

#34(L)

9/3/64

Memorandum 64-61

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--  
Division 5--Presumptions)

We have received some comments from the Judicial Council's staff on a portion of Division 5. We have received no other comments.

Sections 500-510

The following is the Judicial Council staff's criticism of Sections 500 and 510:

This section [500], and Section 510, seem unsatisfactory in that they provide no positive standards to guide the litigants and the courts as to who bears the burden of producing evidence or the burden of proof. A statement that the burden of proof, or of producing evidence, is "on the party to whom it is assigned by rule of law" does not answer the question as to who has the burden, but merely raises another question: What rule of law?

On page 72 of Witkin's California Evidence the phrase, "affirmative of the issue", used in C.C.P. Section 1981 is criticized as lacking "any substantial objective meaning," and as actually requiring "the application of several rules of practice and policy not entirely consistent and not wholly reliable." It would appear that proposed Sections 500 and 510 are subject to the same criticism.

This criticism is valid. These sections were drafted and approved in the full realization that they provide no guides to the actual incidence of the evidentiary burdens. They are in the Evidence Code, to a large extent, to replace C.C.P. § 1981 which states that the burden of proof is on the party with the "affirmative of the issue." Section 1981 is incorrect in singling out one factor as determining the incidence of the evidentiary burdens when actually the courts consider a variety of factors. Sections 500 and 510 correct this error, but omit all criteria.

As Wigmore says (quoted in the comment to Section 500), "There is . . . no one test, of any real significance, for determining the incidence of this duty . . . ." The courts consider a variety of factors, sometimes giving more

weight to one and sometimes giving more weight to another. See Professor Degnan's Study, Part II, pp.9-15. Since this is so, we decided that it would be impossible to indicate in a statute when probability would be the most important consideration, when the difficulty of proving a negative would be the most important consideration, or when policy would be the most important consideration. The most that could be done in a statute would be to catalog some of the factors considered by the courts.

We finally concluded (at the April meeting) that listing of the various factors to be considered in the statute provides no solution to the problem of who has the burden in a specific instance. Hence, the statute was revised to indicate only that, in the absense of a specific statute, the courts must allocate these burdens. This conclusion has left the pertinent statutes somewhat vague, and hence the criticism.

An alternative is to list all of the factors that we can think of in the sections; and this will still leave the section without any positive standards to guide the litigants and the courts to the solution of particular problems.

On page 23 of Part II of his study, Professor Degnan suggested language that might be used to list the appropriate factors. His suggestion was to include the following language:

In the absence of statute, courts shall assign the burden of producing evidence to the parties, taking into account what is the most desirable result in the absence of evidence, considerations of fairness and convenience in access to evidence and in eliminating unnecessary proof, and the probabilities of particular results in issues of that nature.

Another alternative is repeal of Section 1981 of the Code of Civil Procedure without attempting to replace it with Evidence Code sections--to delete Sections 500 and 510.

#### Section 511

The Judicial Council staff also suggests that the lead line on Section 511

be revised to read: Limitations on criminal defendant's burden of proof.

#### Inference

We have omitted from our code any definition of an "inference." The staff of the Judicial Council suggests that one should be added. We use the term only in Section 608. Code of Civil Procedure Section 1958 defines "inference" to mean "a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect." This definition is fairly accurate. The dictionary definition is "a logical conclusion from given data or premises" or (paraphrasing the definition of "infer") a conclusion arrived at through reasoning from evidence. Should such a definition be included in the Evidence Code?

#### Remainder of division

We have no report from the Judicial Council on the remainder of the presumptions recommendation because at the time their report was prepared they had not had an opportunity to consider our final version of Section 607.

Respectfully submitted,

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DIVISION 5. BURDEN OF PRODUCING EVIDENCE, BURDEN OF PROOF, AND PRESUMPTIONS

CHAPTER 1. BURDEN OF PRODUCING EVIDENCE

500. Party who has burden of producing evidence.

500. The burden of producing evidence is on the party to whom it is assigned by rule of law. In the absence of such assignment, the party who has the burden of producing evidence shall be determined by the court as the ends of justice may require.

CHAPTER 2. BURDEN OF PROOF

Article 1. General

510. Party who has the burden of proof.

510. The burden of proof is on the party to whom it is assigned by rule of law. In the absence of such assignment, the party who has the burden of proof shall be determined by the court as the ends of justice may require.

511. Burden of proof of defendant in criminal case generally.

511. The provisions of any statute, except Section 522, that assign the burden of proof as to specific issues are subject to Penal Code Section 1096. Therefore, except as provided in Section 522, when under the provisions of a statute the defendant in a criminal case has the burden of proof as to the existence or nonexistence of any fact essential to his guilt or innocence, his burden of proof is to raise a reasonable doubt as to his guilt.

## Article 2. Burden of Proof on Specific Issues

### 520. Claim that person guilty of crime or wrong.

520. The party claiming that a person is guilty of crime or wrong has the burden of proof on that issue.

### 521. Claim that person did not exercise care.

521. The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue.

### 522. Claim that person insane.

522. The party claiming that any person, including himself, is or was insane has the burden of proof on that issue.

## CHAPTER 3. PRESUMPTIONS

### Article 1. General

#### 600. Presumption defined.

600. Subject to Section 607, a presumption is ~~a rule of law~~ that ~~requires a fact~~ to be assumed ~~from~~ another fact or group of facts found or otherwise established in the action. A presumption is not evidence.

an assumption of fact

when

#### 601. Classification of presumptions.

601. A presumption is either conclusive or rebuttable. Every rebuttable presumption in the law of this State is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.

#### 602. Statute making one fact prima facie evidence of another.

602. A statute providing that a fact or group of facts is prima facie evidence of another fact creates a rebuttable presumption.

#### 603. Presumption affecting burden of producing evidence defined.

603. A presumption affecting the burden of producing evidence is a presumption established to implement no public policy except to facilitate the determination of the particular action in which the presumption is applied.

604. Effect of presumption affecting burden of producing evidence.

604. Subject to Section 607, the effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.

605. Presumption affecting burden of proof.

605. A presumption affecting the burden of proof is a presumption (other than a presumption established solely to facilitate the determination of the particular action in which the presumption is applied) established to implement some public policy, such as the policy in favor of the legitimacy of children, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.

606. Effect of presumption affecting burden of proof.

606. Subject to Section 607, the effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.

607. Effect of presumption that establishes an element of a crime.

607. When by rule of law a rebuttable presumption operates in a criminal action to establish an element of the crime with which the defendant is charged, neither the burden of producing evidence nor the burden of proof is imposed upon the defendant, but ~~the judge shall instruct the jury that, if they believe that the facts that give rise to the presumption have been proved beyond a reasonable doubt, the jury shall then to find that the presumed fact has also been proved beyond a reasonable doubt.~~

if the trier of fact finds

the trier of fact may but is not required

608. Matters listed in former Code of Civil Procedure Section 1963.

608. A matter listed in Former Section 1963 of the Code of Civil Procedure, as set out in Section 1 of Chapter 860 of the Statutes of 1955, is not a presumption unless declared to be a presumption by statute. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate in any case to which a provision of former Section 1963 would have applied.

Article 2. Conclusive Presumptions

620. Conclusive presumptions.

620. The presumptions in this article and all other presumptions declared to be conclusive by rule of law are conclusive ~~presumptions~~.

621. Legitimacy.

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

622. Facts recited in written instrument.

622. The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto; but this rule does not apply to the recital of a consideration.

623. Estoppel by own statement or conduct.

623. Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to falsify it.

624. Estoppel of tenant to deny title of landlord.

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

Article 3. Presumptions Affecting the Burden of Producing Evidence

630. Presumptions affecting the burden of producing evidence.

630. The presumptions in this article and the presumptions described by Section 603 are presumptions affecting the burden of producing evidence.

631. Money delivered by one to another.

631. Money delivered by one to another is presumed to have been due to the latter.

632. Thing delivered by one to another.

632. A thing delivered by one to another is presumed to have belonged to the latter.

633. Obligation delivered up to the debtor.

633. An obligation delivered up to the debtor is presumed to have been paid.

634. Person in possession of order on himself.

634. A person in possession of an order on himself for the payment of money, or delivery of a thing, is presumed to have paid the money or delivered the thing accordingly.

635. Obligation possessed by creditor.

635. An obligation possessed by the creditor is presumed not to have been paid.

636. Payment of earlier rent or installments.

636. The payment of earlier rent or installments is presumed from a receipt for later rent or installments.

637. Ownership of things possessed.

637. The things which a person possesses are presumed to be owned by him.

638. Ownership of property by person who exercises acts of ownership.

638. A person who exercises acts of ownership over property is presumed to be the owner of it.

639. Judgment correctly determines rights of parties.

639. A judgment, when not conclusive, is presumed to correctly determine or set forth the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined.

640. Writing truly dated.

640. A writing is presumed to have been truly dated.



**641. Letter received in ordinary course of mail.**

641. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.

**642. Conveyance by person having duty to convey real property.**

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

**643. Authenticity of ancient document.**

643. A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic when it:

- (1) Is at least 30 years old;
- (2) Is in such condition as to create no suspicion concerning its authenticity;
- (3) Was kept, or when found was found, in a place where such writing, if authentic, would be likely to be kept or found; and
- (4) Has been generally acted upon as authentic by persons having an interest in the matter.

**644. Book purporting to be published by public authority.**

644. A book, purporting to be printed or published by public authority, is presumed to have been so printed or published.

**645. Book purporting to contain reports of cases.**

645. A book, purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published, is presumed to contain correct reports of such cases.

**Article 4. Presumptions Affecting the Burden of Proof**

**660. Presumptions affecting the burden of proof.**

660. The presumptions in this article and the presumptions described by Section 605 are presumptions affecting the burden of proof.

**661. Legitimacy.**

661. A child of a woman who is or has been married, born during the marriage or within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the people of the State of California in a criminal action brought under Section 270 of the Penal Code or by the husband or wife, or the descendant of one or both of them. In a civil action, the presumption may be rebutted only by clear and convincing proof.

**662. Owner of legal title to property is owner of beneficial title.**

662. The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

**663. Ceremonial marriage.**

663. A ceremonial marriage is presumed to be valid.

**664. Official duty regularly performed.**

664. It is presumed that official duty has been regularly performed.

**665. Arrest without warrant.**

665. An arrest without a warrant is presumed to be unlawful.

**666. Judicial action lawful exercise of jurisdiction.**

666. Any court of this State or the United States, or any court of general jurisdiction in any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction. This presumption applies only when the act of the court or judge is under collateral attack.

**667. Death of person not heard from in seven years.**

667. A person not heard from in seven years is presumed to be dead.