#34(L) 6/3/64

Memorandum 64-37

Subject: Study No. 34(L) - URE (Article III. Presumptions)

We are sending with this memorandum a revised version of the tentative recommendation relating to burden of proof, burden of producing evidence, and presumptions. Attached to this memorandum as Exhibit I is a letter from the Northern Section of the State Bar Committee relating to this recommendation.

This memorandum will discuss the State Bar Committee's letter first, and will then discuss the current version of the tentative recommendation.

State Bar Committee Comments

1. The Northern Section disapproves the proposed Division 5. It is of the opinion that courts and lawyers have learned to live with the existing law and the Law Revision Commission's proposals will only cause more confusion. Moreover they do not believe that the existing law has worked badly in practice. The Section does not object, however, to the proposed revision and repeal of specific presumptions.

We cannot agree that the existing California law works well. Professor Chadbourn's study adequately demonstrates that it has caused the courts to apply an irrational rule on motions for directed verdict against a party relying on a presumption. Justice Traynor's dissents in Scott v. Burke, 39 Cal.2d 388 (1952), and Speck v. Sarver, 20 Cal.2d 585 (1942), also point out that the existing rule does not work well in practice. At the time Speck v. Sarver was decided, Chief Justice Gibson apparently thought that the rule should be changed but that the Legislature should do so:

> I concur for the reason that the rules as to the nature of rebuttable presumptions upon which the foregoing opinion is based have been fixed by many decisions of this court, and any modification of such rules should be effected by the Legislature, and not by overruling at this time the cases establishing them. [20 Cal.2d at 590.]

The staff, therefore, believes that the Commission's recommendations represent a significant improvement in the law of California.

2. The Northern Section also objects to the chapters on burden of producing evidence and burden of proof. They state that they prefer the definitions in Rule 1.

The definitions serve an entirely different purpose--they define what "burden of proof" and "burden of producing evidence" mean whereas the sections in this recommendation indicate how those defined burdens are assigned in particular cases. Hence, we cannot understand why the definitions should be preferred over the substantive sections.

The chapters are somewhat vague. They were included in the recommendation to correct and recodify certain inaccurate sections in the Code of Civil Procedure. But it is doubtful that they can be made more meaningful. The textwriters all agree that there is no clearly ascertainable guide to the allocation of these burdens.

Revised Tentative Recommendation

The tentative recommendation has been revised to carry out the decisions of the Commission at the May meeting. The following matters should be noted:

Comments generally. The comments in the other tentative recommendations contrast the proposed rules with existing California law. This tentative recommendation is drafted as part of an Evidence Code that we hope to have enacted. If it is, the comments will serve their most important purpose

as a guide to the interpretation of existing statute sections.

If we draft the comments to refer to "former Section 1963" etc., the comments will be in their permanent form and the type can be used in the final recommendation. If we refer only to "Section 1963", for example, the comment will be accurate for present purposes, but it must be modified to refer to "former" to be accurate for permanent reference purposes. Thus, in the final publication, we will have to reset all lines on which such references appear.

We suggest that the comments be drafted in their permanent form and that an explanatory note be included in the recommendation indicating that the recommended statute is drafted as it might be codified in California law and, therefore, the comments discuss the statute as if it had been enacted.

Section 510. The comment has been modified to include some material that formerly appeared under Section 511.

Section 511. Section 511 has been modified to refer to statutory allocations of the burden of proof other than those appearing in this chapter. Under the previous version of the section, nothing indicated the effect of such sections.

This amendment is substantially the same as the comparable provisions in the Model Penal Code. Under MPC § 1.12, an affirmative defense is one that

> involves a matter of excuse of justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence.

The MPC itself identifies the affirmative defenses contained therein, but affirmative defenses to offenses defined in other statutes may not be specifically identified, and the above language is intended to define what are affirmative defenses under such other statutes.

Where an affirmative defense is involved, the prosecution is relieved of proof of the matter, and if no contrary evidence is adduced, "there is no issue on the point to be submitted to the jury." Comment, MPC Tentative Draft No. 4 at 110. The comment suggests that the defendant has the burden of showing enough to justify a reasonable doubt on the issue. Ibid.

Section 511 deals specifically with the statutes that have required the defense to show some matter in defense, and it provides specifically that the defendant's burden is as indicated in the comment to the MPC section.

This modification may be inconsistent in some degree with the action taken on presumptions at the last meeting. At the last meeting the Commission indicated that a presumption should not be used to force the defendant to come forward with some evidence--the defendant should never be required to come forward with some evidence. Lulking large in our discussion was the "presumption" of nonpossession of a prescription from proof of possession of narcotics.

However, our resolution of the presumptions problem actually left the disposition of the narcotics cases untouched. Health and Safety Code Section 11500 contains no presumptions. It merely provides that possession of narcotics is illegal "except" upon the prescription of a physician. The courts have held that the possession of a prescription is a defense. The prosecution does not need to show nonpossession of a prescription, and an instruction that nonpossession of a prescription must be assumed in the absence of contrary evidence is proper. People v. Bill, 140 Cal. App. 389 (1934); People v. Harmon, 89 Cal. App.2d 55 (1948). Since no explicit presumption is involved, Health and Safety Code Section 11500 was apparently untouched by our action.

Nonetheless, the discussion of presumptions at the last meeting indicated that you may wish to make affirmative defenses somewhat akin to presumptions. Certainly, your action forbade the use of presumptions to create affirmative defenses, although no statute in California has been drafted in the light of such a prohibition.

Unlike the Commission, the Model Penal Code commissioners accepted the fact that the defendant can be required to disprove elements of a crime; and the MPC has been drafted on that principle. The effect of an affirmative defense under the MPC has already been explained. The Comment goes on to state:

> Affirmative defenses, in this sense, are very common in existing penal law--even as to matters which in any ordinary meaning of the term involve the proof or disproof of elements of the crime charged. Typical illustrations are: Self-defense and similar claims of justification for conduct that would otherwise be criminal; excuses such as necessity, duress and claim of right; some exculpating mistakes, such as those based upon intoxication; license; many claims of exemption from a statutory prohibition based on a proviso or exception. . . .
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> No single principle can be conscripted to explain when these shifts of burden to defendants are defensible, even if the burden goes no further than to call for the production of some evidence. Neither the logical point that the prosecution would be called upon to prove a negative, nor the grammatical point that the defense rests on an exception or proviso divorced from the definition of the crime is potently persuasive, although both points have been invoked. See e.g. Rossi v. United States, 289 U.S. 89 (1933); United States v. Fleischman, 339 U.S. 349, 360-363 (1950) . . . . What is involved seems rather a more subtle balance which acknowledges that a defendant ought not [to (?)] be required to defend until some solid substance is presented to support the accusation but, beyond this, perceives a point where need for narrowing the issues, coupled with the relative accessibility of evidence to the defendant, warrants calling upon him to present his defensive claim. No doubt this point is reached more quickly if, given the facts the prosecution must establish, the normal probabilities are against the defense, but this is hardly an essential factor. Given the mere fact of an intentional homicide, no one can estimate the probability that it was or was not committed in self-defense. The point is rather that

> purposeful homicide is an event of such gravity to society, and the basis for a claim of self-defense is so specially within the cognizance of the defendant, that it is fair to call on him to offer evidence if the defense is claimed. This is in essence the classic analysis by Justice Cardozo in Morrison v. California, 291 U.S. 82, 88-90 (1934) . . . . So long as this criterion is satisfied, it is submitted that no constitutional objection is presented, though language in Tot v. United States, 319 U.S. 463, 469 (1943), but not the decision, must be distinguished. See Morgan, Comment, 56 Harv. L. Rev. 1324, 1328-1330.

Thus, the Model Penal Code defines murder as the purposeful killing of another human being. § 210.2. It is an affirmative defense, however, to show a justification or excuse provided in Sections 3.01-3.11. This scheme is little different from that in Penal Code Section 1105 as interpreted by the California courts. Other affirmative defenses may be found scattered through the MPC. In some instances, the MPC requires the defendant to prove an affirmative defense by a preponderance of the evidence. See, e.g., MPC §§ 5.07, 224.6, 224.7.

Accordingly, as the revision we made in Section 511 was consistent with the action taken on 511 last month and generally consistent with the MPC, we made the revision to eliminate any uncertainty concerning the construction of the code sections allocating the burden of proof not found in this chapter. We think the proposed revision is consistent with existing California law. People v. Scott, 24 Cal.2d 774 (1944); People v. Bushton, 80 Cal. 160 (1889).

Sections 600, 604, 606. These sections were approved at the last meeting. They have been made "subject to Section 607" to carry out the Commission's actions on presumptions in criminal cases.

The second paragraph of the Comment to Section 600, the last paragraph of the Comment to Section 604, and the last paragraph of the Comment to

Section 606 have been revised to conform to these changes.

Section 607. This is a new section designed to carry out the Commission's action on presumptions in criminal cases.

As indicated in the Comment, the section will alter California practice and affect the interpretation of statutes considerably. In the past, statutory allocations of the burden of proof in criminal cases have been referred to as presumptions. See, e.g., People v. Bushton, 80 Cal. 160 (1889). Conversely, statutory and common law presumptions have been treated as allocations of the burden of proof. People v. Scott, 24 Cal.2d 774 (1944); People v. Agnew, 16 Cal.2d 655 (1940). It has made little difference before, and both devices were treated as creating affirmative defenses.

The Model Penal Code uses presumptions in a different way. It does not use presumptions where it intends to create an affirmative defense which must be shown by the defendant. The MPC uses presumptions only where there is a strong inference of the presumed fact arising from the proven facts and where the Code intends to permit--but not require--the jury to find the presumed fact. Where the jury is to be foreclosed on the defensive issue, the device of an affirmative defense is used. Because the MPC presumptions are used for this limited purpose only, the Code provides:

> A presumption not established by the Code or inconsistent with it has the consequences otherwise accorded it by law. [§ 1.12(6).]

Because the California codes have not been drafted with this nice distinction in mind, they seem to use the terms "prima facie evidence" and "presumptive evidence" interchangeably with specific allocations of the burden of proof and specific defenses. They have been so interpreted. For example, People v. Scott, 24 Cal.2d 774 (1944), was a presumptions case

involving a statutory presumption, but it cites and relies on People v. Bushton, 80 Cal. 160 (1889), a case involving a specific allocation of the burden of proof, and People v. Agnew, 16 Cal.2d 655 (1940), a common law presumption case. And, in the course of the opinion, it refers to the statutory presumption as making the proven fact "prima facie evidence" of the presumed fact.

Section 607, therefore, appears to make some sense within the context of an entire body of law that has been conceived with the distinction in mind; but it makes little sense when suddenly inserted in a body of law that has grown up without any thought that there was such a distinction. The Model Penal Code Commissioners realized that such a broad gauge application of their presumptions provisions would be impossible--particularly when many presumptions have been established to create affirmative defenses within the meaning of the MPC--so they confined the application of their presumptions provisions to the presumptions they were creating.

We think, therefore, that Section 607 is ineffective to accomplish its purpose--to relieve the defendant of the obligation to prove anything in a criminal case. Section 511 preserves the effect of the narcotics sections, the provisions on murder in the Penal Code, and any other section where the Legislature had the foresight to avoid presumption language. It will substantively change such sections as the provision in the Deadly Weapons Act (presumption of alteration of identification marks from proof of possession of altered weapon) where the Legislature did not have the foresight to use burden of proof language instead of presumption language. We do not think it is wise to make the meaning of statutes depend on the

fortuitous use of particular words. And, hence, we do not think that Section 607 should be so broadly applied.

On the other hand, there was some objection at the last meeting to making all presumptions binding in a criminal case--even where not intended to create affirmative defenses. Accordingly, we think that the following might be a sensible legislative scheme in criminal cases:

Section 607 as now drafted should be made applicable to all Thayer presumptions. These are merely designed to facilitate disposition of the action. There is an underlying logical inference in each case so that the jury can rationally weigh the evidentiary effect of the proven facts.

A jury should be told that Morgan presumptions require the presumed fact to be assumed to exist unless there is evidence raising a reasonable doubt as to the existence of the presumed fact. Thus, it should be recognized that Morgan presumptions create affirmative defenses. But, the courts should be told that they should scrutinize a Morgan presumption sought to be applied in a criminal case and determine whether the policy that underlies the presumption warrants its application in a criminal case. For example, death from seven years absence is a Morgan presumption; but the policy giving rise to it has nothing to do with criminal cases. Hence, that presumption should not be applied in a criminal case. But, the many statutes scattered through the codes referring to "prima facie evidence" that were obviously designed to be applied in criminal cases would then be construed as creating affirmative defenses. The following revisions would carry out this scheme:

Section 600--as in the tentative draft.

Section 604--as in the tentative draft.

Section 606--add the following additional subdivisions:

(b) A presumption affecting the burden of proof does not apply in a criminal action to establish an element of a crime with which the defendant is charged unless the public policy that the presumption was established to implement requires such application of the presumption.

(c) When a presumption affecting the burden of proof operates in a criminal action to establish an element of the crime with which the defendant is charged, the defendant's burden of proof is to establish a reasonable doubt as to the existence of the presumed fact.

Section 607--revise to limit to presumptions affecting the burden of producing evidence.

This legislative scheme would meet some of the objections to the proposals submitted to the May meeting and would avoid the inconsistency with Section 511.

Section 665 and its comment are new. They have been added pursuant to the direction of the Commission at the May meeting.

Section 1963. The Comment explaining the noncontinuance of subdivision 14 is new; and the Comment explaining the noncontinuance of subdivision 27 is new.

Section 1983. The Commission decided to repeal the section. The Comment is new.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Memo. 64-37 EXHIBIT I

May 28, 1964

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

Attention: Mr. John H. DeMoully

Gentlemen:

The Northern Section of the Committee to Consider Uniform Rules of Evidence met at 4:30 p.m. on May 26, 1964, to consider Division 5, Burden of Producing Evidence, Burden of Proof, and Presumptions.

In view of the nature of this subject, the Committee did not consider it advisable to consider this Division section by section, but rather to look at it as a whole.

With respect to Chapter 1, Burden of Producing Evidence, the Committee finds it difficult to discern any real meaning in the various sections of this Chapter. This Chapter and its various sections appear to the Committee to be unnecessary and confusing. The Committee also finds it difficult to understand why the various specific issues in Article 2 should be singled out to be inserted in the Rules.

Perhaps today we are no longer concerned with adopting uniform rules of evidence, but if so, the Chapter here in question does not add to uniformity.

The Committee would prefer the definitions of "Burden of Proof" and "Burden of Producing Evidence" as set forth in sections 4 and 5 of Rule 1 of U.R.E.

With respect to presumptions, the Committee recognizes that the Law Revision Commission has sincerely endeavored to solve a problem which has always been fraught with confusion.

However, the Committee feels that the proposals of the Law Revision Commission will only result in more confusion. The courts and lawyers in California have learned to live with the theory of presumptions as laid down by the California Supreme Court. The Committee cannot see how it can help the administration of justice to depart now from existing California law.

It is true that the concept of a presumption as evidence is bothersome to a mind seeking purity of theory. However the Committee cannot see that the California rule has worked badly in practice, and would therefore retain it.

Based upon the foregoing, the Northern Section of the Committee would disapprove the proposed Division 5 except that the Committee has no quarrel with suggestions for revising or eliminating certain of the presumptions which are set forth in our codes.

Sincerely yours

S/
Lawrence C. Baker, Chairman
State Bar Committee on
Uniform Rules of Evidence