#34 10/14/64

Memorandum 64-80

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1--Division 5)

Attached are two copies of the revised Comments to Division 5. Mr. McDonough is responsible for checking these Comments. Please mark any revisions you believe should be made on one copy of the Comments.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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

CHAPTER 1. BURDEN OF PRODUCING EVIDENCE

§ 500. Party Who Has the Burden of Producing Evidence

Comment. Section 1981 of the Code of Civil Procedure provides that the party holding the affirmative of the issue must produce the evidence to prove it and that the burden of proof lies on the party who would be defeated if no evidence were given on either side.

(superseded by Evidence Code Sections 500 and 510)

As used in Section 1981, the term "burden of proof" probably embraces both the concept of burden of persuasion and the concept of burden of producing evidence. However, the distinction between these concepts was not as clear in 1872 as it became after Professors Thayer and Wigmore made their analyses of the law of evidence. Hence, Evidence Code Sections 500 and 510, which replace Section 1981, separate these concepts and provide the guides for determining the incidence of the burden of producing evidence (Section 500) and the guides for determining the incidence of the burden of proof (Section 510).

As used in Section 500, the burden of producing evidence means the obligation of a party to introduce evidence sufficient to avoid a [redacted]. In other words, if a party has the burden of producing evidence of a fact, "it is thereby settled that in the absence of the requisite evidence, the judge and jury must assume the non-existence of the fact." MORGAN, BASIC PROBLEMS OF EVIDENCE 19 (1957). See 9 WIGMORE, EVIDENCE § 2487 (3d ed. 1940). In the words of Code of Civil Procedure Section 1981, the party with the burden of producing evidence is "the party who would be defeated if no evidence were given on either side," although that description sometimes describes the party with the burden of proof as well. See the Comment to Section 510.

ruling against him on the issue. EVIDENCE CODE § 110.

It has long been recognized that the party with the affirmative of the issue does not necessarily have the burden of producing evidence. "There is . . . no one test, of any real significance, for determining the incidence of this duty . . . ." 9 WIGMORE, EVIDENCE § 2488 at 285 (3d ed. 1940). The courts consider a variety of factors in determining the allocation of this burden. Among these considerations are the peculiar knowledge of the parties concerning the particular fact, the most desirable result in terms of public policy and of justice to the litigants in the absence of evidence, the probability of the existence or nonexistence of the disputed fact, and the relative ease of proving the existence of a fact as compared with proving the nonexistence of a fact. See 9 WIGMORE, EVIDENCE §§ 2486-2488 (3d ed. 1940); Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity,* 12 STAN. L. REV. 5, 8-14 (1959).

Accordingly, Section 500 abandons the erroneous proposition that the burden of producing evidence is on the party with the affirmative of the issue and substitutes a general reference to the statutory and decisional law that has developed despite the provisions of Code of Civil Procedure Section 1981. In the absence of any statutory or decisional authority, the judge should weigh the various considerations that affect the burden of producing evidence and allocate the burden as the ends of justice may require in litigation of the kind in which the question arises.

Section 500 deals with the allocation of the burden of producing evidence. At the outset of the case, this burden will coincide with the burden of proof. 9 WIGMORE, EVIDENCE § 2487 at 279 (3d ed. 1940). However, during the course of the trial, the burden may shift from one party to another, irrespective of the incidence of the burden of proof.

Under Section 510, the criteria for determining the party who has the burden of proof are the same as the criteria for determining the party who has the burden of producing evidence. See Comment to Section 500. However, the determination takes place at a different time. The burden of producing evidence is determined by the judge at the outset of a trial and from time to time during the course of a trial. The burden of proof must be determined only at the close of the evidence and when the question in dispute is to be submitted to the trier of fact for determination. Thus, although the incidence of the burden of producing evidence and the burden of proof are determined by similar factors, they may at times be on different parties to the action. For example, the plaintiff in a negligence action has the burden of proof on the issue of negligence; but, if the plaintiff relies on the doctrine of res ipsa loquitur, the defendant will have the burden in the course of the trial of coming forward with evidence of his lack of negligence. See, *e.g., Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 268 P.2d 1041 (1954).

Although it is sometimes said that the burden of proof never shifts (see cases collected in WITKIN, CALIFORNIA EVIDENCE § 53 (1958)), this is true only in the limited sense that the burden of proof is not determined until the case is finally submitted for decision. See MORGAN, SOME PROBLEMS OF PROOF 79-81 (1956). During the trial, assumptions as to the eventual allocation of the burden of proof may be changed; in this sense, the burden of proof does shift. For example, the party asserting that an arrest was unlawful has the burden of proving that fact at the outset of the case. However, if he proves or if it is otherwise established that the arrest was made without a warrant, the party asserting the lawfulness of the arrest then has the burden of proof on the issue of probable cause. See, *e.g., Badillo v. Superior Court*, 46 Cal.2d 269, 294 P.2d 23 (1956); *People v. Gorg*, 45 Cal.2d 776, 782, 291 P.2d 469, 472 (1955); *Dragna v. White*, 45 Cal.2d 469, 289 P.2d 428 (1955).

Under existing California law, certain matters have been called "presumptions" even though they do not fall within the definition contained in Code of Civil Procedure Section 1959 (superseded by Evidence Code Section 600). Both Section 1959 and Evidence Code Section 600 define a presumption to be an assumption or conclusion of fact that the law requires to be drawn from the proof or establishment of some other fact. Despite the statutory definition, subdivisions 1 and 4 of Code of Civil Procedure Section 1963 (superseded by Sections 520 and 521 of the Evidence Code) provide presumptions that a person is innocent of crime or wrong and that a person exercises ordinary care for his own concerns. Similarly, some cases refer to a presumption of sanity. It is apparent that these so-called presumptions do not arise from the establishment or proof of a fact in the action. In fact, they are not presumptions at all but are preliminary allocations of the burden of proof in regard to the particular issue. This preliminary allocation of the burden of proof may be satisfied in particular cases by proof of a fact giving rise to a presumption that does affect the burden of proof. For example, the initial burden of proving negligence may be satisfied in a particular case by proof that undamaged goods were delivered to a bailee and that such goods were lost or damaged while in the bailee's possession. Upon such proof, the bailee would have the burden of proof as to his lack of negligence. *George v. Bekins Van & Storage Co.*, 33 Cal.2d 834, 205 P.2d 1037 (1949). *Cf.* COM. CODE § 7403.

Because the assumptions referred to above do not meet the definition of a presumption contained in Section 600, they are not continued in this code as presumptions. Instead, they appear in the next article in several sections allocating the burden of proof on specific issues. See Article 2 (Sections 520-522).

§ 511. Burden of Proof of Defendant in Criminal Case—Generally

Comment. The sections that appear in the next article assigning the burden of proof on specific issues may, at times, assign the burden of proof to the defendant in a criminal action. Elsewhere in the codes are other sections that either specifically allocate the burden of proof to the defendant in a criminal action or have been construed to allocate the burden of proof to the defense. For example, Health and Safety Code Section 11721 provides specifically that, in a prosecution for the use of narcotics, it is the burden of the defense to show that the narcotics were administered by or under the direction of a person licensed to prescribe and administer narcotics. Health and Safety Code Section 11500, on the other hand, prohibits the possession of narcotics but provides an exception for narcotics possessed pursuant to a prescription. The courts have construed this section to place the burden of proof on the defense to show that the exception applies and that the narcotics were possessed pursuant to a prescription. *People v. Marschalk*, 206 Cal. App.2d 346, 23 Cal. Rptr. 743 (1962); *People v. Bill*, 140 Cal. App. 389, 392-394, 35 P.2d 645, 647-648 (1934).

Section 511 is intended to make it clear that the statutory allocations of the burden of proof appearing in this chapter and elsewhere in the codes do not require the defendant to persuade the trier of fact as to his innocence. The issue of insanity is the only issue going to the defendant's guilt or innocence upon which the defendant has the burden of persuading the trier of fact. Under Evidence Code Section 522, as under existing law, the defendant must prove his insanity by a preponderance of the evidence. *People v. Daugherty*, 40 Cal.2d 876, 256 P.2d 911 (1953). However, where a statute allocates the burden of proof to the defendant on any other issue relating to the defendant's guilt, the defendant's burden, as under existing law, is merely to raise a reasonable doubt as to his guilt. *People v. Bushton*, 80 Cal. 160, 22 Pac. 127 (1889).

Article 2. Burden of Proof on Specific Issues

§ 520. Claim That Person Guilty of Crime or Wrong

Comment. Section 520 is based on and supersedes subdivision 1 of Code of Civil Procedure Section 1963. Of course, in a criminal case, the prosecution has the burden of proof beyond a reasonable doubt. PENAL CODE § 1096.

§ 521. Claim That Person Did Not Exercise Care

Comment. Section 521 is based on and supersedes subdivision 4 of Code of Civil Procedure Section 1963.

§ 522. Claim That Person Insane

Comment. Section 522 codifies an allocation of the burden of proof that is frequently referred to in the cases as a presumption. See, *e.g.*, *People v. Daugherty*, 40 Cal.2d 876, 899, 256 P.2d 911, 925-926 (1953).

Article 1. General

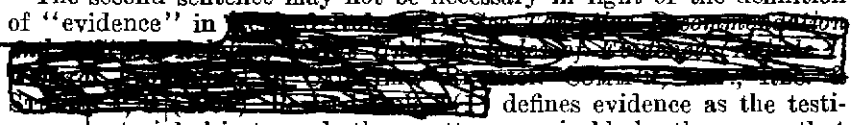
§ 600. Presumption Defined

Comment. Except for the limitation at the beginning of the section, the definition of a presumption in Section 600 is substantially the same as that contained in Code of Civil Procedure Section 1959: "A presumption is a deduction which the law expressly directs to be made from particular facts." Section 600 was derived from Rule 13 of the Uniform Rules of Evidence and supersedes Code of Civil Procedure Section 1959.

The reference to Section 607 appears in this section because, under the Evidence Code, a rebuttable presumption cannot require the jury to find a fact essential to the guilt of a defendant in a criminal case; it can merely authorize such a finding. See Section 607 and the Comment thereto.

The second sentence may not be necessary in light of the definition of "evidence" in

Evidence Code Section 140, which



defines evidence as the testimony, material objects, and other matters cognizable by the senses that are presented to a tribunal as a basis of proof. Presumptions and inferences, then, are not "evidence" but are conclusions that either are required to be drawn or are permitted to be drawn from evidence. An inference under this code is merely a conclusion of fact that rationally can be drawn from the proof of some other fact. A presumption under this code is a conclusion the law requires to be drawn (in the absence of a sufficient contrary showing) when some other fact is proved or otherwise established in the action.

Nonetheless, the second sentence has been added here to repudiate specifically the rule of *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 Pac. 529 (1931). That case held that a presumption is evidence that must be weighed against conflicting evidence; and in *Scott v. Burke*, 39 Cal.2d 388, 247 P.2d 313 (1952), the Supreme Court held that conflicting presumptions must be weighed against each other. These decisions require the jury to perform an intellectually impossible task. The jury is required to weigh the testimony of witnesses and other evidence as to the circumstances of a particular event against the fact that the law requires an opposing conclusion in the absence of contrary evidence and to determine which "evidence" is of greater probative force. Or else, the jury is required to weigh the fact that the law requires two opposing conclusions and to determine which required conclusion is of greater probative force.

Moreover, the doctrine that a presumption is evidence imposes upon the party with the burden of proof an even higher burden of proof than is warranted. For example, if a party with the burden of proof has a presumption invoked against him and if the presumption remains in the case as evidence even though the jury believes that he has produced a preponderance of the evidence, the effect is that he must produce some additional but unascertainable quantum of proof in order to dispel the effect of the presumption. See *Scott v. Burke*, 39 Cal.2d 388, 405-406, 247 P.2d 313, 323-324 (1952) (dissenting opinion). The doctrine that a presumption is evidence gives no guidance to the jury or to the parties as to the amount of this additional proof. The most that should be expected of a party in a civil case is to prove his case by a preponderance of the evidence (unless some specific presumption or rule of law requires proof of a particular issue by clear and convincing evidence). The most that should be expected of the prosecution in a criminal case is to establish the defendant's guilt beyond a reasonable doubt. To require some additional quantum of proof, unspecified and uncertain in amount, to dispel a presumption which persists as evidence in the case unfairly weights the scales of justice against the party with the burden of proof.

To avoid the confusion engendered by the doctrine that a presumption is evidence, this code describes "evidence" as the matters presented in judicial proceedings and uses presumptions solely as devices to aid in determining the facts from the evidence presented.

§ 601. Classification of Presumptions

Comment. Under existing law, some presumptions are conclusive. The court or jury is required to find the existence of the presumed fact regardless of the strength of the opposing evidence. The conclusive presumptions are specified in Section 1962 of the Code of Civil Procedure (superseded by Article 2 (Sections 620-624) of this chapter).

Under existing law, too, all presumptions that are not conclusive are rebuttable presumptions. CODE CIV. PROC. § 1961 (superseded by EVIDENCE CODE § 601). However, the existing statutes make no attempt to classify the rebuttable presumptions.

For several decades, courts and legal scholars have wrangled over the purpose and function of presumptions. The view espoused by Professors Thayer (THAYER, PRELIMINARY TREATISE ON EVIDENCE 313-352 (1898)) and Wigmore (9 WIGMORE, EVIDENCE §§ 2485-2491 (3d ed. 1940)), accepted by most courts (see Morgan, *Presumptions*, 10 RUTGERS L. REV. 512, 516 (1956)), and adopted by the American Law Institute's Model Code of Evidence, is that a presumption is a preliminary assumption of fact that disappears from the case upon the introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact. In Professor Thayer's view, a presumption merely reflects the judicial determination that the same conclusionary fact exists so frequently when the preliminary fact is established that proof of the conclusionary fact may be dispensed with unless there is actually some contrary evidence:

> Many facts and groups of facts often recur, and when a body of men with a continuous tradition has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut short the process and lay down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them. [THAYER, PRELIMINARY TREATISE ON EVIDENCE 326 (1898).]

Professors Morgan and McCormick argue that a presumption should shift the burden of proof to the adverse party. MORGAN, SOME PROBLEMS OF PROOF 81 (1956); MCCORMICK, EVIDENCE § 317 at 671-672 (1954). They believe that presumptions are created for reasons of policy and argue that, if the policy underlying a presumption is of sufficient weight to require a finding of the presumed fact when there is no contrary evidence, it should be of sufficient weight to require a finding when the mind of the trier of fact is in equilibrium, and, *a fortiori*, it should be of sufficient weight to require a finding if the trier of fact does not believe the contrary evidence.

The Evidence Code is based on a third view suggested by Professor Bohlen in 1920. Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, 68 U. PA. L. REV. 307 (1920). Underlying the presumptions provisions of the Evidence Code is the conclusion that the Thayer view is correct as to some presumptions, but that the Morgan view is right as to others. The fact is that presumptions are created for a variety of reasons, and no single theory or rationale of presumptions can deal adequately with all of them. Hence, the Evidence Code classifies all rebuttable presumptions as either (1) presumptions affecting the burden of producing evidence (essentially Thayer presumptions), or (2) presumptions affecting the burden of proof (essentially Morgan presumptions).

Sections 603 and 605 set forth the criteria by which the two classes of rebuttable presumptions may be distinguished, and Sections 604, 606, and 607 prescribe their effect. Articles 3 and 4 (Sections 630-667) classify many presumptions found in California law; but many other presumptions, both statutory and common law, must await classification by the courts in accordance with the criteria contained in Sections 603 and 605.

The classification scheme contained in the Evidence Code follows a distinction that appears in the California cases. Thus, for example, the courts have at times held that presumptions do not affect the burden of proof. Estate of Eakle, 33 Cal. App.2d 379, 91 P.2d 481 (1939)(presumption of undue influence); Valentine v. Provident Mut. L. Ins. Co., 12 Cal. App.2d 616, 55 P.2d 1243 (1933)(presumption of death from seven years' absence). And at other times the courts have held that certain presumptions do affect the burden of proof. Estate of Walker, 180 Cal. 478, 181 Pac. 792 (1919)("clear and satisfactory proof" required to overcome presumption of legitimacy); Estate of Nickson, 187 Cal. 603, 203 Pac. 105 (1921)("clear and convincing proof" required to overcome presumption of community property). The cases have not, however, explicitly recognized the distinction, nor have they applied it consistently. Compare Estate of Eakle, supra, (presumption of undue influence does not affect burden of proof) with Estate of Witt, 198 Cal. 407, 245 Pac. 197 (1926)(presumption of undue influence must be overcome with "the clearest and most satisfactory evidence"). The Evidence Code clarifies the law relating to presumptions by identifying the distinguishing factors, and it provides a measure of certainty by classifying a number of specific presumptions.

§ 602. Statute Making One Fact Prima Facie Evidence of Another

Comment. Section 602 indicates the construction to be given to the large number of statutes scattered through the codes that state that one fact or group of facts is prima facie evidence of another fact. See, *e.g.*, AGRIC. CODE § 18, COM. CODE § 1202, REV. & TAX. CODE § 6714. In some instances, these statutes have been enacted for reasons of public policy that require them to be treated as presumptions affecting the burden of proof. See *People v. Schwartz*, 31 Cal.2d 59, 63, 187 P.2d 12, 14 (1947); *People v. Mahoney*, 13 Cal.2d 729, 732-733, 91 P.2d 1029, 1030-1031 (1939). It seems likely, however, that in many instances such statutes are not intended to affect the burden of proof but only the burden of producing evidence. Section 602 provides that these statutes are to be regarded as rebuttable presumptions. Hence, unless some specific language applicable to the particular statute in question indicates whether it affects the burden of proof or only the burden of producing evidence, the courts will be required to classify these statutes as presumptions affecting the burden of proof or the burden of producing evidence in accordance with the criteria set forth in Sections 603 and 605.

§ 603. Presumption Affecting Burden of Producing Evidence Defined

Comment. Sections 603 and 605 set forth the criteria for determining whether a particular presumption is a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof. Many presumptions are classified in Articles 3 and 4 (Sections 630-667) of this chapter. In the absence of specific statutory classification, the courts may determine whether a presumption is a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof by applying the standards contained in Sections 603 and 605.

Section 603 describes those presumptions that are not based on any public policy extrinsic to the action in which they are invoked. These presumptions are designed to dispense with unnecessary proof of facts that are likely to be true if not disputed. Typically, such presumptions are based on an underlying logical inference. In some cases the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence. In other cases, evidence of the nonexistence of the presumed fact, if there is any, is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence. In still other cases, there may be no direct evidence of the existence or nonexistence of the presumed fact; but, because the case must be decided, the law requires a determination that the presumed fact exists in light of common experience indicating that it usually exists in such cases. *Cf.* BOHLEN, STUDIES IN THE LAW OF TORTS 644 (1926). Typical of such presumptions are the presumption that a mailed letter was received (Section 641) and presumptions relating to the authenticity of documents (Sections 643-645).

The presumptions described in Section 603 are not expressions of policy; they are expressions of experience. They are intended solely to eliminate the need for the trier of fact to reason from the proven or established fact to the presumed fact and to forestall argument over the existence of the presumed fact when there is no evidence tending to prove the nonexistence of the presumed fact.

§ 604. Effect of Presumption Affecting Burden of Producing Evidence

Comment. Section 604 describes the manner in which a presumption affecting the burden of producing evidence operates. Such a presumption is merely a preliminary assumption in the absence of contrary evidence, *i.e.*, evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If contrary evidence is introduced, the trier of fact must weigh the inferences arising from the facts established by proof against the contrary evidence and resolve the conflict. For example, if a party proves that a letter was mailed, the trier of fact is required to find that the letter was received in the absence of any believable contrary evidence. However, if the adverse party denies receipt, the presumption is gone from the case. The trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received.

If a presumption affecting the burden of producing evidence is relied on, the judge must determine whether there is evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If there is such evidence, the presumption disappears and the judge need say nothing about it in his instructions. If there is not evidence sufficient to sustain a finding of the nonexistence of the presumed fact, the judge should instruct the jury concerning the presumption. If the basic fact from which the presumption arises is established (by the pleadings, by stipulation, by judicial notice, etc.) so that the existence of the basic fact is not a question of fact for the jury, the jury should be instructed that the presumed fact is also established. If the basic fact is a question of fact for the jury, the judge should charge the jury that, if it finds the basic fact, the jury must also find the presumed fact. MORGAN, BASIC PROBLEMS OF EVIDENCE 36-38 (1957).

If the prosecution in a criminal action relies on a presumption affecting the burden of producing evidence to establish an element of the crime with which the defendant is charged and if there is no evidence as to the nonexistence of the presumed fact, the jury should be instructed that it is permitted to find the presumed fact but is not required to do so. See Section 607 and the Comment thereto.

§ 605. Presumption Affecting Burden of Proof

Comment. Section 605 describes a presumption affecting the burden of proof. Such presumptions are established in order to carry out or make effective some public policy.

Frequently, presumptions affecting the burden of proof are designed to facilitate determination of the action in which they are applied. Superficially, therefore, they may appear merely to be presumptions affecting the burden of producing evidence. But there is always some further reason of policy for the establishment of a presumption affecting the burden of proof. It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of proof from a presumption affecting the burden of producing evidence. For example, the presumption of death from seven years' absence (Section 667) exists in part to facilitate the disposition of actions by supplying a rule of thumb to govern certain cases in which there is likely to be no direct evidence of the presumed fact. But the policy in favor of distributing estates, of settling titles, and of permitting life to proceed normally at some time prior to the expiration of the absentee's normal life expectancy (perhaps 30 or 40 years) that underlies the presumption indicates that it should be a presumption affecting the burden of proof.

Frequently, too, a presumption affecting the burden of proof will have an underlying basis in probability and logical inference. For example, the presumption of the validity of a ceremonial marriage may be based in part on the probability that most marriages are valid. However, an underlying logical inference is not essential. In fact, the lack of an underlying inference is a strong indication that the presumption affects the burden of proof. Only the needs of public policy can justify the direction of a particular assumption that is not warranted by the application of probability and common experience to the known facts. Thus, the total lack of any inference underlying the presumption of the negligence of an employer that arises from his failure to secure the payment of workmen's compensation (LABOR CODE § 3708) is a clear indication that the presumption is based on public policy and affects the burden of proof. Similarly, the fact that the presumption of death from seven years' absence may conflict directly with the logical inference that life continues for its normal expectancy is an indication that the presumption is based on public policy and, hence, affects the burden of proof.

§ 606. Effect of Presumption Affecting Burden of Proof

Comment. Section 606 describes the manner in which a presumption affecting the burden of proof operates. In the ordinary case, the party against whom it is invoked will have the burden of proving the nonexistence of the presumed fact by a preponderance of the evidence. Certain presumptions affecting the burden of proof may be overcome only by clear and convincing proof. When such a presumption is relied on, the party against whom the presumption operates will have a heavier burden of proof and will be required to persuade the trier of fact of the nonexistence of the presumed fact by proof " 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " *Sheehan v. Sullivan*, 126 Cal. 189, 193, 58 Pac. 543, 544 (1899).

If the party against whom the presumption operates already has the same burden of proof as to the nonexistence of the presumed fact that is assigned by the presumption, the presumption can have no effect on the case and no instruction in regard to the presumption should be given. See *Speck v. Sarver*, 20 Cal.2d 585, 590, 128 P.2d 16, 19 (1942) (dissenting opinion by Traynor, J.); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 69 (1933). If there is not evidence sufficient to sustain a finding of the nonexistence of the presumed fact, the judge's instructions will be the same as if the presumption were merely a presumption affecting the burden of producing evidence. See the Comment to Section 604. If there is evidence of the nonexistence of the presumed fact, the judge should instruct the jury on the manner in which the presumption affects the factfinding process. If the basic fact from which the presumption arises is so established that the existence of the basic fact is not a question of fact for the jury (as, for example, by the pleadings, by judicial notice, or by stipulation of the parties), the judge should instruct the jury that the existence of the presumed fact is to be assumed until the jury is persuaded to the contrary by the requisite degree of proof (proof by a preponderance of the evidence, clear and convincing proof, etc.). See MCCORMICK, EVIDENCE § 317 at 672 (1954). If the basic fact is a question of fact for the jury, the judge should instruct the jury that, if it finds the basic fact, it must also find the presumed fact unless persuaded of the nonexistence of the presumed fact by the requisite degree of proof. MORGAN, BASIC PROBLEMS OF EVIDENCE 38 (1957).

In a criminal case, a presumption affecting the burden of proof may be relied upon by the prosecution *to establish an element of the crime* with which the defendant is charged. But, in such a case, the effect of the presumption on the factfinding process and the nature of the instructions differ substantially from those described in Section 606 and this Comment. See Section 607 and the Comment thereto. On other issues, a presumption affecting the burden of proof will have the same effect in a criminal case as it does in a civil case, and the instructions will be the same.

§ 607. Effect of Presumption That Establishes an Element of a Crime

Comment. Under Section 607, rebuttable presumptions apply somewhat differently when invoked to establish the guilt of a criminal defendant than they do when invoked to establish some other fact.

If a presumption affecting the burden of producing evidence is invoked to establish a defendant's guilt, the judge must determine whether there is evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If there is such evidence, the presumption disappears from the case under Section 604 and the jury should be given no instruction on the effect of the presumption. If there is no contrary evidence, however, the judge should instruct the jury that, if it finds that the facts giving rise to the presumption have been proved beyond a reasonable doubt, it is *permitted* to find that the presumed fact has been proved beyond a reasonable doubt.

If a presumption affecting the burden of proof is invoked to establish a defendant's guilt, whether or not there is contrary evidence, the judge should instruct the jury that, if it finds that the facts giving rise to the presumption have been proved beyond a reasonable doubt, it is permitted—but not required—to find that the presumed fact has also been proved beyond a reasonable doubt.

Thus, in a criminal case, a rebuttable presumption cannot place either the burden of producing evidence or the burden of proof on the defendant concerning a fact constituting an element of the crime with which he is charged. Those burdens, by definition, require the trier of fact to assume the nonexistence of a fact until the party with the burden of proof or burden of producing evidence concerning the existence of the fact discharges his burden; and, if there is no evidence tending to satisfy the burden, there is no issue on the question to be decided by the jury. See Comments to Sections 500 and 510. See also the comment on affirmative defenses in MODEL PENAL CODE, TENTATIVE DRAFT No. 4 at 110-112 (1955). Under Section 607, however, whenever a presumption is relied on, the issue must be submitted to the jury under the instruction that the law permits, but does not require, the finding of the presumed fact.

To the extent indicated below, Section 607 changes existing California law and practice. However, because of the confusion engendered by conflicting instructions that are now given in criminal cases, it is uncertain whether the change will have any practical significance in the trial of criminal cases.

Code of Civil Procedure Section 1959 (superseded by Section 600) defines a presumption as "a deduction which the law expressly directs to be made from particular facts." The applicability of this definition to criminal cases cannot be regarded as settled, for there appears to be no appellate decision in which the propriety of instructing a jury in a criminal case in the terms of this definition has been considered. Nevertheless, there are cases in which juries have been instructed on presumptions in the terms of *California Jury Instructions, Criminal* (2d ed. 1958) Numbers 25 and 40, both of which, after reciting the statutory definition, state: "Unless declared by law to be conclusive, it [a

presumption] may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption." See, *e.g., People v. Masters,* 219 Cal. App.2d 672, 33 Cal. Rptr. 383 (1963); *People v. Porter,* 217 Cal. App.2d 824, 31 Cal. Rptr. 841 (1963); *People v. Perez,* 128 Cal. App.2d 750, 276 P.2d 72 (1954); *People v. Candiotto,* 128 Cal. App.2d 347, 275 P.2d 500 (1954) (opinions indicate, without discussion, that the quoted instruction was given).

Under Section 607, it is clear that a presumption which operates to establish the guilt of a criminal defendant is not a "deduction which the law expressly directs to be made"; it is only a conclusion that the trier of fact is *permitted*—but is not required—to draw. Hence, a jury cannot be instructed that, unless a presumption is controverted, "the jury is bound to find in accordance with the presumption." Instead, the judge should instruct the jury that it is permitted, but is not required, to find in accordance with the presumption. An instruction similar to that contained in *California Jury Instructions, Criminal* (2d ed. 1958) Number 25 may be given only if the statute defining the crime explicitly places the burden of proof on the defendant or provides that the fact in question creates an exception to the defined crime. See, *e.g., People v. Harmon,* 89 Cal. App.2d 55, 58, 200 P.2d 32, 34 (1948) (crime defined as possession of narcotics *except* upon prescription; instruction approved stating "that the burden of proof is upon the defendant that he possessed a written prescription and that in the absence of such evidence it must be assumed that he had no such prescription"). See also *People v. Boo Doo Hong,* 122 Cal. 606, 607, 55 Pac. 402, 403 (1898). *Cf.* Comments to Sections 510 and 511.

In addition, the California courts have held that a presumption that operates to establish the guilt of a criminal defendant " 'places upon the defendant the burden of producing such evidence thereon as will . . . create a reasonable doubt in the minds of the jury as to' " the existence of the presumed fact. *People v. Martina,* 140 Cal. App.2d 17, 25, 294 P.2d 1015, 1019 (1956). See also *People v. Hardy,* 33 Cal.2d 52, 64, 198 P.2d 865, 872 (1948) ("the defendant . . . is . . . required . . . only to produce sufficient evidence to raise a reasonable doubt in the minds of the jury"); *People v. Scott,* 24 Cal.2d 774, 783, 151 P.2d 517, 521 (1944) ("he [the defendant] must . . . go forward with evidence to the extent of raising a reasonable doubt that he tampered with the identification marks [of a firearm in violation of Penal Code Section 12091]"); *People v. Agnew,* 16 Cal.2d 655, 666, 107 P.2d 601, 606 (1940) ("the burden thus placed upon the defendant [by a common law presumption] could be met by evidence which produced in their [the jury's] minds a reasonable doubt . . ."). And, under existing law, an instruction stating that the defendant has such a burden may be given. *People v. Martina,* 140 Cal. App.2d 17, 294 P.2d 1015 (1956). Thus, under existing law, a presumption has been held to place upon the defendant a burden similar to that which he has under a statute specifically placing the burden of proof upon him. *People v. Agnew,* 16 Cal.2d 655, 107 P.2d 601 (1940); *People v. Bushton,* 80 Cal. 160, 22 Pac. 127 (1889).

However, under existing law, a criminal defendant is entitled to an instruction in every case that he "is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal . . . ." PENAL CODE § 1096. In presumptions cases, juries have been instructed that a presumption relied on by the prosecution does "not relieve the prosecution of the burden of proving every element of the offense charged . . . ." *People v. Hewlett,* 108 Cal. App.2d 358, 373, 239 P.2d 150, 159 (1951). *California Jury Instructions, Criminal* (2d ed. 1958) Number 51, which relates to the defendant's right to refuse to testify, refers to the prosecution's "burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt" and goes on to say that "the defendant may choose to rely on the state of the evidence

and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element." Thus, where a crime is defined to include certain specified elements and a presumption is relied on to prove one of the elements, juries have been given instructions that both require the prosecution to prove the crucial element beyond a reasonable doubt and require the defendant to raise a reasonable doubt on the question.

Under Section 607, it is clear that neither the burden of producing evidence nor the burden of proof—even to the extent of raising a reasonable doubt—is placed on a criminal defendant by a presumption. It is also clear that an instruction that so states—such as the instruction approved in *People v. Martina,* 140 Cal. App.2d 17, 294 P.2d 1015 (1956)—is improper. But it is uncertain whether this change will have much practical significance in the trial of criminal cases. Section 607 merely precludes the giving of an instruction that conflicts with other required instructions and, therefore, avoids the present confusion concerning the proper allocation of the burden of proof. It seems likely that the practical effect of these instructions has been to require the jury to weigh the effect of a presumption in determining whether the prosecution has proved each element of the crime beyond a reasonable doubt. Thus, as a practical matter, a presumption may be considered much the same as other evidence in the case is considered. There is language in some cases indicating that this is the actual function of a presumption. For example, in *People v. Hardy,* 33 Cal.2d 52, 64, 198 P.2d 865, 872 (1948), the court said that "the rule [relating to the defendant's burden] is the same whether the People rely on testimonial evidence or on presumptions, except where the presumption is conclusive." See also *People v. Hewlett,* 108 Cal. App.2d 358, 373, 239 P.2d 150, 159 (1951) ("it seems quite clear that any of the disputable presumptions set forth by law . . . may be considered by the jury in weighing the presumption of innocence and in determining whether the prosecution has sustained the burden of showing that the defendant is guilty . . . beyond a reasonable doubt").

Section 607 provides specifically that a presumption is a matter that *may* be relied on by the trier of fact, and in so providing it achieves directly a result that now is probably achieved in practice as a result of the contradictory instructions that are given.

The treatment of presumptions and the burden of proof in this code is similar to that proposed in the Model Penal Code. Under the Model Penal Code, the prosecution is relieved of producing any evidence as to a matter that is made an affirmative defense. MODEL PENAL CODE § 1.12 (Proposed Official Draft 1962). "Unless there is evidence supporting the defense, there is no issue on the point to be submitted to the jury." MODEL PENAL CODE, TENTATIVE DRAFT No. 4 at 110 (1955). The prosecution is required to prove beyond a reasonable doubt a fact that is made an affirmative defense only when "the defendant shows enough to justify such doubt upon the issue." *Ibid.* Similarly, under Evidence Code Section 511, the defendant may be foreclosed from obtaining a jury decision as to the existence of a particular fact when there is no evidence thereof if the existence of that fact is made an affirmative defense either by a statute specifically assigning to the defendant the burden of proof as to the existence of the fact or by a statute describing the existence of the fact as an exception to the defined crime.

The presumptions contained in the Model Penal Code permit a jury finding of the presumed fact but do not require such a finding. MODEL PENAL CODE § 1.12(5) (Proposed Official Draft 1962). Similarly, under Evidence Code Section 607, a presumption created by California law will permit, but not require, a jury finding of the presumed fact when that fact is an element of a crime with which the defendant in a criminal case is charged.

Although the Model Penal Code provision on presumptions is limited in its application to presumptions contained in the Model Penal Code (§ 1.12(6), Proposed Official Draft 1962), the distinction there recommended between affirmative defenses and presumptions provides an excellent basis for the preparation and interpretation of statutes generally. Under Evidence Code Sections 511 and 607, the Legislature can draft legislation that will prescribe precisely the consequences of the proof of particular facts by the prosecution and the failure of the defendant to produce evidence in defense. If the defendant is to be foreclosed from obtaining a jury decision as to the existence of an exculpatory fact (such as the existence of a prescription for narcotics, justification for a purposeful homicide, and the like) in the absence of evidence thereof, the existence of that fact may be made an affirmative defense by specifically imposing the burden of proof upon the defendant or by describing the particular fact as an exception to the defined crime. If the defendant is not to be so foreclosed, the statute may be drafted in terms of a presumption or prima facie evidence.

The Commission recognizes that in some instances, as a practical matter, it will be difficult or virtually impossible for the prosecution to produce evidence of an essential element of an offense. That is especially so when the element involves proof of a negative fact (*e.g.*, a possessor of narcotics did not have a doctor's prescription therefor) or a fact solely or peculiarly within the defendant's knowledge (*e.g.*, that he defaced the identification marks on a pistol or revolver). Nonetheless, it is and has been the prosecution's burden on all of the evidence to persuade the trier of fact beyond a reasonable doubt of the defendant's guilt of the offense charged. The Commission's purpose has been to reconcile these two policies so that an undue burden of producing evidence is not imposed on the prosecution while, at the same time, maintaining and not relaxing its burden of persuasion; it is believed that Section 607 accomplishes this purpose.

§ 608. Matters Listed in Former Code of Civil Procedure Section 1963

Comment. Section 1963 of the Code of Civil Procedure (superseded by Articles 3 and 4 (§§ 630-667) of this chapter) lists 40 rebuttable presumptions. Many of these presumptions do not meet the criteria of presumptions set forth in this article. Many do not meet even the definition of a presumption in Section 1959 of the Code of Civil Procedure (superseded by Evidence Code Section 600). Some do not arise from the establishment of a preliminary fact—for example, the presumptions of due care and innocence. Others have no underlying public policy and arise under such varying circumstances that no fixed conclusion should be required in every case—for example, the presumption of marriage from common reputation. In some cases, the 1872 draftsmen used the language of presumptions to state merely the admissibility of evidence—for example, the presumption that the regular course of business has been followed merely indicates that evidence of a business practice or custom is admissible as evidence that the practice or custom was followed on a particular occasion. Such provisions are not continued as presumptions in these statutes.

Similarly, the presumption that a condition continues to exist "[a]t most . . . is a device to justify the admission of evidence of [the condition] at times prior" to the time when its existence is crucial, "but . . . such evidence would be admissible in any event, if within the bounds of materiality." People v. Wolff, 61 Cal.2d ___, ___, 40 Cal. Rptr. 271, 285, 391 P.2d 959, 973 (1964).

The provisions of Section 1963 that meet the criteria of presumptions in this article are recodified in Articles 3 and 4 (Sections 630-667) of this chapter. The substance of other provisions of Section 1963 has been continued in a variety of ways. The substantive meaning of some of these provisions has been incorporated into appropriate sections of the [redacted]. See, *e.g.*, [redacted] EVIDENCE CODE § 445. Others have been added to the maxims of jurisprudence in the Civil Code.

Evidence Code.

The provisions of Section 1963 that are not continued as presumptions in these statutes are not continued as common law presumptions either. Section 608 makes this clear. In particular cases, of course, the jury may be permitted to infer the existence of a fact that would have been presumed under Section 1963. The repeal of these presumptions will not affect the process of drawing inferences. Section 608 also makes this clear. The repeal merely means that the presumed fact is not required to be found in all cases in which the underlying fact is established.

Of course, Section 608 will have no effect on any common law presumptions that were not listed in Section 1963.

Article 2. Conclusive Presumptions

§ 620. Conclusive Presumptions

Comment. This article supersedes and continues in effect without substantive change the provisions of subdivisions 2, 3, 4, and 5 of Section 1962 of the Code of Civil Procedure. Other statutes not listed in this article also provide conclusive presumptions. See, *e.g.*, CIVIL CODE § 3440. There may also be a few nonstatutory conclusive presumptions. See WITKIN, CALIFORNIA EVIDENCE § 63 (1958).

Conclusive presumptions are not evidentiary rules so much as they are rules of substantive law. Hence, the Commission has not recommended any substantive revision of the conclusive presumptions contained in this article.

§ 621. Legitimacy

Comment. Section 621 restates and supersedes subdivision 5 of Code of Civil Procedure Section 1962.

§ 622. Facts Recited in Written Instrument

Comment. Section 622 restates and supersedes subdivision 2 of Code of Civil Procedure Section 1962.

§ 623. Estoppel by Own Statement or Conduct

Comment. Section 623 restates and supersedes subdivision 3 of Code of Civil Procedure Section 1962.

§ 624. Estoppel of Tenant to Deny Title of Landlord

Comment. Section 624 restates and supersedes subdivision 4 of Code of Civil Procedure Section 1962.

Article 3. Presumptions Affecting the Burden of Producing Evidence

§ 630. Presumptions Affecting the Burden of Producing Evidence

Comment. Article 3 sets forth a list of presumptions, recognized in existing law, that are classified here as presumptions affecting the burden of producing evidence. The list is not exhaustive. Other presumptions affecting the burden of producing evidence may be found in other codes. Others will be found in the common law. Specific statutes will classify some of these, but some must await classification by the courts. The list here, however, will eliminate any uncertainty as to the proper classification for the presumptions in this article.

§ 631. Money Delivered by One to Another

Comment. Section 631 restates and supersedes the presumption in subdivision 7 of Code of Civil Procedure Section 1963.

§ 632. Thing Delivered by One to Another

Comment. Section 632 restates and supersedes the presumption in subdivision 8 of Code of Civil Procedure Section 1963.

§ 633. Obligation Delivered Up to the Debtor

Comment. Section 633 restates and supersedes the presumption in subdivision 9 of Code of Civil Procedure Section 1963.

§ 634. Person in Possession of Order on Himself

Comment. Section 634 restates and supersedes the presumption found in subdivision 13 of Code of Civil Procedure Section 1963.

§ 635. Obligation Possessed by Creditor

Comment. The presumption in Section 635 is a common law presumption recognized in the California cases. *E.g.*, *Light v. Stevens*, 159 Cal. 288, 113 Pac. 659 (1911).

§ 636. Payment of Earlier Rent or Installments

Comment. Section 636 restates and supersedes the presumption in subdivision 10 of Code of Civil Procedure Section 1963.

§ 637. Ownership of Things Possessed

Comment. Section 637 restates and supersedes the presumption found in subdivision 11 of Code of Civil Procedure Section 1963.

§ 638. Ownership of Property by Person Who Exercises Acts of Ownership

Comment. Section 638 restates and supersedes the presumption found in subdivision 12 of Code of Civil Procedure Section 1963. Subdivision 12 of Code of Civil Procedure Section 1963 provides that a presumption of ownership arises from common reputation of ownership. This is inaccurate, however, for common reputation is not admissible to prove private title to property. *Berniaud v. Beecher*, 76 Cal. 394, 18 Pac. 598 (1888); *Simons v. Inyo Cerro Gordo Co.*, 48 Cal. App. 524, 192 Pac. 144 (1920).

§ 639. Judgment Correctly Determines Rights of Parties

Comment. Section 639 restates and supersedes the presumption found in subdivision 17 of Code of Civil Procedure Section 1963. The presumption involved here is that the judgment correctly determines that one party owes another money, or that the parties are divorced, or their marriage has been annulled, or any similar rights of the parties. The presumption does not apply to the facts underlying the judgment. For example, a judgment of annulment is presumed to determine correctly that the marriage is void. *Clark v. City of Los Angeles*, 187 Cal. App.2d 792, 9 Cal. Rptr. 913 (1960). However, the judgment may not be used to establish presumptively that one of the parties was guilty of fraud as against some third party who is not bound by the judgment.

In a few cases, a judgment may be used as evidence of the facts necessarily determined by the judgment. See, *e.g.*, [redacted]. But, even in those cases, the judgments do not presumptively establish the facts determined; they are merely evidence.

EVIDENCE CODE §§ 1300-1302.

§ 640. Writing Truly Dated

Comment. Section 640 restates and supersedes the presumption in subdivision 23 of Code of Civil Procedure Section 1963.

§ 641. Letter Received in Ordinary Course of Mail

Comment. Section 641 restates and supersedes the presumption in subdivision 24 of Code of Civil Procedure Section 1963.

§ 642. Conveyance by Person Having Duty to Convey Real Property

Comment. Section 642 restates and supersedes the presumption in subdivision 37 of Code of Civil Procedure Section 1963.

§ 643. Authenticity of Ancient Document

Comment. Section 643 restates and supersedes the presumption found in subdivision 34 of Code of Civil Procedure Section 1963. Although the statement of the ancient documents rule in Section 1963 requires the document to have been acted upon as if genuine before the presumption applies, some recent cases have not insisted upon this requirement. *Estate of Nidever*, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960); *Kirkpatrick v. Tapo Oil Co.*, 144 Cal. App.2d 404, 301 P.2d 274 (1956). The requirement that the document be acted upon as genuine is, in substance, a requirement of the possession of property by those persons who would be entitled to such possession under the document if it were genuine. See 7 WIGMORE, EVIDENCE §§ 2141, 2146; (3d ed. 1940); *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IX. Authentication and Content of Writings)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 101, 135-137 (1964). Giving the ancient documents rule a presumptive effect—*i.e.*, *requiring* a finding of the authenticity of an ancient document—seems justified when it is a dispositive instrument and the persons interested in the matter have acted upon the instrument for a period of at least 30 years as if it were genuine. Evidence which is not of this strength may be sufficient in particular cases to warrant an inference of genuineness and thus justify the admission of the document into evidence, but the presumption should be confined to those cases where the evidence of genuineness is not likely to be disputed. See 7 WIGMORE, EVIDENCE § 2146 (3d ed. 1940). Accordingly, Section 643 limits the presumptive application of the ancient documents rule to dispositive instruments. Cf. EVIDENCE CODE § 1419.

§ 644. Book Purporting to Be Published by Public Authority

Comment. Section 644 restates and supersedes the presumption in subdivision 35 of Code of Civil Procedure Section 1963.

§ 645. Book Purporting to Contain Reports of Cases

Comment. Section 645 restates and supersedes the presumption found in subdivision 36 of Code of Civil Procedure Section 1963.

Article 4. Presumptions Affecting the Burden of Proof

§ 660. Presumptions Affecting the Burden of Proof

Comment. In some cases it may be difficult to determine whether a particular presumption is a presumption affecting the burden of

proof or a presumption affecting the burden of producing evidence. To avoid uncertainty, it is desirable to classify as many presumptions as possible. Article 4 (§§ 660-667), therefore, lists several presumptions that are to be regarded as presumptions affecting the burden of proof. The list is not exclusive. Other statutory and common law presumptions that affect the burden of proof must await classification by the courts.

§ 661. Legitimacy

Comment. Section 661 restates and supersedes the presumption found in Sections 193, 194, and 195 of the Civil Code and subdivision 31 of Code of Civil Procedure Section 1963 as these sections have been interpreted by the courts.

Civil Code Section 194 provides a presumption of legitimacy for children born within ten months after the dissolution of a marriage. The courts have said that the ten-month period referred to is actually 300 days. *Estate of McNamara,* 181 Cal. 82, 183 Pac. 552 (1919). Hence, the more accurate time period has been substituted for the ten-month period referred to in Section 194.

As under existing law, the presumption may be overcome only by clear and convincing proof. *Kusior v. Silver,* 54 Cal.2d 603, 7 Cal. Rptr. 129, 354 P.2d 657 (1960).

Of course, this presumption can be applied only when the conclusive presumption of legitimacy stated in Section 621 is inapplicable. *Kusior v. Silver,* 54 Cal.2d 603, 7 Cal. Rptr. 129, 354 P.2d 657 (1960).

§ 662. Owner of Legal Title to Property Is Owner of Beneficial Title

Comment. Section 662 codifies a common law presumption recognized in the California cases. The presumption may be overcome only by clear and convincing proof. *Olson v. Olson,* 4 Cal.2d 434, 437, 49 P.2d 827, 828 (1935); *Rench v. McMullen,* 82 Cal. App.2d 872, 187 P.2d 111 (1947).

§ 663. Ceremonial Marriage

Comment. Section 663 codifies a common law presumption recognized in the California cases. *Estate of Hughson,* 173 Cal. 448, 160 Pac. 548 (1916); *Wilcox v. Wilcox,* 171 Cal. 770, 155 Pac. 95 (1916); *Freeman S.S. Co. v. Pillsbury,* 172 F.2d 321 (9th Cir. 1949).

§ 664. Official Duty Regularly Performed

Comment. Section 664 restates and supersedes subdivision 15 of Code of Civil Procedure Section 1963.

§ 665. Arrest Without Warrant

Comment. Section 665 codifies a common law presumption recognized in the California cases. *People v. Agnew,* 16 Cal.2d 655, 107 P.2d 601 (1940). Under this presumption, if a person arrests another without the color of legality provided by a warrant, the person making the arrest must prove the circumstances that justified the arrest without a warrant. *Badillo v. Superior Court,* 46 Cal.2d 269, 294 P.2d 23 (1956); *Dragna v. White,* 45 Cal.2d 469, 471, 289 P.2d 428, 430 (1955) ("Upon proof of [arrest without process] the burden is on the defendants to prove justification for the arrest.").

§ 666. Judicial Action Lawful Exercise of Jurisdiction

Comment. Section 666 restates and supersedes the presumption in subdivision 16 of Code of Civil Procedure Section 1963. Under existing law, the presumption applies only to courts of general jurisdiction; the presumption has been held inapplicable to a superior court in California when acting in a special or limited jurisdiction. *Estate of Sharon,* 179 Cal. 447, 177 Pac. 283 (1918). The presumption also has been held inapplicable to courts of inferior jurisdiction. *Santos v. Dondero,* 11 Cal. App.2d 720, 54 P.2d 764 (1936). There is no reason to perpetuate this distinction insofar as the courts of California and of the United

States are concerned. California's municipal and justice courts are served by able and conscientious judges and are no more likely to act beyond their jurisdiction than are the superior courts. Moreover, there is no reason to suppose that a superior court or a federal court is less respectful of its jurisdiction when acting in a limited capacity (for example, as a juvenile court) than it is when acting in any other capacity. Section 666, therefore, applies to any court or judge of any court of California or of the United States. So far as other states are concerned, the distinction is still applicable, and the presumption applies only to courts of general jurisdiction.

§ 667. Death of Person Not Heard From in Seven Years

Comment. Section 667 restates and supersedes the presumption in subdivision 26 of Code of Civil Procedure Section 1963.