate of acknowledgment of an instrument executed by a corporation, foreign or domestic, by its president or vice president and secretary or assistant secretary, other than an instrument conveying or otherwise transferring all, or substantially all, the assets of the corporation, may contain, in addition to the matters set forth in Section 1190 of this code, a statement substantially in the following form: "and acknowledged to me that such corporation executed the within instrument pursuant to its by-laws or a resolution of its board of directors"; and such recital shall be prima facie evidence that such instrument is the act of the corporation, and that it was duly executed pursuant to authority duly given by its by-laws or the board of directors, and conclusive evidence of such matters in favor of any good faith purchaser, lessee or encumbrancer. This presumption is a presumption affecting the burden of producing evidence.

1263. The declaration of homestead must contain:

1. A statement showing that the person making it is the head of a family, and if the claimant is married, the name of the spouse; or, when the declaration is made by the wife, showing that her husband has not made such declaration and that she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises, and claims them as a homestead;

3. A description of the premises;

4. An estimate of their actual cash value;

5. Such declaration of homestead may further contain a statement of the character of the property sought to be homesteaded, showing the improvement or improvements which have been affixed thereto, with sufficient detail to show that it is a proper subject of homestead, and that no former declaration has been made, or, if made, that it has been abandoned and if it contains such further statement and the declaration is supported by the affidavit of the declarant, annexed thereto, that the matters therein stated are true of his or her own knowledge, such declaration, when properly recorded, shall be prima facie evidence of the facts therein stated, and conclusive evidence thereof in favor of a purchaser or encumbrancer in good faith and for a valuable consideration. This presumption is a presumption affecting the burden of producing evidence.

1431.

[WHEN-JOINT.] An obligation

imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except in the special cases mentioned in the Title on the Interpretation of Contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary. This presumption is a presumption affecting the burden of producing evidence.

1477.

[PARTIAL PERFORMANCE.] A partial

performance of an indivisible obligation extinguishes a corresponding proportion thereof, if the benefit of such performance is voluntarily retained by the creditor, but not otherwise. If such partial performance is of such a nature that the creditor cannot avoid retaining it without injuring his own property, his retention thereof is [not] presumed to be involuntary. This presumption is a presumption affecting the burden of producing evidence.

1654.

~~WORDS TO BE TAKEN MOST STRONGLY AGAINST WHOM.]~~ In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.

These presumptions are presumptions affecting the burden of producing evidence.

1659.           ~~[WHEN JOINT AND SEVERAL.]~~ Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several. This presumption is a presumption affecting the burden of producing evidence.

1660.

[SALUTE.] A promise, made in the singular number, but executed by several persons, is presumed to be joint and several.

This presumption is a presumption affecting the burden of producing evidence.

1838.

[ INJURY TO, OR LOSS

OF THING DEPOSITED. --- If a thing is lost or injured during its deposit, and the depositary refuses to inform the depositor of the circumstances under which the loss or injury occurred, -- so far as he has information concerning them, -- or willfully misrepresents the circumstances to him, -- the depositary is presumed to have willfully, -- or by gross negligence, permitted the loss or injury to occur. ]

COMMENT

This section is superseded by proposed Section 3768 of the Code of Civil Procedure.

1914.

Whenever a loan of money is made, it is presumed to be made upon interest, unless it is otherwise expressly stipulated at the time in writing. This presumption is a presumption affecting the burden of producing evidence.

1943.

A hiring of real property, other than lodgings and dwelling-houses, in places where there is no custom or usage on the subject, is presumed to be a month to month tenancy unless otherwise designated in writing; except that, in the case of real property used for agricultural or grazing purposes a hiring is presumed to be for one year from its commencement unless otherwise expressed in the hiring.

The presumptions in this section are presumptions affecting the burden of producing evidence.

1944.

~~[HIRING OF LODGINGS FOR INDEFINITE TERM.]~~ A hiring of lodgings or a dwelling house for an unspecified term is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a monthly rate of rent is presumed to be for one month. In the absence of any agreement respecting the length of time or the rent, the hiring is presumed to be monthly. The presumptions in this section are presumptions affecting the burden of producing evidence.

1945.

~~RENEWAL OF LEASE BY LESSEE'S CONTINUED POSSESSION.]~~ If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor in any case one year. This presumption is a presumption affecting the burden of producing evidence.

2137.

[CONSIGNOR, WHEN LIABLE FOR FREIGHTAGE.]

The consignor of freight is presumed to be liable for the freightage, but if the contract between him and the carrier provides that the consignee shall pay it, and the carrier allows the consignee to take the freight, he cannot afterwards recover the freightage from the consignor. This presumption is a presumption affecting the burden of evidence.

3336.

The detriment

caused by the wrongful conversion of personal property is presumed to be:

First--The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and

Second--A fair compensation for the time and money properly expended in pursuit of the property.

This presumption is a presumption affecting the burden of producing evidence.

3356.

For the

purpose of estimating damages, the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner. This presumption is a presumption affecting the burden of producing evidence.

3387.           ~~[It is to be presumed that the breach of an agree-~~  
~~ment to transfer real property cannot be adequately relieved by pecuniary~~  
~~compensation.]~~ Except as otherwise provided in this article, the specific  
performance of an agreement to transfer real property may be compelled.

COMMENT

The only purpose of the presumption in Section 3385 is to indicate that an agreement to transfer real property may be specifically enforced. The presumption removes such agreements from the rule that specific performance will not be compelled if damages afford an adequate remedy. The section is amended to provide directly, instead of obliquely, that agreements to transfer real property can be specifically enforced.

3400.

[~~PRESUMPTION AS TO INTENT OF PARTIES.~~] For the purpose of revising a contract, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement. This presumption is a presumption affecting the burden of proof.

Code of Civil Procedure

273. The report of the official reporter, or official reporter pro tempore, of any court, duly appointed and sworn, when transcribed and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie evidence of such testimony and proceedings.  
This presumption is a presumption affecting the burden of proof.

321.

In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action. This presumption is a presumption affecting the burden of proof.

326.

When the relation

of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or, where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But ~~[such presumptions cannot be made]~~ the possession of the tenant is not deemed the possession of the landlord after the periods herein limited.

1020.

Any notice

required by law, other than those required to be given to a party to an action or to his attorney, the service of which is not governed by the other sections of this chapter and which is not otherwise specifically provided for by law, may be given by sending the same by registered mail with proper postage prepaid addressed to the addressee's last known address with request for return receipt, and the production of a returned receipt purporting to be signed by the addressee shall create a [disputable] presumption that such notice was received by the person to whom the notice was required to be sent. This presumption is a presumption affecting the burden of producing evidence.

1861.

The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly. This presumption is a presumption affecting the burden of producing evidence.

1927. Whenever any patent for mineral lands within the State of California, issued or granted by the United States of America, shall contain a statement of the date of the location of a claim or claims, upon which the granting or issuance of such patent is based, such statement shall be prima facie evidence of the date of such location. This presumption is a presumption affecting the burden of producing evidence.

1927.5. Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this State, derived from the Spanish or Mexican Governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-6, are receivable as [~~prima-facie~~] evidence in all the courts of this State with like force and effect as the originals and without proving the execution of such originals.

1928. A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this state, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed. This presumption is a presumption affecting the burden of producing evidence.

1948. Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgment or proof is prima facie evidence of the execution of the writing, in the same manner as if it were a conveyance of real property. This presumption is a presumption affecting the burden of producing evidence.

2011. If such affidavit be made in an action or special proceeding pending in a Court, it may be filed with the Court or a Clerk thereof. If not so made, it may be filed with the Clerk of the county where the newspaper is printed. In either case the original affidavit, or a copy thereof, certified by the Judge of the Court or Clerk having it in custody, is prima facie evidence of the facts stated therein. This presumption is a presumption affecting the burden of producing evidence.

#### COMMENT

The affidavit referred to in Section 2011 is an affidavit by the printer of a newspaper, or his foreman or principal clerk, stating that a document or notice was published in the newspaper at the specified times.

## Commercial Code

As originally proposed by the Commissioners on Uniform State Laws, the Commercial Code contained definition of a presumption. The Commercial Code was drafted in the light of this definition of a presumption. When the Commercial Code was adopted in California, the definition of a presumption was deleted for three reasons: 1. The proposed definition was thought to be ambiguous because it did not state explicitly that a presumption no longer exists when contrary evidence is introduced, thus leaving unclear whether a presumption affects the burden of proof. 2. The Commercial Code definition was inconsistent with existing California law and the proponents of the Commercial Code did not wish to introduce additional confusion and complexity into the existing California law. 3. The California Law Revision Commission was studying the law of evidence and the proponents of the Commercial Code believed that any revision of the law of presumptions should await the recommendation of the Law Revision Commission. 37 Calif. State Bar J. 131-132 (1962).

The Commercial Code adopted the view that a presumption requires the trier of fact to find the presumed fact until evidence is introduced which would support a finding of its nonexistence. Under the Commercial Code, a presumption did not place the burden of persuasion on the party against whom the presumption operates. See, e.g., Comm. C. § 3307. Thus, the definition of a presumption proposed in the original Uniform Commercial Code was, in substance, the description of the manner in which a presumption affecting the burden of producing evidence operates under the provisions of proposed Code of Civil Procedure Section 3730. Accordingly, the addition of the following section to the Commercial Code would carry out the intent of its original drafters and would harmonize its provisions relating to presumptions with the proposed statutes on presumptions:

1209. The presumptions in this code are presumptions affecting the burden of producing evidence.

Corporations Code

2233. The inspectors of election shall determine the number of shares outstanding and the voting power of each, the shares represented at the meeting, the existence of a quorum, the authenticity, validity, and effect of proxies, receive votes, ballots, or consents, hear and determine all challenges and questions in any way arising in connection with the right to vote, count and tabulate all votes or consents, determine the result, and do such acts as may be proper to conduct the election or vote with fairness to all shareholders.

The inspectors of election shall perform their duties impartially, in good faith, to the best of their ability and as expeditiously as is practical. If there are three inspectors of election the decision, act, or certificate of a majority is effective in all respects as the decision, act, or certificate of all.

On request of the chairman of the meeting or of any shareholder or his proxy the inspectors shall make a report in writing of any challenge or question or matter determined by them and execute a certificate of any fact found by them. Any report or certificate made by them is prima facie evidence of the facts stated therein. This presumption is a presumption affecting the burden of producing evidence.

2711. The certificate of the secretary or assistant secretary is prima facie evidence of the time and place of sale and any postponement thereof, of the quantity and particular description of the stock sold, to whom, for what price, and of the fact of payment of the purchase money. The certificate shall be filed in the office of the corporation, and copies of the certificate, certified by the secretary of the corporation, are prima facie evidence of the facts therein stated. This presumption is a presumption affecting the burden of producing evidence.

Elections Code

380. Upon the personal or written application of any person, the county clerk shall give him a certified copy of the entries upon the register relating to the applicant.

A certified copy of an uncanceled affidavit of registration is prima facie evidence that the person named in the entry is a voter of the county. This presumption is a presumption affecting the burden of producing evidence.

6087. A verified nomination paper is prima facie evidence that the signatures are genuine and that the persons signing it are voters, until it is otherwise proved by comparison of the signatures with the affidavits of registration in the office of the county clerk. This presumption is a presumption affecting the burden of proof.

6837. A verified nomination paper is prima facie evidence that the signatures to it are genuine and that the persons signing it are voters unless it is otherwise proven by comparison of the signatures with the affidavits of registration in the office of the county clerk. This presumption is a presumption affecting the burden of proof.

Fish and Game Code

2000. It is unlawful to take any bird, mammal, fish, or amphibian except as provided in this code or regulations made pursuant thereto. Possession of a bird, mammal, or fish in or on the fields, forests, or waters of this State, or while returning therefrom with fishing or hunting equipment, is prima facie evidence the possessor took the bird, mammal, or fish. This presumption is a presumption affecting the burden of proof.

3005. It is unlawful to take birds or mammals with any net, pound, cage, trap, set line or wire, or poisonous substance, or to possess birds or mammals so taken, whether taken within or without this State.

Proof of possession of any bird or mammal which does not show evidence of having been taken by means other than a net, pound, cage, trap, set line or wire, or poisonous substance, is prima facie evidence that the birds or mammals were taken in violation of the provisions of this section. This presumption is a presumption affecting burden of proof.

This section does not apply to the lawful taking of fur-bearing mammals, nonprotected birds, nonprotected mammals, or mammals found to be injuring crops or property, nor to the taking of birds or mammals under depredation permits, nor to taking by employees of the department acting in an official capacity or holders of a scientific or propagation permit acting in accordance with the conditions of the permit.

3217. The carcass of a game bird which shows that it has been killed by shooting shall constitute prima facie evidence that it was not a domesticated game bird. The fact that the bird has been tagged in accordance with Section 3206 of this code shall not alter this presumption. This presumption is a presumption affecting burden of proof.

4600. It is unlawful to kill, wound, capture, or have in possession any undomesticated burro, except as provided in this chapter or under a permit issued pursuant to Section 4187.

An undomesticated burro, for the purpose of this chapter, is a wild burro or a burro which has not been tamed or domesticated for a period of three years after its capture. The fact that a burro was killed, wounded, or captured on publicly owned land, or on land owned by a person other than the person who killed, wounded, or captured the burro is prima facie evidence that the burro was an undomesticated burro at the time it was killed, wounded, or captured. This presumption is a presumption affecting the burden of proof.

Neither the commission nor any other department or agency has any power to modify the provisions of this chapter by any order, rule, or regulation.

8664. Except in Districts 6 and 7, any net found in, or within 500 feet of the Klamath, Smith, Eel, Mad, Van Dusen, or Mattole Rivers, or their tributaries, is prima facie evidence that the owner or person in possession of the net is or has been using it unlawfully. This presumption is a presumption affecting the burden of proof.

The provisions of this section do not apply to trawl or drag nets being transported.

Government Code

8208. The protest of a notary public, under his hand and official seal, of a bill of exchange or promissory note for nonacceptance or nonpayment, specifying:

- (a) the time and place of presentment.
- (b) the fact that presentment was made and the manner thereof.
- (c) the cause or reason for protesting the bill.
- (d) the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found,

is prima facie evidence of the facts recited therein. This presumption is a presumption affecting the burden of producing evidence.

C

9021. The certificate of election is prima facie evidence of the right to membership. This presumption is a presumption affecting the burden of producing evidence.

Government Code

11383. The filing of a certified copy of a regulation or an order of repeal with the Secretary of State raises the [~~rebuttable~~] presumptions , which are presumptions affecting the burden of proof, that:

- (a) It was duly adopted.
- (b) It was duly filed and made available for public inspection at the day and hour endorsed on it.
- (c) All requirements of this chapter and the regulations of the department relative to such regulation have been complied with.
- (d) The text of the certified copy of a regulation or order of repeal is the text of the regulation or order of repeal as adopted.

The courts shall take judicial notice of the contents of the certified copy of each regulation and of each order of repeal duly filed.

11384.

The publication of a regulation in the California Administrative Code or Register raises a [~~rebuttable~~] presumption that the text of the regulation as so published is the text of the regulation adopted. This presumption is a presumption affecting the burden of producing evidence.

The courts shall take judicial notice of the content of each regulation or notice of the repeal of a regulation printed in the California Administrative Code or California Administrative Register.

50022.8. Copies of such codes in published form, duly certified by the clerk of the legislative body, shall be received without further proof as prima facie evidence of the provisions of such codes or public records in all courts and administrative tribunals of this State. This presumption is a presumption affecting the burden of producing evidence.

71615. The several particulars specified in Section 71614 shall be entered under the title of the action to which they relate, and, unless otherwise provided, at the time when they occur. Such entries in the docket in a justice court, or a transcript of them, certified by the judge, or his successor in office, are prima facie evidence of the facts so stated. This presumption is a presumption affecting the burden of producing evidence.

Harbors & Navigation Code

832. A managing owner ~~[is presumed to be without]~~ has no right to compensation for his own services except to the extent provided in Corporations Code Section 15018.

COMMENT

Section 832 appears in a chapter relating to ships' managers. A ship's manager is the general agent for the owners for the care of the ship and its freight. § 830. If the manager is a part owner, he is called the managing owner. § 830.

Section 832 was originally enacted in 1872 as Civil Code Section 2072. It is a specific application of the general rule that a partner has no right to compensation for services rendered by him to the partnership. Ferem v. Olson & Mahony, 176 Cal. 652, 657 (1917); Corp. C. § 15018 (f). The section has been modified, therefore, to remove any inconsistency between its 1872 statement of the rule and the current statement of the rule that appears in Corporation Code Section 15018.

871.

A certificate from the master or chief surviving officer of a vessel, to the effect that a seaman exerted himself to the utmost to save the vessel, cargo, and stores, is presumptive evidence of the fact. This presumption is a presumption affecting the burden of producing evidence.

Health and Safety Code

15. Unless expressly otherwise provided, any notice required to be given to any person by any provision of this code may be given by mailing notice, postage prepaid, addressed to the person to be notified, at his residence or principal place of business in this State. The affidavit of the person who mails the notice, stating the facts of such mailing, is prima facie evidence that the notice was thus mailed. This presumption is a presumption affecting the burden of producing evidence.

Health & Safety Code

8600.

All

plots conveyed to individuals are presumed to be the sole and separate property of the owner named in the instrument of conveyance. This presumption is a presumption affecting the burden of proof.

11227. In a prosecution under this division proof that a defendant received or has had in his possession at any time a greater amount of narcotics than is accounted for by any record required by law or that the amount of narcotics possessed by a defendant is a lesser amount than is accounted for by any record required by law is prima facie evidence of guilt. This presumption is a presumption affecting the burden of proof.

12352.

Every person who

does either of the following is guilty of a felony:

(a) Recklessly or maliciously has in his possession an explosive on a public street or highway; in or near any theater, hall, school, college, church, hotel, other public building, or private habitation; in, on, or near any railway passenger train or car, cable road or cable car, steam or other vessel engaged in carrying passengers, ferryboat, or public place ordinarily passed by human beings.

(b) Recklessly or maliciously uses an explosive to intimidate, terrify, or endanger any human being.

Any person not in the lawful possession of an explosive who is found with an explosive on his person or in his possession, on, in, or near any of the buildings, means of transportation, or places mentioned in this section, is presumably guilty of reckless and malicious possession of the explosive. This presumption is a presumption that affects the burden of proof.

14840. Every certificate is prima facie evidence of the facts stated in it. This presumption is a presumption affecting the burden of producing evidence.

COMMENT

Section 14840 relates to fire companies in unincorporated towns. The certificates referred to are certificates of active membership in the fire company and "exempt certificates" that are issued to firemen who have served five years in a fire company.

26293. The possession [~~sale, or offering for sale~~] of any adulterated, mislabeled or misbranded drugs or devices by any manufacturer, producer, jobber, packer or dealer in drugs or devices, or broker, commission merchant, agent, employee or servant of any such manufacturer, producer, jobber, packer, or dealer shall be prima facie evidence of the violation of this chapter. This presumption is a presumption affecting the burden of proof.

#### COMMENT

Section 26280 prohibits the selling or offering for sale of adulterated or misbranded drugs or devices. Therefore, such sale or offer to sell is not merely "prima facie evidence" of a violation--it is a violation.

26339. Every certificate certified to by the Chief of the Division of Laboratories or by the Chief of the Bureau of Food and Drug Inspections shall be prima facie evidence of the facts therein stated. This presumption is a presumption affecting the burden of producing evidence.

26518. The possession~~, sale, or offering for sale~~ of any adulterated or misbranded article of food by any manufacturer, producer, jobber, packer, or dealer in food, or broker, commission merchant, agent, employee, or servant of any such manufacturer, producer, jobber, packer, or dealer, shall be prima facie evidence of the violation of this chapter. This presumption is a presumption affecting the burden of proof.

COMMENT

Section 26510 prohibits selling or offering for sale any adulterated or misbranded article of food. Therefore, the sale or offering for sale of adulterated or misbranded food is not merely "prima facie evidence" of a violation of this chapter--it is a violation.

26563. Every certificate certified to by the Chief of the Division of Laboratories or by the Chief of the Bureau of Food and Drug Inspections shall be prima facie evidence of the facts therein stated. This presumption is a presumption affecting the burden of producing evidence.

Insurance Code

772. In any trial, hearing or proceeding to determine a violation of this article a written statement signed by the person for whom any purchase is financed, to whom any money is loaned or for whom any extension, renewal or other act in connection with the loan is to be granted or performed, declaring that such person voluntarily chooses the insurance agent or broker through whom the insurance or its renewal was transacted, and that the choice of such insurance agent or broker was not made a condition precedent to such purchase, loan, extension, renewal or other act [~~shall-be-prima-facie~~] is evidence that no violation of Section 770 has occurred, if the borrower or purchaser in his own handwriting shall have written the name of his chosen insurance agent or broker into an authorization of such insurance agent or broker.

COMMENT

Section 770 prohibits a person engaged in financing real or personal property from requiring that the property be insured through a particular insurance agent or broker as a condition of a loan. Section 772 provides a defense in a trial, hearing or proceeding to determine a violation of Section 770. There is no need to make a presumption of the matters stated in Section 772. The burden of proof would normally be upon the party asserting that the violation had taken place. As the burden of proof is already on that party, no presumption is needed in Section 772 to place the burden of proof on the same party. The purpose of Section 772 is sufficiently accomplished by making the statement evidence.

1740. The certificate of the commissioner certifying any facts found after a hearing held under this chapter [~~shall-be-prima-facie~~] is evidence of the facts set forth therein.

COMMENT

The hearings referred to in the section are disciplinary proceedings for the purpose of suspending or revoking insurance agents' or insurance brokers' licenses. Under the amendment, the commissioner's certificate will be evidence of the facts found just as a judgment is evidence of the facts found under Revised Rules 63(20), (21), and (21.1).

1819. The certificate of the commissioner certifying any facts found after hearing under this chapter [~~shall-be-prima-facie~~] is evidence evidence of the facts set forth therein.

COMMENT

The hearings referred to are administrative hearings for the purpose of denying, suspending, or revoking bail licenses.

1964. An actual loss may be [~~presumed~~] inferred from the continued absence of a ship without being heard of. The length of time which is sufficient to raise this [~~presumption~~] inference depends on the circumstances of the case.

11014. The commissioner may make such examination and require such further information as he deems advisable. Upon presentation of satisfactory evidence that the society has complied with all the provisions of law, he shall issue to the society a certificate to that effect, and that the society is authorized to transact business pursuant to the provisions of this chapter. The certificate [~~shall-be-prima-facie~~] is evidence of the existence of the society at the date of such certificate. The commissioner shall cause a record of such certificate to be made. A certified copy of such record may be given in evidence with like effect as the original certificate.

11022. The affidavit of any officer of the society or of anyone authorized by it to mail any notice or document, stating facts which show that same has been duly addressed and mailed, [~~shall-be-prima-facie~~] is evidence that such notice or document has been furnished the addressees.

11028. Within 90 days from the approval thereof by the commissioner, all such amendments, or a synopsis thereof shall be furnished to all members of the society either by being published in the official organ of the society or by being sent by mail. The affidavit of any officer of the society or of anyone authorized by it to mail any amendments or synopsis

thereof, stating facts which show that same has been duly addressed and mailed [~~shall-be-prima-facie~~] is evidence that such amendments or synopsis thereof have been furnished the addressee.

11030. Printed copies of the constitution or laws of any domestic or foreign society as amended, certified by the secretary or corresponding officer of the society shall be prima facie evidence of the legal adoption thereof. This is a presumption affecting the burden of proof.

11090. Subject to the annual fee provisions as provided herein every certificate of authority issued to a fraternal benefit society shall be for an indefinite term and shall expire with the expiration or termination of the corporate existence of the holder thereof unless sooner revoked by the commissioner. . . . A duly certified copy or duplicate of such certificate of authority shall be prima facie evidence that the holder is a fraternal benefit society within the meaning of this chapter. This presumption is a presumption affecting the burden of producing evidence.

11139. No report of examination shall be adopted by the commissioner or filed by him as an official document except after a notice is given and a hearing held thereon, if demanded, in accordance with the provisions of Section 11141. The commissioner in his determination made upon the basis of his findings from the record of such hearing may direct the society to comply with such recommendations or take such other corrective steps as may be contained therein. In any action or proceeding in the name of the commissioner or instituted in his behalf against the society, such

report, if adopted by the commissioner and filed as an official document shall be admissible in evidence and shall be prima facie evidence of the facts stated therein. This presumption is a presumption affecting the burden of proof. Nothing herein contained shall preclude the commissioner from instituting any proceeding under Section 11137 of this chapter at any time or from using as proof in such proceeding any report of examination or part thereof whether or not such report has been adopted and filed.

12629. The provisions of this article shall apply to any mortgage insurer:

(a) The property, business and assets of which are in possession of the commissioner;

(b) Which is no longer able to conduct the normal business of a mortgage insurer;

(c) Which is unable to discharge its debts or other obligations as they become due;

(d) Which is in such condition that unless such insurer is liquidated or a plan of reorganization consummated a preference is likely to be obtained by some holders of mortgage participation certificates over other such holders, or by some creditors over other creditors of the same class;

(e) Which is in such condition that it will probably be necessary, unless a plan of reorganization is consummated, to liquidate such insurer or to sell or otherwise dispose of a substantial part of its assets at substantially less than the amount which might be reasonably expected to be realized therefrom in the ordinary and proper conduct of a going business.

The determination of the commissioner that a mortgage insurer is included in one or more of the foregoing classifications shall be prima facie evidence of such fact. This presumption is a presumption affecting the burden of proof.

212. No person, or agent or officer thereof, shall issue in payment of wages due, or to become due, or as an advance on wages to be earned:

(a) Any order, check, draft, note, memorandum, or other acknowledgment of indebtedness, unless it is negotiable and payable in cash, on demand, without discount, at some established place of business in the State, the name and address of which must appear on the instrument, and at the time of its issuance and for a reasonable time thereafter, which must be at least 30 days, the maker or drawer has sufficient funds in, or credit, arrangement, or understanding with the drawee for its payment.

(b) Any script, coupon, cards, or other thing redeemable, in merchandise or purporting to be payable or redeemable otherwise than in money.

Where an instrument mentioned in subdivision (a) is protested or dishonored, the notice or memorandum of protest or dishonor is admissible as proof of presentation, nonpayment and protest and is presumptive evidence of knowledge of insufficiency of funds or credit with the drawee.

This presumption is a presumption affecting the burden of proof.

COMMENT

The function of the presumption in the above section is uncertain. Knowledge of the insufficiency of the funds is not an element of the offense defined in Section 212. People v. Turner, 154 Cal. App.2d Supp. 883, 316 P.2d 781 (1957). Perhaps lack of knowledge is a defense. If so, the presumption clearly places the burden of creating a reasonable doubt on the issue upon the defendant.

272. Every person, agent, or officer thereof engaged in the businesses specified in Section 270, 270.5 or 271 shall keep conspicuously posted upon the premises where persons are employed, a notice specifying the name and address of the bank or trust company where the required cash or readily saleable securities are on deposit, or the name of the surety or sureties on the bond deposited pursuant to Section 270.5. Failure to keep the notice conspicuously posted is prima facie evidence of a violation of Section 270, 270.5, or 271. This presumption is a presumption affecting the burden of proof.

#### COMMENT

Sections 270, 270.5 and 271 require employers in specified industries to have cash or securities on deposit in a bank or trust company, or a bond on deposit with the Labor Commissioner, sufficient to guarantee the payment of wages.

973. If any person advertises for, or seeks employees by means of newspapers, posters, letters, or otherwise, or solicits or communicates by letter or otherwise with persons to work for him or the person for whom he is acting, or to work at any shop, plant, or establishment while a strike, lockout, or other trade dispute is still in active progress at such shop, plant, or establishment, he shall plainly and explicitly mention in such advertisement or oral or written solicitations or communications that a strike, lockout, or other labor disturbance exists.

The person inserting any such advertisement, solicitation, or communication in a newspaper, on a poster, or otherwise, shall insert in such advertisement, solicitation or communication his own name and, if he is representing another, the name of the person he is representing and at whose direction and under whose authority he is inserting the advertisement, solicitation or communication. The appearance of this name in connection with such advertisement, solicitation or communication is prima facie evidence as to the person responsible for the advertisement, solicitation, or communication. This presumption is a presumption affecting the burden of proof.

1053. Nothing in this chapter shall prevent an employer or an agent, employee, superintendent or manager thereof from furnishing, upon special request therefor, a truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer. If such statement furnishes any mark, sign, or other means conveying information different from that expressed by words therein, such facts, or the fact that such statement or other means of furnishing information was given without a special request therefor, is prima facie evidence of a violation of Sections 1050 to 1053. This is a presumption affecting the burden of proof.

#### COMMENT

Sections 1050 through 1052 constitute the antiblacklisting law. They prevent employers from taking action to prevent discharged employees from obtaining employment elsewhere.

1200. In every prosecution for violation of any provision of this chapter, the minimum wage, the maximum hours of work, and the standard conditions of labor fixed by the commission shall be presumed to be reasonable and lawful. This is a presumption affecting the burden of proof.

Labor Code

1304. Failure to produce any permit or certificate either to work or to employ or to post any notice required by this article is prima facie evidence of the illegal employment of any minor whose permit or certificate is not so produced or whose name is not so posted. Proof that any person was the manager or superintendent of any place of employment subject to the provisions of this article at the time any minor is alleged to have been employed therein in violation thereof, is prima facie evidence that the person employed, or permitted the minor so to work. The sworn statement of the Labor Commissioner or his deputy or agents as to the age of any child affected by this article is prima facie evidence of the age of such child. The presumptions in this section are presumptions affecting the burden proof.

2855.

A contract to render personal service, other than a contract of apprenticeship as provided in Chapter 4 of this division, may not be enforced against the employee beyond seven years from the commencement of service under it.

Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which can not be reasonable or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render such service, for a term not to exceed seven years from the commencement of service under it. If the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation. This presumption is a presumption affecting the burden of producing evidence.

3003. If, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service. This is a presumption affecting the burden of producing evidence.

3357. Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee. This is a presumption affecting the burden of proof.

3713. Every employer subject to the compensation provisions of this code shall post and keep posted in a conspicuous location at his headquarters or at one of his places of employment, as defined in Division 5 of this code, a notice which shall state the name of the current compensation insurance carrier of such employer, or when such is the fact, that the employer is self-insured. Failure to keep the notice so conspicuously posted shall constitute a misdemeanor, and shall be prima facie evidence of noninsurance.

This presumption is a presumption affecting the burden of proof.

4554. In case of the willful failure by an employer to secure the payment of compensation, the amount of compensation otherwise recoverable for injury or death as provided in this division shall be increased 10 percent. Failure of the employer to secure the payment of compensation as provided in Article 1 (commencing at Section 3700) of Chapter 4 of Part 1 of this division is prima facie evidence of willfulness on his part. This presumption is a presumption affecting the burden of proof.

4660. (a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market.

(b) The commission may prepare, adopt, and from time to time amend, a schedule for the determination of the percentage of permanent disabilities in accordance with this section. Such schedule shall be available for public inspection, and without formal introduction in evidence shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule. This presumption is a presumption affecting the burden of proof.

(c) Any such schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities which result from compensable injuries received or occurring on and after the effective date of the adoption of such schedule, amendment or revision, as the fact may be.

5302. All orders, rules, findings, decisions, and awards of the commission shall be ~~prima facie lawful and~~ conclusively presumed to be reasonable and lawful, until and unless they are modified or set aside by the commission or upon a review by the courts within the time and in the manner specified in this division.

COMMENT

The deleted words are meaningless in the light of the conclusive presumption also provided in Section 5302.

5704.5.

A written contract entered into between a person engaged in household domestic service and his employer shall raise a rebuttable presumption that the hours of employment specified therein are the hours actually worked per week by such household domestic for that employer. This is a presumption affecting the burden of producing evidence.

5707. If the body of a deceased employee is not in the custody of the coroner, the commission may authorize the performance of such autopsy and, if necessary, the exhumation of the body therefor. If the dependents, or a majority thereof, of any such deceased employee, having the custody of the body refuse to allow the autopsy, it shall not be performed. In such case, upon the hearing of any application for compensation it is a disputable presumption that the injury or death was not due to causes entitling the claimants to benefits under this division. This presumption is a presumption affecting the burden of proof.

Military and Veterans Code

438. Prior to the commencement of condemnation proceedings, The Adjutant General shall declare in writing that the public interest and necessity require the purchase or acquisition of the property by the State. Upon filing with the Department of Finance, such declaration shall be prima facie evidence (a) of the public necessity for the acquisition of such property; (b) that such property is necessary therefor; and (c) that such property is planned or located in the manner which will be most compatible with the greatest good and the least private injury. This presumption is a presumption affecting the burden of proof.

Penal Code

118a. Any person who, in any affidavit taken before any person authorized to administer oaths, swears, affirms, declares, deposes, or certifies that he will testify, declare, depose, or certify before any competent tribunal, officer, or person, in any case then pending or thereafter to be instituted, in any particular manner, or to any particular fact, and in such affidavit willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury. In any prosecution under this section, the subsequent testimony of such person, in any action involving the matters in such affidavit contained, which is contrary to any of the matters in such affidavit contained, shall be prima facie evidence that the matters in such affidavit were false. This presumption is a presumption affecting the burden of proof.

Penal Code

250.   ~~[MALICE-PRESUMED.]~~   An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.   This presumption is a presumption affecting the burden of proof.

259.

The injurious utterance of slander is presumed to have been malicious save when it is a communication to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information. This presumption is a presumption affecting the burden of proof.

270. A father of either a legitimate or illegitimate minor child who wilfully omits without lawful excuse to furnish necessary clothing, food, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment. If the father, during such violation, remains out of the State for 30 days, or if he fails or refuses to comply with the order of a court of competent jurisdiction requiring him to make any provision for the maintenance, support, medical treatment or other remedial care of such minor child and remains out of the State for 10 days without doing so, he is guilty of a felony. . . .

Proof of abandonment or desertion of a child by such father, or the omission by such father to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is wilful and without lawful excuse. This presumption is a presumption affecting the burden of producing evidence.

Proof of abandonment or desertion of a child by such father or omission by such father to furnish such food, shelter, clothing or medical attendance or other remedial care for more than thirty (30) days is prima facie evidence that such father was outside the State. This presumption is a presumption affecting the burden of producing evidence.

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496. 1. Every

person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion knowing the same to be so stolen or obtained, or who conceals, withholds or aids in concealing or withholding any such property from the owner, knowing the same to be so stolen or obtained, is punishable by imprisonment in a state prison for not more than 10 years, or in a county jail for not more than 1 year.

2.

Every person

whose principal business is dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee or representative of such person, who buys or receives any property which has been stolen or obtained in any manner constituting theft or extortion, under such circumstances as should cause such person, agent, employee or representative to make reasonable inquiry to ascertain that the person from whom such property was bought or received had the legal right to sell or deliver it, without making such reasonable inquiry, shall be presumed to have bought or received such property knowing it to have been so stolen or obtained. This presumption ~~may, however, be rebutted by:~~ is a presumption affecting the burden of proof.

496. continued

3. When in a prosecution under this section it shall appear from the evidence that the defendant's principal business was as set forth in the preceding paragraph, that the defendant bought, received, or otherwise obtained, or concealed, withheld or aided in concealing or withholding from the owner, any property which had been stolen or obtained in any manner constituting theft or extortion, and that the defendant bought, received, obtained, concealed or withheld such property under such circumstances as should have caused him to make reasonable inquiry to ascertain that the person from whom he bought, received, or obtained such property had the legal right to sell or deliver it to him, then the burden shall be upon the defendant to show that before so buying, receiving, or otherwise obtaining such property, he made such reasonable inquiry to ascertain that the person so selling or delivering the same to him had the legal right to so sell or deliver it.

597q. The driving, working, keeping, racing or using of any unregistered docked horse, or horses, after 60 days after the passage of this act, shall be deemed prima facie evidence of the fact that the party driving, working, keeping, racing or using such unregistered docked horse, or horses, docked the tail of such horse or horses. This presumption is a presumption affecting the burden of proof.

597j. Any person who owns, possesses or keeps any cock with the intent that such cock shall be used or engaged by himself or by his vendee or by any other person in any exhibition of fighting is guilty of a misdemeanor. The fact that the cock's comb has been clipped shall be prima facie evidence of intention to use or engage such cock in an exhibition of fighting. This presumption is a presumption affecting the burden of proof.

1270. [~~OFFENCE-NOT-PALIABLE.~~] A defendant charged with an offense punishable with death cannot be admitted to bail, when proof of his guilt is evident or the [~~presumption~~] inference thereof great. The finding of an indictment does not add to the strength of the proof or the [~~presumptions~~] inferences to be drawn therefrom.

12023. In the trial of a person charged with committing or attempting to commit a felony against the person of another while armed with any of the weapons mentioned in Section 12020, or while armed with any pistol, revolver, or other firearm capable of being concealed upon the person, without having a license or permit to carry such firearm as provided by this chapter, the fact that he was so armed shall be prima facie evidence of his intent to commit the felony if such Weapon was used in the commission of the offense. This presumption is a presumption affecting the burden of proof.

Probate Code

70. If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision[~~;-and-no other-evidence-to-rebut-the-presumption-of-revocation-can-be-received~~].

COMMENT

The last clause improperly speaks of rebutting "the presumption of revocation." The preceding clause does not create a "presumption" of revocation, it provides affirmatively that a will is revoked by subsequent marriage except in the cases mentioned.

71. If a person marries after making a will and has issue of such marriage, and any of the issue survives the maker, or is born after its father's death, the will is revoked as to such issue, unless provision has been made for such issue, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision[~~and no other evidence to rebut the presumption of such revocation can be received~~].

Probate Code

545. In all cases in which bonds are required to be given under the provisions of this code, the sureties must justify thereon in the same manner and in like amounts as required by the Code of Civil Procedure, and the certificate thereof must be attached to and filed with the bond. If the surety is not an authorized surety company, all such bonds must be approved by a judge of the superior court before being filed. Upon filing, the clerk shall enter in the register of actions the date and amount of such bond and the name or names of the surety or sureties thereon. In the event of the loss of such bond, such entries so made shall be prima facie evidence of the due execution of such bond as required by law. This presumption is a presumption affecting the burden of proof.

853. The decree shall be prima facie evidence of the correctness of the proceedings and of the authority of the executor or administrator to make the conveyance or transfer; and after its entry the person entitled to the conveyance or transfer has a right to the possession of the property contracted for, and to hold the same according to the terms of the intended conveyance or transfer, in like manner as if the same had been conveyed or transferred in pursuance of the decree. Nevertheless, the executor or administrator must execute the conveyance or transfer according to the directions of the decree and the court may enforce its execution by process. The conveyance or transfer shall pass title to the property contracted for, as fully as if the contracting party had executed it while living. The presumption in this section is a presumption affecting the burden of proof.

931. The order settling and allowing the account, when it becomes final, is conclusive against all persons interested in the estate, saving, however, to persons under legal disability, the right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator or his sureties, at any time before final distribution; and in any such action such order is prima facie evidence of the correctness of the account. This presumption is a presumption affecting the burden of proof.

1461. Any relative or friend may file a verified petition alleging that a person is insane or incompetent, and setting forth the names and residences, so far as they are known to the petitioner, of the relatives of the alleged insane or incompetent person within the second degree residing within or without the State. The clerk shall set the petition for hearing by the court and issue a citation directed to the alleged insane or incompetent person setting forth the time and place of hearing so fixed by him.

\* \* \* \* \*

If the alleged insane or incompetent person is within the State and is able to attend, he must be produced at the hearing, and if he is not able to attend by reason of physical inability or by reason that the presence of such person in court would retard or impair the recovery of such person or would increase his mental debility, such inability or harmful effect must be evidenced by the affidavit or certificate of a duly licensed medical practitioner, unless such alleged insane or incompetent person is a patient at a county or state hospital in this State in which case the affidavit or certificate shall be by the medical director or medical superintendent or acting medical director or medical superintendent of such county or state hospital.

If the alleged insane or incompetent person is not within the State and if the court determines that his attendance at the hearing is necessary in the interest of justice, the

C court may order him to be produced at the hearing upon penalty of dismissing the petition if he is not produced. If such an order is made and it is contended that the alleged insane or incompetent person is not able to attend by reason of physical inability or by reason that the presence of such person in court would retard or impair the recovery of such person or would increase his mental debility, such inability or harmful effect must be evidenced by the affidavit or certificate of a duly licensed medical practitioner, unless such alleged insane or incompetent person is a patient at a county or state hospital in which case the affidavit or certificate shall be by the medical director or medical superintendent or acting medical director or medical superintendent of such county or state hospital.

C All affidavits or certificates provided by this section shall be prima facie evidence of the facts contained therein. The presumptions in this section are presumptions affecting the burden of producing evidence.

1653. Where a petition is filed for the appointment of a guardian for a minor, a certificate of the administrator or his authorized representative, setting forth the age of such minor as shown by the records of the Veterans Administration and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the Veterans Administration shall be prima facie evidence of the necessity for such appointment. This presumption is a presumption affecting the burden of producing evidence.

1654. Where a petition is filed for the appointment of a guardian for a mentally incompetent ward, a certificate of the administrator or his duly authorized representative, that such person has been rated incompetent by the Veterans Administration on examination in accordance with the laws and regulations governing such Veterans Administration and that the appointment of a guardian is a condition precedent to the payment of any moneys due such ward by the Veterans Administration, shall be prima facie evidence of the necessity for such appointment. This presumption is a presumption affecting the burden of producing evidence.

1662.5 A certificate by the Veterans Administration showing that a minor ward has attained majority, or that an incompetent ward committed or transferred to a United States Veterans Administration facility has been rated competent by the Veterans Administration upon examination in accordance with law shall be prima facie evidence that the ward has attained majority, or has recovered his competency. Upon hearing after notice as provided by this chapter and the determination by the court that the ward has attained majority or has recovered his competency, an order shall be entered to that effect, and the guardian shall file a final account. Upon hearing after notice to the former ward and to the Veterans Administration as in case of other accounts, upon approval of the final account, and upon delivery to the ward of the assets due him from the guardian, the guardian shall be discharged and his sureties released. The presumptions in this section are presumptions affecting the burden of producing evidence.

1664. When a person who has been committed or transferred to a facility of the Veterans Administration, in accordance with the provisions of Section 1663, is thereafter discharged as recovered by the chief officer of such facility or is rated competent by the Veterans Administration, a certificate showing such discharge or rating may be filed with the clerk of the superior court of the county from which the person was committed. The clerk shall keep an index of said certificate. No fee shall be charged by the clerk for performing such duties. If no guardian has been appointed for such person as provided in this code, the certificate showing such discharge as recovered or rating as competent shall be prima facie evidence that the person has recovered his competency, and the filing of such certificate or a duly certified copy thereof with the clerk of the court shall have the same legal force and effect as a judgment of restoration to capacity made under the provisions of this code. The presumption in this section is a presumption affecting the burden of proof.

Public Resources Code

2311. Where a locator, or his assigns, has the boundaries and corners of his claim established by a United States deputy mineral surveyor, or a licensed surveyor of this State, and his claim connected with the corner of the public or minor surveys of an established initial point, and incorporates into the record of the claim the field notes of such survey, and attaches to and files with such location notice a certificate of the surveyor setting forth (a) that the survey was actually made by him giving the date thereof, (b) the name of the claim surveyed and the location thereof, and (c) that the description incorporated in the declaratory statement is sufficient to identify the claim, such survey and certificate becomes a part of the record, and such record is prima facie evidence of the facts therein contained. This presumption is a presumption affecting the burden of proof.

2315. Whenever a mine owner has performed the labor and made the improvements required by law upon any mining claim, the person in whose behalf such labor was performed or improvements made, or some one in his behalf shall, within 30 days after the time limited for performing such labor or making such improvements, make and have recorded by the county recorder, in books kept for that purpose, in the county in which the mining claim is situated, an affidavit setting forth the value of labor or improvements, the name of the claim, and the name of the owner or claimant of the claim at whose expense the labor was performed or the improvements were made. The affidavit, or a copy thereof, duly certified by the county recorder, shall be prima facie evidence of the performance of such labor or the making of such improvements, or both. This presumption is a presumption affecting the burden of proof.

2318. The original of such notice and affidavit, or a duly certified copy of the record thereof, shall be prima facie evidence that the delinquent mentioned in Section 2324 of the Revised Statutes of the United States has failed or refused to contribute his proportion of the expenditure required by that section, and of the service of publication of the notice, unless the writing or affidavit hereinafter provided for is of record. This presumption is a presumption affecting the burden of producing evidence.

2606. All grubstake contracts and prospecting agreements hereafter entered into, and which may in any way affect the title of mining locations, or other locations under the mining laws of this State, shall be void and of no effect unless the instrument has first been recorded in the office of the county recorder of the county in which the instrument is made. The instrument shall be duly acknowledged before a notary public or other person competent to take acknowledgments. Grubstake contracts and prospecting agreements, duly acknowledged and recorded as provided for in this section, shall be prima facie evidence in all courts in this State in all cases wherein the title to mining locations and other locations under the mining laws of this State are in dispute. This presumption is a presumption affecting the burden of producing evidence.

3300. The unreasonable waste of natural gas by the act, omission, sufferance, or insistence of the lessor, lessee or operator of any land containing oil or gas, or both, whether before or after the removal of gasoline from the gas, is opposed to the public interest and is unlawful. The blowing, release, or escape of gas into the air shall be prima facie evidence of unreasonable waste. This presumption is a presumption affecting the burden of proof.

3311. In such suits a restraining order shall not be issued ex parte, and a temporary or permanent injunction issued in such proceedings shall not be refused or dissolved or stayed pending appeal upon the giving of any bond or undertaking or otherwise, but otherwise the procedure, including the procedure on appeal, shall be conformable with the provisions of Chapter 3 of Title 7 of Part 2 of the Code of Civil Procedure.

In such proceedings the findings of the supervisor, unless set aside or modified by the board of district commissioners, or if so modified then except to the extent so modified, shall constitute prima facie evidence of the unreasonable wastage of gas therein found to be occurring or threatened. This presumption is a presumption affecting the burden of proof.

4803. Any log or timber having any such recorded mark impressed thereon shall be presumed to belong to the person, firm or corporation in whose name the mark has been recorded. This presumption is a presumption affecting the burden of proof.

5559. The board may adopt regulations, and it shall cause the regulations made by it to be posted upon park or other property of the district to which they apply, and it shall cause them to be published at least once in a newspaper published in the county or counties within which the district is in whole or in part situated, and such posting and publication shall be sufficient notice to all persons.

The affidavit of the district manager, superintendent, or the secretary that the district rules and regulations have been so posted and published is prima facie evidence thereof. A copy of the rules and regulations, attested by any member of the board or by its secretary shall be prima facie evidence that the rules and regulations have been made by the board as provided by law. The presumptions in this section are presumptions affecting the burden of proof.

Revenue and Taxation Code

There are several sections in the Revenue and Taxation Code containing presumptions. The purpose of the presumption in each case is to facilitate the collection of some tax. Several of these statutes have been construed to place the burden of proof on the taxpayer. See, e.g., Rathjen Bros. v. Collins, 50 Cal. App.2d 774 (1942); People v. Schwartz, 31 Cal.2d 59 (1947). Accordingly, to give these presumptions the full effect needed to carry out the underlying policy, the following section should be added to the Revenue and Taxation Code:

129. The presumptions in this code are presumptions affecting the burden of proof.

[The next few pages contain presumptions found in the Revenue and Taxation Code for your consideration in connection with the above section. No amendment of these sections is contemplated.]

1870. A copy of the order certified by the secretary of the board is prima facie evidence of the regularity of all proceedings of the board resulting in the action which is the subject matter of the order.

2634. The roll or delinquent roll or a copy certified by the redemption officer, showing unpaid taxes against any property, is prima facie evidence of the assessment, the property assessed, the delinquency, the amount of taxes due and unpaid, and that there has been compliance with all forms of law relating to assessment and levy of the taxes.

3004. In any suit for taxes the roll, or a duly certified copy of any entry, showing the assessee, the property, and unpaid taxes or assessments, is prima facie evidence of the plaintiff's right to recover.

3357. Immediately after the publication is completed, the tax collector shall file with the county recorder a copy of the publication and an attached affidavit. This affidavit is prima facie evidence of the facts stated. The affidavit shall show:

- (a) That it is affixed to a true copy of the publication.
- (b) The manner of publication.
- (c) If the publication was in a newspaper, its name and place of publication and the date of each appearance.
- (d) If not published in a newspaper, the places of posting.

Revenue and Taxation Code

1823. The final action of the board in equalizing a local roll shall be performed only at the state capital. On September 2d of each year, the secretary of the board shall transmit to each county auditor and the board of supervisors and each city council involved a preliminary statement of the percentum that the board proposes to add to or deduct from the valuation of the roll.

Upon the request of any county that receives such a statement which desires to be heard with respect to the statement, an opportunity for such a hearing shall be afforded by the board. The request shall be submitted in writing by the board of supervisors prior to September 10th. The board shall consider all pertinent evidence offered at the hearing, and if such evidence warrants a change in the statement, it shall so find and alter the statement accordingly. Otherwise, the statement shall remain unchanged.

The preliminary statement shall become final on September 10th if no hearing is requested. If a hearing is requested the final determination shall be made by the board and the auditor shall be notified not later than September 25th.

The final statement is prima facie evidence of the regularity of all proceedings of the board resulting in the action which is the subject matter of the statement.

3517. The deed, duly acknowledged or proved, is prima facie evidence that:

- (a) The property was assessed as required by law.
- (b) The property was equalized as required by law.
- (c) The taxes were levied in accordance with law.
- (d) The taxes were not paid.
- (e) At a proper time and place the property was sold as prescribed by law.
- (f) The property was not redeemed.
- (g) The person who executed the deed was the proper officer.
- (h) That the amount for which the property was sold was legally a lien on the real property.

3520. As used in this section, "lien" includes any lien for:

- (a) Interest and penalties or both on taxes or special assessments or both.
- (b) Amounts payable to cities or for their account on redemption of property from sale for taxes, special assessments, or other amounts.

The deed conveys to the State the absolute title to the property, free of all encumbrances, except:

- (1) Liens for taxes levied for municipal, irrigation, reclamation, protection, flood control, public utility or other district purposes, not included among those taxes and assessments for delinquency in the payment of which the property is conveyed to the State.
- (2) Liens for special assessments collected on tax rolls.

(3) Liens or assessments for other amounts which by law are collected on tax rolls by or for account of cities.

(4) Easements constituting servitudes upon or burdens to the property; water rights, the record title to which is held separately from the title to the property; and restrictions of record.

Where the tax collector executes a single deed conveying property to the State for the delinquent taxes and assessments of the county and of revenue districts, the tax and assessment liens of such revenue districts are extinguished by the conveyance to the State and are not included in the exceptions enumerated in subparagraphs (1), (2) and (3) of this section. Each such revenue district, however, shall retain an equitable lien in the property and there shall be paid by the county to each such district its pro rata share of the proceeds of any resale by the State, or redemption from the State, and such lien and right shall be terminated in the manner and at the time that the county's rights in the property are terminated.

When the land is owned by the United States or this State, the deed is prima facie evidence of the right of possession accrued as of the date of the deed without prejudice to the taxes or assessments which are a lien upon the property.

4376. The abstract list, or a copy certified by the redemption officer, showing unpaid taxes against any property, is prima facie evidence of the assessment, the property assessed, the delinquency, the amount of taxes due and unpaid, and that there has been compliance with all forms of law relating to assessment, equalization, and levy of the taxes.

6091. Gross receipts presumed taxable; burden of proof; resale certificate. For the purpose of the proper administration of this part and to prevent evasion of the sales tax it shall be presumed that all gross receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale.

6241. Sale for taxable use presumed; burden of proof; resale certificate. For the purpose of the proper administration of this part and to prevent evasion of the use tax and the duty to collect the use tax, it shall be presumed that tangible personal property sold by any person for delivery in this State is sold for storage, use, or other consumption in this State until the contrary is established. The burden of proving the contrary is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale.

6246. Imports; presumption. It shall be further presumed that tangible personal property shipped or brought to this State by the purchaser was purchased from a retailer on or after July 1, 1935, for storage, use, or other consumption in this State.

6247. Delivery to resident out of state; presumption of storage for use in state. On and after the effective date of this section, it shall be further presumed that tangible personal property delivered outside this State to a purchaser known by the retailer to be a resident of this State was purchased from a retailer for storage, use or other consumption in this State and stored, used or otherwise consumed in this State.

This presumption may be controverted by a statement in writing signed by the purchaser or his authorized representative, and retained by the vendor, that the property was purchased for use at a designated point or points outside this State. This presumption may also be controverted by other evidence satisfactory to the board that the property was not purchased for storage, use, or other consumption in this State.

6714. In the action a certificate by the board showing the delinquency shall be prima facie evidence of the determination of the tax or the amount of tax, of the delinquency of the amounts set forth, and of the compliance by the board with all the provisions of this part in relation to the computation and determination of the amounts.

7730. In the suit a copy of the jeopardy determination certified by the secretary of the board or by the Controller, shall be prima facie evidence that the unlicensed distributor is indebted to the State in the amount of the license tax, penalties and interest computed as prescribed by Section 7706.

10075. In the action a certificate issued by the board showing unpaid license taxes determined against any operator shall be prima facie evidence of all of the following:

(a) The determination of the license tax, the delinquency thereof, and the amount of the license tax, interest, penalties, and costs due and unpaid to the State.

(b) The indebtedness of the operator to the State in the amount of the license tax, interest, and penalties therein appearing unpaid.

(c) The full compliance by all persons required to perform administrative duties under this part with all the forms of law in relation to the determination and levy of the license tax.

7352. Presumption of distribution; conversion ineffective; liability for conversion. For the purpose of the proper administration of this part and to prevent evasion of the license tax, unless the contrary is established, it shall be presumed that all motor vehicle fuel refined, manufactured, produced, blended, or compounded in this State or imported into this State and no longer in the possession of the distributor has been distributed. This presumption cannot be overcome by proof that the motor vehicle fuel has been converted to his own use by any person to whom the distributor has entrusted the control or possession of the fuel either as bailee, consignee, employee, or agent; provided, however, any such person causing a distribution by the act of converting to his own use any fuel so entrusted to him, as well as any other person receiving such fuel with the knowledge that it was so converted, shall be jointly and severally liable with the distributor for payment of the tax imposed upon such distribution, and all such persons shall be considered as distributors for the purpose of Chapter 5 (commencing at Section 7651) or 6 (commencing at Section 7851) of this part.

9652. Presumption that receipts are taxable. For the purpose of the proper administration of this part and to prevent evasion of the tax it shall be presumed that the gross receipts from all operations of operators are subject to the tax until the contrary is established.

11473. In the action a certificate by the board showing the delinquency shall be prima facie evidence of the levy of the tax, of the delinquency of the amount of tax, interest, and penalties set forth in the certificate, and of compliance by the board with all provisions of this part in relation to the assessment of the property and computation and levy of the tax.

12681. In the action, a certificate of the Controller or of the secretary of the board, showing unpaid taxes against an insurer is prima facie evidence of:

- (a) The assessment of the taxes.
- (b) The delinquency.
- (c) The amount of the taxes, interest, and penalties due and unpaid to the State.
- (d) That the insurer is indebted to the State in the amount of taxes, interest, and penalties appearing unpaid.
- (e) That there has been compliance with all the requirements of law in relation to the assessment of the taxes.

12834. The certified copies of lists of corporations which have failed to pay the taxes, interest, and penalties imposed upon insurers transmitted by the Controller to county clerks and county recorders for filing in their respective offices, or a copy of these lists certified by the Controller, are receivable in evidence in any court in lieu of the original record of suspension or forfeiture on file with the Controller, and are prima facie evidence of the truth of all statements contained.

16122. In any proceeding for the enforcement of the gift tax a certificate by the Controller showing the amount due is prima facie evidence of the imposition of the tax, of the fact that it is due, and of compliance by the Controller with all the provisions of this part in relation to the computation and determination of the tax.

18600. A certificate by the Franchise Tax Board or of the board, as the case may be, of the mailing of the notices specified in this article is prima facie evidence of the assessment of the deficiency and of the giving of the notices.

18834. In the action a certificate by the Franchise Tax Board showing the delinquency shall be prima facie evidence of the levy of the tax, of the delinquency, and of the compliance by the Franchise Tax Board and the board with all the provisions of this part in relation to the computation and levy of the tax.

19403. The certificate of the Franchise Tax Board to the effect that a return has not been filed or that information has not been supplied as required by this part is prima facie evidence that the return has not been filed or that the information has not been supplied.

19405. (a) Any person who wilfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall

14512. Report; presumption of correctness; burden of proof. For the purpose of the hearing the report of the inheritance tax appraiser is presumed to be correct, and at the hearing it is the duty of the objector to proceed in support of his objection.

17016. Presumption of residence; rebuttal. Every individual who spends in the aggregate more than nine months of the taxable year within this State shall be presumed to be a resident. The presumption may be overcome by satisfactory evidence that the individual is in the State for a temporary or transitory purpose.

18647. Finding and certificate; presumptive evidence. In any proceeding brought to enforce payment of taxes made due and payable by this article, the finding of the Franchise Tax Board under Section 18641, whether made after notice to the taxpayer or not, is for all purposes presumptive evidence that the assessment or collection of the tax or the deficiency was in jeopardy. A certificate of the Franchise Tax Board of the mailing or issuing of the notices specified in this article is presumptive evidence that the notices were mailed or issued.

be guilty of a felony, and, upon conviction thereof, shall be fined not more than two thousand dollars (\$2,000) or imprisoned in the state prison not more than five years, or both.

(b) The fact that an individual's name is signed to a return, statement, or other document filed shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him.

23302. The Franchise Tax Board shall transmit the name of such delinquent taxpayer to the Secretary of State, and the suspension or forfeiture herein provided for shall thereupon become effective and the certificate of the Secretary of State shall be prima facie evidence of such suspension or forfeiture.

23305a. Before such certificate of revivor is issued by the Franchise Tax Board, it shall obtain from the Secretary of State an endorsement upon such application of the fact that the name of the taxpayer is not one which is likely to mislead the public or which is the same as, or resembles so closely as to tend to deceive, the name of a foreign or domestic bank or corporation which is authorized to transact business in this State or a name which is under reservation. If the name of the taxpayer is one which is likely to mislead the public or is the same as, or resembles so closely as to tend to deceive the name of a foreign or domestic bank or corporation which is authorized to transact business in this State, or a name which is under reservation, the Secretary of State shall not endorse such statement upon such application until the taxpayer therein named, if it be a domestic bank or corporation, files in his office amended articles

of incorporation changing its name, or, if it be a foreign taxpayer, files in his office a copy of such document changing its name as may be required by the law of the State or other jurisdiction under which it was incorporated, which copy shall be certified in the manner prescribed by Section 6400 of the Corporations Code. Upon the issuance of such certificate by the Franchise Tax Board the taxpayer therein named shall become reinstated but such reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture. The certificate of revivor shall be prima facie evidence of such reinstatement and such certificate may be recorded in the office of the county recorder of any county of this State.

23572. The certificate of the Franchise Tax Board setting forth that the suspended taxpayer has been notified of its liability for tax under this chapter and that such tax has not been paid, shall constitute prima facie evidence of such facts. The suspension shall be terminated on payment of the tax, and the certificate of the Franchise Tax Board that the tax has been paid shall be evidence of the termination of the suspension.

25669. A certificate by the Franchise Tax Board or of the board, as the case may be, of the mailing of the notices specified in this article shall be prima facie evidence of the computation and levy of the deficiency in tax and of the giving of the notices.

25761b. In any proceedings brought to enforce payment of taxes made due and payable under this article, the findings of the Franchise Tax Board, whether or not made after notice to the taxpayer, shall be for all purposes presumptive evidence that the assessment or collection of the tax or the deficiency was in jeopardy. A certificate of the Franchise Tax Board of the mailing or issuing the notices specified in this article shall be presumptive evidence that the notices were mailed or issued.

25962. (b) The fact that an individual's name is signed to a return, statement, or other document filed shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him.

26252. In such action a certificate by the Franchise Tax Board showing the amount due shall be prima facie evidence of the levy of the tax, penalties, and interest, of the delinquency and of compliance by the Franchise Tax Board and the board with all the provisions of this part in relation to the computation and levy of the tax.

32352. In any suit brought to enforce the rights of the State with respect to taxes, a certificate by the board showing the delinquency shall be prima facie evidence of the levy of the tax, of the delinquency of the amount of tax, interest, and penalty set forth therein, and of compliance by the board with all provisions of this part in relation to the computation and levy of the tax. In the action a writ of attachment may issue, and no bond or affidavit previous to the issuing of the attachment shall be required.

### Streets and Highways

100.5 Whenever the location of a state highway is such that a ferry must be used to completely traverse said highway, and there is no existing ferry furnishing service to traffic on said highway, the department may construct, maintain and operate such a ferry, or may, by cooperative agreement, delegate the construction, maintenance or operation thereof to a county, or if the termini of a ferry are within one or more cities, to the cities concerned. Whenever a highway between the termini of which a publicly owned ferry is used, is declared to be a state highway, the title to the ferry and all appurtenances thereto vests in the State. The department is authorized to promulgate reasonable rules and regulations governing the hours of operation of such ferries. The department may impose a charge of not to exceed one dollar (\$1) per vehicle for the use of such ferries between the hours of 11 p.m. and 5 a.m.; provided, that in no event shall any charge be imposed on any ferry formerly operated by a county where the county maintained free ferry service for 24 hours per day at the time the ferry is or was taken over by the department. It is unlawful to operate on any such ferries or the approaches thereto, a vehicle of a size or weight or at a speed, greater than that which any such ferry or its approaches, with safety to itself and to the traveling public, will permit. The department shall determine the maximum size, weight and speed of vehicles which with safety can be permitted on such ferries and shall by appropriate signs notify the public of its determination.

C It is prima facie evidence of violation of this section to exceed the limit specified by the department upon such signs. The department is authorized to recover by civil action any damages done to such ferries or the approaches thereof by reason of a failure to comply with the provisions of this section and a violation of the limits specified on the signs erected by the department is prima facie evidence of such violation. The presumptions in this section are presumptions affecting the burden of proof.

4070. Proof of publication of any notice required by this part shall be made by affidavit, as provided in the Code of Civil Procedure, and proof of the posting or mailing of any such notice shall be made by the affidavit of the person posting or mailing the notice, setting forth the facts regarding such posting or mailing. It shall be the duty of any officer who is required by this part to have any notice published or posted or mailed, to obtain and file in his office the affidavit or affidavits in proof thereof, but his failure so to do shall not affect the validity of any proceedings under this part. Any such affidavit so filed shall be prima facie evidence of the facts therein stated regarding such publication or posting or mailing. This presumption is a presumption affecting the burden of producing evidence.

4350. The deed of the street superintendent shall be prima facie evidence of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof, and of title in the grantee. This presumption is a presumption affecting the burden of proof.

4654. Before the day of sale the city treasurer shall file with the city clerk a copy of the publication of the notice of sale, with an affidavit of publication, attached thereto, certifying that it is a true copy of the publication; that the publication was made in a newspaper, stating its name and place of publication and the date of each appearance in which such publication was made. Such affidavit is prima facie evidence of all the facts stated therein. This presumption is a presumption affecting the burden of producing evidence.

4677. The deed, when duly acknowledged or proved, shall be conclusive evidence of all things of which the bond upon which it is based is conclusive evidence, and prima facie evidence of the regularity of all proceedings subsequent to the issue of the bond, and conveys to the grantee the absolute title to the lands described therein, free of all encumbrances, except the lien for State, county, and municipal taxes. This presumption is a presumption affecting the burden of proof.

5415. The warrant, assessment and diagram, with proof of non-payment shall be prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets, and the legislative body upon which the warrant, assessment and diagram are based, and prima facie evidence of the right of the plaintiff to recover in the action. The presumptions in this section are presumptions affecting the burden of proof.

5700. The engineer or where there is no engineer, an engineer of work shall be the proper officer to do the surveying and other engineering work necessary to be done under this division, and to survey and measure the work to be done under contracts for grading, macadamizing, or improving streets and other work done under this division, and to estimate the costs and expenses thereof, and perform such other duties under this division as may be directed by the legislative body. Every certificate signed by him in his official capacity shall be prima facie evidence in all courts in this State of the truth of the contents. This presumption is a presumption affecting the burden of producing evidence. He shall also keep a record of all surveys made under the provisions of this division, as in other cases.

In a county having a population of 4,000,000 or over, a registered civil engineer, registered pursuant to Chapter 7, Division 3 of the Business and Professions Code, shall be the proper person to do any work required to prepare plans pursuant to Section 5130.

6097. All property sold shall be subject to redemption for one year by the payment of the amount of the assessment, penalty and costs and interest thereon at the rate of 10 percent per annum from the date of sale. The superintendent of streets shall, if there is no redemption, make and deliver to the purchaser at such sale, or his consignee, a deed conveying the property sold, and shall collect for each deed one dollar (\$1). The deed of the street superintendent, made after such sale, in case of failure to redeem, shall be prima facie evidence of the regularity of all proceedings under this part, and of title in the grantee. This presumption is a presumption affecting the burden of proof.

6555. The deed of the treasurer, when duly acknowledged or proved, is primary evidence of the regularity of all proceedings theretofore had, and conveys to the grantee the absolute title to the lands described therein, as of the date of the expiration of the period for redemption, free of all encumbrances, except the lien for state, county and municipal taxes. This presumption is a presumption affecting the burden of proof.

6614. The bond, together with proof, either orally by the treasurer or by a certificate signed by him showing the nonpayment of any of the principal or interest upon the bond, shall be prima facie evidence of the right of the plaintiff to recover in the action. If personal demand for payment was made, proof of personal service of the demand shall be required. This presumption is a presumption affecting the burden of proof.

6768. In the action the certificate of completion shall be and constitute prima facie evidence of the regularity of all proceedings and of the right of the contractor to recover judgment against the person owning the tracks. Execution may be taken out upon the entry of judgment, and levied upon any property of that person which is subject to execution. This presumption is a presumption affecting the burden of proof.

6790. In the action, the certificate of completion shall be prima facie evidence of the regularity of all proceedings, and of the right of the contractor to recover judgment against the said person. Execution may be taken out upon the entry of judgment, and levied upon any property of that person which is subject to execution. The presumption in this section is a presumption affecting the burden of proof.

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7150. Before the hearing of any protest there shall be filed with the legislative body affidavits showing that the notices have been posted and published as required thus far in the proceedings. The legislative body shall thereupon cause to be entered in its minutes an order reciting that notice of the hearing has been posted and published as required by law, and such order shall be prima facie evidence of the truth of the facts therein recited. This presumption is a presumption affecting the burden of producing evidence.

7274. No deed for any property sold for a delinquent assessment shall be made until the purchaser, or his assignee, has complied with all of the provisions of this chapter, and filed the proper affidavits with the superintendent of streets. The deed shall be prima facie evidence of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof, and of title in the grantee. This presumption is a presumption affecting the burden of proof.

7454. The city treasurer, before the day of sale, shall file with the city clerk a copy of the publication of the notice of sale, with an affidavit of the publisher of such newspaper, or someone in his behalf, attached thereto, that it is a true copy of the publication, that the publication was made in a newspaper, stating its name and place of publication and the date of each issue thereof in which such publication was made. Such affidavit is prima facie evidence of all the facts stated therein. This presumption is a presumption affecting the burden of producing evidence.

8008. Proof of publication of any notice required by this part shall be made by affidavit, as provided in the Code of Civil Procedure, and proof of the posting of any such notice shall be made by the affidavit of the person posting the notice, setting forth the facts regarding such posting.

Any officer who is required by this part to have any notice published or posted shall obtain and file in his office the affidavits in proof thereof but his failure so to do shall not affect the validity of any proceedings under this part. Any such affidavit so filed shall be prima facie evidence of the facts therein stated regarding such publication or posting. This presumption is a presumption affecting the burden of producing evidence.

8307. Proof of publication of any notice required by this part shall be made by affidavit, as provided in the Code of Civil Procedure, and proof of the posting of any such notice shall be made by the affidavit of the person posting the notice, setting forth the facts regarding such posting.

Any officer who is required by this part to have any notice published or posted shall obtain and file in his office the affidavits in proof thereof but his failure so to do shall not affect the validity of any proceedings under this part. Any such affidavit so filed shall be prima facie evidence of the facts therein stated regarding such publication or posting. This presumption is a presumption affecting the burden of producing evidence.

8801. If any lot or parcel of land is sold for nonpayment of taxes and of any installment of the assessment thereon, or of the penalties, interest or costs on the same, or for the nonpayment of any installment of the assessment or of the penalties, interest or costs on the same, any certificate of such sale and deed issued pursuant thereto, is ~~[primary]~~<sup>prima facie</sup> evidence of the regularity of all proceedings had prior thereto, and shall be conclusive evidence of all things of which bonds issued upon the security thereof are conclusive evidence, and prima facie evidence of the regularity of all proceedings subsequent to the issuance of the bonds, and such deed conveys to the grantee the absolute title to the lands described therein, free of all incumbrances, except the lien for other state, county and city taxes and unpaid installments, interest and penalties under the same proceeding and except all public improvement assessments which may have priority thereover. The presumptions in this section are presumptions affecting the burden of proof.

18131. The deed of the tax collector shall be prima facie evidence of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof, and of title in the grantee. This presumption is a presumption affecting the burden of proof.

19037. The affidavit of the person who circulated and obtained the signatures on the petition, stating that to the best of his knowledge and belief said signatures are genuine and are the signatures of residents within the proposed district, shall be prima facie evidence of the facts recited. This presumption is a presumption affecting the burden of producing evidence.

22178. The deed of the tax collector shall be prima facie evidence of the truth of all matters recited therein, of the regularity of all proceedings prior to the execution thereof, and of title in the grantee. This presumption is a presumption affecting the burden of proof.

Vehicle Code

390. "Manufacturer's gross vehicle weight rating" means the weight in pounds of the chassis of a truck or truck tractor with lubricants, radiator full of water, full fuel tank or tanks plus the weights of the cab or driver's compartment, body, special chassis and body equipment and pay load as authorized by the chassis manufacturer.

In the event a vehicle is equipped with an identification plate or marker bearing the manufacturer's name and manufacturer's gross vehicle weight rating, the rating stated thereon shall be prima facie evidence of the manufacturer's gross vehicle weight rating. This presumption is a presumption affecting the burden of producing evidence.

Vehicle Code

22362.

It is prima facie a violation of the basic speed law for any person to operate a vehicle at a speed greater than 25 miles per hour upon any portion of a highway where officers or employees of the agency having jurisdiction of the same, or any contractor of the agency or his employees, are at work on the roadway or within the right-of-way so close thereto as to be endangered by passing traffic. This section applies only when appropriate signs, indicating the limits of the restricted zone, and the speed limit applicable therein, are placed by such agency within 400 feet of each end of such zone. The signs shall display the figures "25" in the size provided in Section 21403 and shall indicate the purpose of the speed restriction, but otherwise need not comply with the details set forth in Section 21403. Nothing in this section shall be deemed to relieve any operator of a vehicle from complying with the basic speed law. This presumption is a presumption affecting the burden of proof.

23302. It is unlawful for any person to refuse to pay or to evade or attempt to evade the payment of such tolls or other charges. It is prima facie evidence of a violation of this section for any person to enter upon any vehicular crossing without lawful money of the United States in his immediate possession in an amount sufficient to pay the prescribed tolls due from such person. This presumption is a presumption affecting the burden of proof.

41100. In any action involving the question of unlawful speed of a vehicle upon a highway which has been signposted with speed restriction signs of a type complying with the requirements of this code, it shall be presumed that existing facts authorize the erection of the signs and that the prima facie speed limit on the highway is the limit stated on the signs. This presumption~~[may be rebutted.]~~ is a presumption affecting the burden of proof.

41102. (a) In any prosecution charging a violation of any regulation governing the standing or parking of a vehicle under this code or any ordinance enacted by local authorities, proof by the people of the State of California that the particular vehicle described in the complaint was parked in violation of any provision of this code or such ordinance, together with proof that the defendant named in the complaint was at the time of parking the registered owner of the vehicle, shall constitute in evidence a ~~[prima facie]~~ presumption that the registered owner of the vehicle was the person who parked or placed the vehicle at the point where, and for the time during which, the violation occurred, but for the purposes of this subdivision proof that a person is the registered owner of a vehicle does not create a presumption that the registered owner has violated any other provision of law. The above provisions shall apply only when the procedure required by Section 41103 is complied with.

(b) In any prosecution charging a violation of any provision of this code requiring the display of any evidence of registration with respect to an unattended vehicle, proof by the people of the State of California that the particular vehicle described in the complaint failed to properly display such evidence of registration, together with proof that the defendant named in the complaint was at the time the registered owner of the vehicle, shall constitute a ~~[prima facie]~~ presumption that the registered owner of the vehicle was in control of, or responsible for, the vehicle at the time the violation occurred. No other presumption shall be created by this subdivision. The above provisions shall apply only when the procedure required by Section 41103 is complied with.

(c) The presumptions in this section are presumptions affecting the burden of proof.

41104.

In any case, involving an accident or otherwise, where any rear component of a train of vehicles fails to follow substantially in the path of the towing vehicle while moving upon a highway, the vehicle shall be presumed to have been operated in violation of Section 21711. This presumption is a presumption affecting the burden of proof.

### Water Code

2019. The report filed by the board is prima facie evidence of the physical facts therein found; but the court shall hear such evidence as may be offered by any party to rebut the report or the prima facie evidence. This presumption is a presumption affecting the burden of proof.

### COMMENT

Section 2019 appears in a chapter permitting any court of this State to order a reference of any litigation involving rights to water to the State Water Rights Board. The reference may be of any or all issues involved in the suit or it may be for investigation of and report upon the physical facts involved. Section 2019 makes the report filed by the Board pursuant to the reference prima facie evidence of the physical facts found.

4176. The possession or use of water when it has been so denied him by the watermaster is prima facie evidence of the guilt of the person using it. This presumption is a presumption affecting the burden of proof.

COMMENT

Section 4175 makes it a misdemeanor to take or use water if such taking or use has been denied by the water master in charge of the distribution of the water. A water master is an official appointed by the Department of Water Resources who has the power to divide a water supply among several users to ensure a distribution of the water among such users according to their rights to the water.

8567. A copy of any record of the board, certified by its secretary or assistant secretary to be a true copy, and attested by the seal of the board, is prima facie evidence of the existence and contents of the record. This presumption is a presumption affecting the burden of producing evidence.

8883. Each deed by the board purporting to be executed under this chapter shall be prima facie evidence of the truth of the matters therein recited and of ownership by the grantee of the lands therein described. This presumption is a presumption affecting the burden of proof.

26080. The assessment book, a copy of any portion of it certified by the collector, or the published list of delinquencies, showing unpaid assessments against any property is prima facie evidence of the assessment, the property assessed, the delinquency, the amount of assessments due and unpaid, and compliance with all forms of law relating to the assessment, equalization, and levy of the assessments. This presumption is a presumption affecting the burden of proof.

31028. A district shall have power to make findings upon each and all of the matters referred to in Section 31026. A finding by the board of directors upon the existence, threat or duration of an emergency or shortage or upon the matter of necessity or any other matter or condition shall be made by resolution or ordinance, and shall be prima facie evidence of the fact or matter so found, and such fact or matter shall be presumed to continue unchanged unless and until a contrary finding shall have been made by the board by resolution or ordinance. Such finding shall be received in evidence in any civil or criminal proceeding in which it may be offered, and shall be proof and evidence of the fact or matter found until rebutted or overcome by other sufficient evidence received in such proceeding. Copy of any resolution or ordinance setting forth any finding shall, when certified by the secretary of the district, be evidence that the finding was made by the district as shown by the resolution or ordinance and certification. The presumptions in this section are presumptions affecting the burden of proof.

Welfare & Institutions Code

104.3 For the purposes of the provisions of this code relating to public assistance, including but not limited to aid to the aged, aid to families with dependent children, aid to the disabled, aid to blind, and aid to potentially self-supporting blind residents, the continued absence of a recipient of public assistance from this State for a period of one year or longer[shall be prima facie] is evidence of the intent of the recipient to have changed his residence to a place outside this State. The county granting the aid shall make inquiry from such persons as to their intent to remain residents of California or to become residents of another state, and shall re-determine the residence of such persons for purposes of this chapter. In any case where the inquiry made under this section establishes that the recipient is no longer a resident of this State, his aid shall be terminated immediately.

If a recipient of aid is prevented by illness or other good cause from returning to this State at the end of one year, and has not by act or intent, established residence elsewhere, he shall not be deemed to have lost his residence in this State.

If a recipient of aid is disqualified for aid on the ground that he has left the State, and returns to the State within one year after leaving, he shall be considered to have resided in the State for a sufficient time to qualify for aid, and, if otherwise eligible, aid shall be granted to him as of the first day of the month following his application.

COMMENT

The context of the term "prima facie evidence" in Section 104.3 indicates that no presumption is intended. Absence for one year or more is merely a factor to be considered with several others in determining the actual residence of the aid recipient.

Welfare & Institutions Code

104.6. The board of supervisors of each county shall comply with and execute every decision of the State Social Welfare Board which is directed to the board of supervisors on any appeal filed with the board pursuant to Section 104.1 of this code. Each board of supervisors is ~~[presumed]~~ deemed to have knowledge of every such decision directed to it.