63 8/7/67

Memorandum 67-54

Subject: Study 63 - Evidence Code

Attached as Exhibit I (pink) is an article by Justice Molinari concerning the presumptions provisions of the Evidence Code.

I am sure you will find the article of interest. However, the article suggests no changes in the new code. Perhaps the article would motivate the Commission to give a higher priority to its task of classifying the presumptions in the various California codes. We have completed work on the Agricultural Code and the Commercial Code. Jon Smock is doing a research study on the Business and Professions Code and the Code of Civil Procedure. We anticipate that we will submit recommendations on those codes to the 1969 legislative session.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 67-54

EXHIBIT I

THE PRESUMPTION TAKES ON A NEW LOOK IN CALIFORNIA

By HON. JOHN B. MOLINARI*

The long awaited demise of the presumtion-is-evidence doctrine in California has finally taken place, not by judicial fiat, as hoped for by Justice Traynor in *Speck v. Sarver*,[1] but by legislative elimination resulting from the adoption of the Evidence Code which became effective on January 1, 1967.[2] This new code recommended to the Legislature by the California Law Revision Commission differs substantially from the Uniform Rules of Evidence,[3] the adoption of which it was initially authorized to consider,[4] and brings about important changes in existing California law. Among these is the Code's significant and novel treatment of presumptions. These changes can best be appreciated by a consideration of the nature and function of the presumption in California under prior law.

PROLOGUE

Courts and writers are in general agreement that a presumption is an assumption of fact that a rule of law requires to be assumed when some other fact is established. They also seem to agree that the presumption is a procedural device for the fair apportionment between the litigants of the burden of going forward with the evidence, that is, that when a party has a presumption in his favor, such presumption may establish a prima facie case or prima facie proof of a material issue requiring his adversary to introduce evidence in order to avoid the risk of a directed verdict or a peremptory finding against him on a material issue of fact. The courts and writers, however, reach a parting of the ways as to the nature of the showing required to overcome a rebuttable presumption. Some contend that such a presumption disappears upon the introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact;[5] others

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[1] 20 Cal.2d 585, 128 P.2d 16 (1942).

[2] CAL. EVID. CODE §12.

[3] Promulgated by the National Conference of Commissioners on Uniform Laws in 1953.

[4] Ass. Con. Res., Cal. Stats. 1956, ch. 42 at 263.

[5] Cases cited 22 C.J. 156, n. 34; IX WIGMORE, EVIDENCE §2491 (3d ed. 1940); 1 JONES, EVIDENCE §32 (2d ed. 1908); and Speck v. Sarver, 20 Cal.2d 585, 592, 128 P.2d 16, 20 (1942).

that it endures until the trier of fact is persuaded as to the nonexistence of the presumed fact.[6] California law, heretofore gravitating towards the latter theory, lengthened the life of the presumption so that it almost always endured until the final decision in the case. This resulted from the long-established rule in this state, reaffirmed in *Smellie v. Southern Pacific Co.*,[7] and thereafter followed by the California Supreme Court,[8] that a presumption was to be regarded as evidence to be weighed with all other evidence in the case. Accordingly, under prior California law, presumptions did not merely affect the burden of going forward with the evidence, but they constituted independent evidence to be weighed against other evidence. The rationale underlying this rule was that it was dictated by statutory classification and description.[9] Thus came into being the "Presumption-Is-Evidence" doctrine in California.

THE PRESUMPTION-IS-EVIDENCE DOCTRINE

In his dissenting opinions in *Speck v. Sarver*[10] and *Scott v. Burke*,[11] Justice Traynor took up the cudgels on the side of those who contended that the then California rule that presumptions may be weighed as evidence was unrealistic and a source of confusion.[12] Articulating persuasively the mischievous consequences and the prejudicial results of the presumption-is-evidence doctrine which he termed a "judge-made-rule," Justice Traynor

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[6] O'Dea v. Amodeo, 118 Conn. 58, 170 A. 486 (1934); Clark v. Diefendorf, 109 Conn. 507, 147 A.33 (1929); Beggs v. Metropolitan Life Ins. Co., 219 Iowa 24, 257 N.W. 445 (1934); Gillett v. Michigan United Traction Co., 205 Mich. 410, 171 N.W. 536 (1919); Klunk v. Hocking Valley Ry. Co., 74 Ohio St. 125, 77 N.E. 752 (1906); *and see* Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933); McBaine, *Presumptions, Are They Evidence?*, 26 CALIF. L. REV. 519, 533 (1938); Speck v. Sarver, 20 Cal.2d 585, 592–3, 128 P.2d 16, 20–21 (1942).

[7] 212 Cal. 540, 549–55, 299 Pac. 529, 532–535 (1931).

[8] People v. Chamberlain, 7 Cal.2d 257, 260, 60 P.2d 299, 300 (1936); Westberg v. Willde, 14 Cal.2d 360, 365, 94 P.2d 590, 593 (1939); Speck v. Sarver, 20 Cal.2d 585, 587, 128 P.2d 16, 17 (1942); Wolstenholme v. City of Oakland, 54 Cal.2d 48, 53, 351 P.2d 321, 323–4, 4 Cal.Rptr. 153, 155–6 (1960); Scott v. Burke, 39 Cal.2d 388, 394–95, 247 P.2d 313, 316–317 (1952); People v. Stevenson, 58 Cal.2d 794, 796, 376 P.2d 297, 298, 26 Cal.Rptr. 297, 298 (1962).

[9] *See* CAL. CODE CIV. PROC. §§1832, 1957, 1961, 1963 (1), (4), 2061 (2); *See* Smellie v. Southern Pacific Co., 212 Cal. 540, 551–52, 299 Pac. 529, 533–534 (1931); Scott v. Burke, 39 Cal.2d 388, 394–95, 247 P.2d 313, 316–317 (1952); Speck v. Sarver, 20 Cal.2d 585, 594, 128 P.2d 16, 21 (1942); WITKIN, CALIFORNIA EVIDENCE 80, 122 (2d ed. 1966); *McBaine, supra* note 6 at 557–61.

[10] 20 Cal.2d 585, 590, 128 P.2d 16, 19 (1942).

[11] 39 Cal.2d 388, 402, 247 P.2d 313, 321 (1952).

[12] For criticisms of the prior California view, *see*: 31 CALIF. L. REV. 105, 108 (1942); 31 CALIF. L. REV. 316 (1943); 26 CALIF. L. REV. 519 (1938); 20 CALIF. L. REV. 189 (1932); 18 CALIF. L. REV. 418 (1930); 13 CALIF. L. REV. 472 (1925); 16 SO. CAL. L. REV. 245 (1943); 2 STAN. L. REV. 559 (1950); 4 HASTINGS L. J. 124, 134 (1953); 2 U.C.L.A. L. REV. 21 (1954).

urged its repudiation by the courts rather than by the Legislature because "it involves . . . technical questions of procedure that are peculiarly within the province of courts."[13]

In *Speck*, Justice Traynor pointed out the impossibility of proving the nonexistence of the fact presumed when the jury was free to regard the presumption as superior to any proof against it. His thesis was that it was mentally impossible for a jury to weigh a presumption as evidence because of the mental gymnastics involved in weighing "a rule of law on the one hand against physical objects and personal observations on the other in order to determine which would more probably establish the existence or nonexistence of a fact.[14]

The criticisms of the presumption-is-evidence doctrine generally fall into two categories. The first is that a litigant cannot, generally speaking, be granted a nonsuit or a directed verdict by producing evidence contrary to the presumed fact.[15] The rationale forming the basis of this general rule is that a presumption is not dispelled as a matter of law by evidence produced by the opponent, even when that evidence is so strong that no reasonable man could find, from all the evidence in the case, that the presumed fact exists, because, since a presumption is treated as evidence, it raises a conflict with the opponent's contrary evidence requiring that such evidence be disregarded under the rule applicable to peremptory rulings.[16] The general rule, however, was subject to certain exceptions and qualifica-

[13] Speck v. Sarver, 20 Cal.2d 585, 598, 128 P.2d 16, 23 (1942).

[14] In support of his thesis Justice Traynor stated further as follows: "The burden of proof may well be impossible for a litigant to sustain if a presumption is applied as evidence against him. He must, under such a rule, establish the existence of certain facts by a preponderance of the probabilities, while a presumption persists that these facts do not exist and the jury is free to weigh this presumption as evidence upon which to find that the facts do not exist despite physical evidence that they do.

Even when a presumption treated as evidence is applied in favor of the party with the burden of proof, the results are incongruous. The other litigant is in effect informed by the court that his opponent has the burden of proving the facts by the preponderance of the probabilities but there is a presumption that the facts thus to be proved are true, and the jury is free to find on the basis of this presumption that the facts do exist despite physical evidence that they do not." 20 Cal.2d at 594, 128 P.2d at 21.

[15] Smellie v. Southern Pacific Co., 212 Cal. 540, 299 Pac. 529 (1931).

[16] In a jury trial, a nonsuit or directed verdict may be granted only when—disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence—the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. Seneris v. Haas, 45 Cal.2d 811, 821, 291 P.2d 915, 921 (1955); Estate of Lances, 216 Cal. 397, 400, 14 P.2d 763 (1932); 2 WITKIN, CALIFORNIA PROCEDURE, *Trial* §§125-27 (1954) and cases cited therein; CAL. CODE CIV. PROC. §§581(c), 629-30. In trials by the court, the judge weighs the evidence where a motion for nonsuit is made. CAL. CODE CIV. PROC. §631.8; 2 WITKIN, CALIFORNIA PROCEDURE, *Trial*, §§123, 127(b) (Supp. 1965).

tions, which added further difficulty and confusion in determining whether a presumption should be weighed with other evidence or whether it was dispelled as a matter of law. Thus, a presumed fact was dispelled as a matter of law where it was *wholly* irreconcilable with the uncontradicted testimony of the party relying on it or of such party's own witnesses.[17] However, where the testimony of the party relying on the presumption or of his witnesses was the product of mistake or inadvertence, such testimony did not operate to dispel the presumption.[18] Another recognized exception to the general rule was that which came into play where the evidence of the *opposite* party was *absolutely* conclusive, as, for example, where the presumption of death of a person who has not been heard from in seven years[19] was dispelled by the production of the missing person in court.[20]

The second area of criticism of the presumption-is-evidence doctrine is that instructions on the doctrine have a tendency to confuse and mislead the jury. Under the prior practice, the trial judge instructed the jury as to the definition of a presumption; advised them of the presumptions that may have arisen in the case; instructed them that unless a presumption is declared by law to be conclusive, it may be controverted by other evidence, but that if it is not controverted, the jury is bound to find in accordance with the presumption; and charged them that the fact that a presumption arises is not to be taken by them to mean a change in the burden of proof.[21] As noted by Justice Traynor, in *Speck*, such instructions require the exercise on the part of the jury of "mental gymnastics" involving the weighing of a rule of law against physical objects and personal observation.[22] Dean Prosser, quoting an unidentified English judge, puts the difficulty of weighing tangible evidence against the fictional evidence presented in the form of a presumption thusly: A rule of law "can no more be balanced against evidence 'than ten pounds of sugar can be weighed against half-past two in the afternoon.' "[23]

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[17] Leonard v. Watsonville Comm. Hosp., 47 Cal.2d 509, 517, 305 P.2d 36, 41 (1956); Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 9, 210 Pac. 269, 273 (1922).

[18] *See* Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 210 Pac. 269 (1922); Leonard v. Watsonville Comm. Hosp., 47 Cal.2d 509, 517 n.4, 305 P.2d 36, 41 n.4 (1956).

[19] CAL. CODE CIV. PROC. §1963(2).

[20] *See* Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 70, 77 P.2d 1059, 1063 (1938); Smellie v. Southern Pacific Co., 212 Cal. 540, 552, 299 Pac. 529, 533 (1931); Leonard v. Watsonville Comm. Hosp., 47 Cal.2d 509, 305 P.2d 36 (1956).

[21] *See* B.A.J.I., Inst. No. 22 (Supp. 1964). CAL. CODE CIV. PROC. §1961 provides as follows: "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted the jury are bound to find according to the presumption."

[22] Speck v. Sarver, 20 Cal.2d 585, 594, 128 P.2d 16, 21 (1942).

[23] Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 225 (1949).

The difficulty experienced by a jury in weighing concrete evidence against evidence of a fictional nature under prior law was transcended when it was called upon to tax its mental processes in attempting to weigh one rule of law against another rule of law. Thus, since neither a rebuttable presumption nor an inference was to be accorded greater weight by the trier of facts than was the other, the jury was subjected to the almost impossible task of determining whether greater weight should be given to the res ipsa loquitur inference or to the presumptions of innocence and due care which conflict with such inference.[24]

The apex of the difficulty confronting the trier of fact was eminently demonstrated under the subject doctrine where the plaintiff and defendant each invoked some presumption in his favor on the same issue. In such a situation, by what mental process was the jury to determine whether a rebuttable presumption was controverted by another rebuttable presumption? It is readily apparent that in the battle between the two presumptions the jury was placed in an impossible impasse. Thus, the jury could be called upon to weigh the presumption of innocence (Cal. Pen. Code §1102; Cal. Code Civ. Proc. §1963 (1)) against the presumption of undue influence by a trustee (Cal. Civ. Code §2235);[25] or it could be required, where the validity of a second marriage was attacked by evidence of a prior marriage, and there is no direct evidence of death or divorce terminating the prior marriage, to weigh the presumption that the status created by the prior marriage continues (Cal. Code Civ. Proc. §1963 (1)).

Under the Uniform Rules of Evidence, a crutch is given the jury to lead it out of its impasse in the form of an application of the principle that the presumption shall be applied which is founded on the "weightier considerations of policy and logic," and that if there is no such preponderance both presumptions shall be disregarded.[26] While no such principle appeared to be applicable in California under the prior law because of the "presumption-is-evidence doctrine," which seemed to require the weighing of one presumption against another, the courts were compelled to resolve the irreconcilable conflict in cases dealing with particular presumptions. Accordingly, in *People v. Hewlett*,[27] the conflict between the presumption of innocence and the presumption of undue influence by a trustee was resolved on the basis that "a presumption tending to show guilt, *when connected with other facts*, may outweigh in the jury's mind, the presumption

[24] Scott v. Burke, 39 Cal.2d 388, 397–99, 247 P.2d 313, 318–20 (1952)

[25] *See* People v. Hewlett, 108 Cal.App.2d 358, 369–74, 239 P.2d 150, 157–160 (1951).

[26] Uniform Rule 15 and Comment; WITKIN, CALIFORNIA EVIDENCE §108 at 126–27 (2d ed. 1966); *see also* 44 HARV. L. REV. 932 (1931); 2 U.C.L.A.L. REV. 29 (1954); MC CORMICK, LAW OF EVIDENCE 652 (1954).

[27] 108 Cal.App.2d 358, 369–74, 239 P.2d 150, 157–160 (1951).

of innocence." (Emphasis added.)[27a] In *Rader v. Thrasher*,[28] the presumption of lack of consideration where a fiduciary obtains an advantage (Cal. Civ. Code §2235) was held to prevail over the presumption of consideration arising from a written instrument (Cal. Code Civ. Proc. §1963 (39)) on the rationale that the former, as a special presumption relating to a particular subject will govern against the latter as a general presumption applicable to the same subject.[29] In situations involving the validity of a second marriage, the California courts appeared to follow a principle akin to that of Uniform Rule 15 in apparent opposition to the "presumption-is-evidence" doctrine, by holding that the presumption of innocence (in support of the validity of the second marriage) was entitled to greater weight than the presumption that the status created by the prior marriage continues. (Cal. Code Civ. Proc. §1963 (32).) They did so, however, upon the basis of a derivative presumption that the prior marriage was dissolved by death or divorce having its foundation upon the rule that the burden is cast upon the party asserting guilt or immorality to prove that the first marriage had not ended before the second marriage.[30]

The foregoing is illustrative of the difficulties which confronted both the judge and jury in the problem of jury instruction with respect to rebuttable presumptions. Moreover, since the jury was simply told that a presumption is evidence and that it was bound to find in accordance with the presumption if it was not controverted by other evidence, the jury was apt to be impressed that a presumption, which finds its basis in some underlying legal policy of which the jury was not informed, had greater weight than the evidence adduced against it. There was danger, furthermore, that because the presumption-is-evidence doctrine found itself the subject of such a special instruction that the jury might reasonably tend to interpret the instruction as giving the presumption more than the probative value to which it was entitled. Accordingly, if the instruction was so interpreted by the jury, it had the effect, when the presumption worked against the party who had the burden of proof, of enlarging that party's burden.[31] Finally, it should be pointed out that the instructions given under prior law—since

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[27a] *Id.* at 373, 239 P.2d at 159.

[28] 57 Cal.2d 244, 252, 368 P.2d 360, 365, 18 Cal.Rptr. 736, 741 (1962).

[29] 57 Cal.2d at 252, 368 P.2d at 365, 18 Cal.Rptr. at 741, citing CAL. CODE CIV. PROC. §1859.

[30] *See* Hunter v. Hunter, 111 Cal. 261, 267, 43 Pac. 756, 757 (1896); Estate of Borneman, 35 Cal.App.2d 455, 459, 96 P.2d 182, 184 (1939); Hamburgh v. Hys, 22 Cal.App.2d 508, 509, 71 P.2d 301, 302 (1937); Estate of Winder, 98 Cal.App.2d 78, 86, 219 P.2d 18, 25 (1950); and *see* People v. Burke, 43 Cal.App.2d 316, 318, 110 P.2d 685, 686 (1941).

[31] "The burden of proof may well be impossible for a litigant to sustain if a presumption is applied as evidence against him." Speck v. Sarver, 20 Cal.2d 585, 594, 128 P.2d 16, 21 (1942).

they did not and could not define the quantum of proof required to dispel the presumption—the jury was left to decide for itself what such proof should be.

THE NEW EVIDENCE CODE

Turning to the character of the presumption under the new Evidence Code we note, initially, that a presumption is defined as follows: "A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action.[32] A presumption is not evidence." The second sentence of the definition, while strictly not definitive, was apparently added to make certain the repudiation of the presumption-is-evidence doctrine.[33]

Under the Evidence Code, presumptions are classified as either conclusive or rebuttable.[34] This classification is the same as under prior law.[35] Since conclusive presumptions are, in essence, rules of substantive law rather than evidentiary rules, their function remains unchanged under the Evidence Code. It sets forth, without substantive change,[36] the conclusive presumptions previously contained in the Code of Civil Procedure, and recognizes, also, the existence of other conclusive presumptions which have their genesis in decisional or other statutory law.[37] Accordingly, when any of the conclusive presumptions provided for in the Evidence Code,[38] or otherwise declared by law to be conclusive, are established in the action, the assumption of fact required to be made by such presumption is uncontrovertible.

The significant parting of the ways between the prior law and the Evidence Code is with respect to rebuttable presumptions which the Evidence Code classifies into two types. A rebuttable presumption is no longer evidence in the case—it is now either a presumption which affects the burden of producing evidence or one which affects the burden of proof.[39]

The presumption affecting the burden of producing evidence[40] requires the trier of fact to assume the existence of the presumed fact until evidence

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[32] CAL. EVID. CODE §600(a). This part of the definition is substantially the same as that contained in former §1959 of the Code of Civil Procedure.

[33] *See* CAL. EVID. CODE §600, Comment.

[34] CAL. EVID. CODE §601.

[35] See former CAL. CODE CIV. PROC. §§1961, 1962 and 1963.

[36] See Law Revision Commission Comment to CAL. EVID. CODE §620.

[37] CAL. EVID. CODE §620.

[38] CAL. EVID. CODE §§621–624.

[39] CAL. EVID. CODE §601.

[40] CAL. EVID. CODE §§603 and 604. This presumption is in conformity with the theory espoused by Professor Thayer that the only function of a presumption is to fix "the duty of going forward with proof." THAYER, PRELIMINARY TREATISE ON EVIDENCE 313–52 (1898).

is introduced which would support a finding of its nonexistence. If evidence is introduced sufficient to support a finding that the assumed fact does not exist, then the presumption vanishes, and the trier of fact determines the existence or nonexistence of the presumed fact from the evidence without regard to the presumption. If the opponent fails to meet the burden of coming forward with sufficient evidence, he loses the issue as a matter of law and the proponent of the presumption is entitled to a peremptory ruling that the fact assumed by the presumption exists. An example of a presumption affecting the burden of producing evidence is that which states that a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.[41] If a party proves that a letter was correctly addressed and properly 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 of the letter, the presumption is removed from the case and the trier of fact must decide whether or not the letter was received by weighing the denial against the inference of receipt arising from the proof of mailing.

The presumptions affecting the burden of producing evidence are specifically set out in the Evidence Code.[42] These are presumptions which were recognized as rebuttable presumptions under prior law. However, they are not exclusive, as other presumptions affecting the burden of producing evidence may be found in other codes and in the common law. Whether these are to be classified as presumptions affecting the burden of producing evidence depends upon whether they fall under the criteria established for such presumptions.[43] Some will be classified by specific statute, while others must await classification by the courts.[44]

The other type of rebuttable presumption under the Evidence Code is that affecting the burden of proof.[45] The effect of this presumption is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.[46] This presumption is more enduring than the presumption affecting the burden of producing evidence because it not only shifts the burden of producing evidence upon the party against whom it operates but also imposes upon that party the burden of persuasion. An example of a presumption affecting the burden of proof

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[41] CAL. EVID. CODE §641.

[42] CAL. EVID. CODE §§631–45.

[43] CAL. EVID. CODE §§630 and 603.

[44] See Law Revision Commission Comment to CAL. EVID. CODE §630.

[45] CAL. EVID. CODE §605.

[46] CAL. EVID. CODE §606.

is that which states that a person who has not been heard from in seven years is presumed dead.[47] Thus, if a party suing as the beneficiary of a life insurance policy proves that the insured has not been heard from in seven years, the trier of fact is required to find that the insured is dead in the absence of any believable contrary evidence. However, if the defendant produces evidence that the insured was seen in a foreign country within the seven-year period, such party has met the burden of producing evidence that the insured is alive. Such evidence does not, however, as in the case of a presumption which merely affects the burden of producing evidence, remove the presumption from the case. The presumption remains and suffices to support a finding that the insured is dead unless such evidence produced by the defendant satisfies the burden imposed upon him of persuading the trier of fact that the insured is alive.

As in the case of presumptions affecting the burden of producing evidence, certain presumptions affecting the burden of proof are set out in the Evidence Code.[48] Similarly, these presumptions were recognized as rebuttable presumptions under prior law. The presumptions affecting the burden of proof listed in the Evidence Code are not exclusive, however, as there are other statutory and common law presumptions which are recognized under existing law. Here, too, the classification will depend upon the criteria established for presumptions affecting the burden of proof.[49]

POLICY PROBLEMS

Since the Evidence Code does not attempt to classify every rebuttable presumption and leaves the classification of those not specifically listed to future determination by the Legislature or the courts according to the public policy that the respective type of rebuttable presumption is intended to implement,[50] it is obvious that in some cases it will be difficult to determine whether a particular presumption recognized by existing law, but not classified, is a presumption affecting the burden of proof, or a presumption affecting the burden of producing evidence. It is anticipated that an attempt will be made to achieve classification in as many instances as possible by statutory fiat in order to obviate the judicial quandry in which trial judges will be placed in attempting to classify a theretofore unclassified rebuttable presumption, particularly when such determination is thrust at the judge in the heat or hurry of a trial. Since the precise stand-

[47] CAL. EVID. CODE §667.

[48] CAL. EVID. CODE §§660–668.

[49] CAL. EVID. CODE §§660, 605. See Law Revision Commission Comment to §660.

[50] CAL. EVID. CODE §§603 and 605.

ards underlying the policy for a particular presumption are not definitively delineated,[51] resting as they do upon an uncertain mixture of convenience and social policy[52]—and in view of the numerous statutory and judge-made presumptions which exist and which continue to be created, it is apparent that the task of classification is not an easy one.

Already questions are presented, for example, as to the classification of the presumption of negligence arising from a violation of statute, ordinance, or regulation. Concern is also manifested as to the function of the doctrine of res ipsa loquitur under the Evidence Code. As to the former, pursuant to the recommendation of the Law Revision Commission to the 1967 Legislature, a bill has been introduced adding section 669 to the Evidence Code, thus providing that the presumption arising from a violation of statute is one affecting the burden of proof, and also making it clear that there need not be a criminal sanction for the violation, in order to bring the presumption into play.

With respect to res ipsa loquitur, the addition of section 646 to the Evidence Code to clarify the manner in which the doctrine functions under the Code has been proposed in the current session of the Legislature upon recommendation of the Commission. Under the proposed statute, the doctrine of res ipsa loquitur is placed in the category of a presumption affecting the burden of producing evidence. Accordingly, when the plaintiff has established the conditions giving rise to the doctrine, the jury is required to find the defendant negligent unless he comes forward with evidence that would support a finding that he used due care. If the defendant does come forward with such evidence, the presumptive effect of the doctrine vanishes. The facts giving rise to the presumption remain in the case, however, and the jury may draw the inference of negligence from these facts unless the defendant presents such conclusive evidence as to dispel the inference of negligence as a matter of law.[52a] In order to assist the jury in its factfinding function, the proposed statute provides that the court may, and upon request shall, instruct the jury that the facts that give rise to res ipsa loquitur constitute circumstantial evidence from which the jury can infer that the defendant failed to exercise due care.

PRESUMPTIONS AND THE TWO BURDENS

Since the rebuttable presumptions under the Evidence Code are classified as either presumptions affecting the burden of proof or presumptions af-

[51] The Evidence Code states that the respective presumptions are "established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." CAL. EVID. CODE §§603, 605.

[52] *See* MC CORMICK, LAW OF EVIDENCE §309 (1954).

[52a] *See* Leonard v. Watsonville Comm. Hosp. 47 Cal.2d 509, 305 P.2d 36 (1956).

fecting the burden of producing evidence, they are of necessity interrelated with the respective burden they affect. Accordingly, there is imposed upon the trial judge the important function of determining whether the proof of the fact in issue is essential to the claim for relief or defense that is being asserted by a party—thus allocating to it the burden of proof; or whether the particular fact in issue is one which merely requires a finding against a party as to that fact in the absence of the production of further evidence by such party—thus allocating the burden of producing evidence.

The allocation of the burden of proof deals with the obligation of a party to produce a particular state of conviction in the mind of the trier of fact as to the existence or nonexistence of a fact and rests normally on the party to whose case the fact is essential.[53] The burden of producing evidence, on the other hand, means the "obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue."[54] Accordingly, this last-mentioned burden is the one that is imposed upon a party who has the initial burden of introducing evidence or to make a prima facie case so as to avoid the risk of nonsuit or other determination against him on a particular issue.[55] In specifically providing for this burden the Evidence Code provides that "The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence"[56] and provides further, that "The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact."[57]

Alluding to the allocation of the burden of proof, note should be taken that the Evidence Code expands the basic rule that the burden of proof follows the burden of pleading in that it applies to issues not necessarily raised in the pleadings, but in its application—both as to pleading and proof—depends upon substantive law.[58] Accordingly, since substantive

[53] CAL. EVID. CODE §§115, 190 and 500. Section 115 provides that the burden of proof may require a party to establish the existence or nonexistence of a fact by proof beyond a reasonable doubt, or by a preponderance of the evidence by clear and convincing proof, and provides, that "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." The Evidence Code thus makes it clear, for example, that when a statute assigns the burden of proof in a criminal action, the prosecution must discharge the burden of proof beyond a reasonable doubt (§501), but recognizes, for example, that a defendant in a criminal action, as under existing law, must prove his insanity by a preponderance of the evidence. (§§501 and 522).

[54] CAL. EVID. CODE §110.

[55] WITKIN, CALIFORNIA EVIDENCE §193 (2d ed. 1966). *See also* MCCORMICK, LAW OF EVIDENCE, 656 (1954).

[56] CAL. EVID. CODE §550(a).

[57] CAL. EVID CODE §550(b).

[58] The criterion set up by the Evidence Code is whether the fact to be proved is essential to a party's claim for relief or defense. (§600; *see* Comment to §500; and *see* WITKIN, CALIFORNIA EVIDENCE §197.0 (2d ed. 1966)).

law determines the facts that must be shown to establish a cause of action or defense, the trial judge is required by the Evidence Code to make that determination and must instruct the jury as to which party bears the burden on a particular issue and whether that party is required to establish the existence or nonexistence of the fact in issue by a preponderance of the evidence or by proof beyond a reasonable doubt.[59] It should be noted, however, that the expansion of the basic burden of proof rule has resulted in the elimination of certain matters which, under prior law, were recognized as disputable presumptions. These matters have, by the Evidence Code, been restated as rules of the burden of proof since they do not meet the definition of presumption contained in section 600 of the Evidence Code. Thus, the claim that a person is guilty of crime or wrongdoing,[60] the claim that a person did not exercise care,[61] and the claim that a person is or was insane[62] are specifically delineated under the Evidence Code as specific issues as to which the party making the claim has the burden of proof. These specific issues, therefore, no longer give rise, respectively, to the presumption that a person is innocent of crime or wrong, that a person has exercised due care in the areas recognized by the decisions under prior law,[63] or that a person is or was sane, but are now preliminary allocations of the burden of proof in regard to the particular issue.[64] Of particular significance is the elimination of the presumption of due care which became an important part of negligence litigation in view of the former rule that such presumption was evidence to be weighed by the jury even against actual evidence of lack of due care.

The preliminary application of the burden of proof in regard to a particular issue, may be satisfied by proof of a fact giving rise to a presumption that *does* affect the burden of proof. Thus, in an action by a bailor against a bailee for damage to goods, the initial burden of proving negligence is on the bailor. However, when the bailor proves that undamaged

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[59] CAL. EVID. CODE §502.

[60] CAL. EVID. CODE §520. Formerly CAL. CODE CIV. PROC. §1963(1) providing for the disputable presumption "That a person is innocent of crime or wrong."

[61] CAL. EVID. CODE §521. Formerly CAL. CODE CIV. PROC. §1963(4) providing for the disputable presumption "That a person takes ordinary care of his own concerns."

[62] CAL. EVID. CODE §522. Formerly, the nonstatutory presumption of sanity was recognized in California by both civil and criminal cases. *See* Estate of Wright, 7 Cal.2d 348, 60 P.2d 434 (1936); People v. Daugherty, 40 Cal.2d 876, 899, 256 P.2d 911, 925 (1953).

[63] This presumption under prior law was applicable, for example, in a wrongful death action on behalf of a decedent (see Westberg v. Willde, 14 Cal.2d 360, 367, 94 P.2d 590, 594 (1939)) and where a living person suffered a loss of memory from the accident rendering him unable to testify in an action brought by him for personal injury. (*See* Brown v. Connolly, 62 Cal.2d 393, 395, 398 P.2d 596, 598, 42 Cal.Rptr. 324, 326 (1965).

[64] See Comment to CAL. EVID. CODE §500.

goods were delivered to the bailee, and that they were damaged while in the bailee's possession, a presumption(the presumed fact) arises that the bailee was negligent. The burden of proof thereupon devolves upon the bailee to persuade the trier of fact by a preponderance of the evidence of the nonexistence of the presumed fact—that is, that he was not negligent.[65]

Adverting to the burden of producing evidence, it should be noted that while at the outset of the trial this burden will coincide with the burden of proof, the burden of producing evidence may shift during the course of the trial from one party to the other, irrespective of the allocation of the burden of proof. Thus, if a party having the initial burden of producing evidence establishes a fact giving rise to a presumption, the burden of producing evidence will shift to the other party whether or not the presumption is one that affects the burden of proof. Accordingly, if it is part of the plaintiff's case, for example, to prove that a person is deceased, the burden of proof as to that fact is initially upon the plaintiff. If he offers evidence that the person has not been heard from in seven years, he fulfills the initial burden of producing evidence and a presumption arises that such person is dead. The burden then shifts to the defendant to produce evidence that the person in question is not dead, in default of which, he is subject to a nonsuit or directed verdict. If the defendant does produce sufficient evidence to sustain a finding that the person is not dead, the defendant has met the burden of producing evidence, entitling him to have the issue determined by the trier of fact. However, since the presumption which arose is one that affects the burden of proof, the burden is upon the defendant to prove by a preponderance of the evidence that the person is not dead.

PROVINCE OF THE COURT AND JURY

The Evidence Code provides generally that all questions of law are to be decided by the court.[66] Accordingly, the duty devolves upon the trial judge to determine in the first instance, as a matter of law, whether there is evidence sufficient to sustain a finding of the nonexistence of the presumed fact, whether the presumption relied upon is one affecting the burden of producing evidence or the burden of proof.

With regard to the presumption affecting the burden of producing evidence, if the trial judge determines that there is sufficient evidence to sustain a finding of the nonexistence of the presumption, the effect of such

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[65] See CAL. EVID. CODE §§605 and 606 and Comment to CAL. EVID. CODE §500; WITKIN, CALIFORNIA EVIDENCE §198 (2d ed. 1966); IX WIGMORE, EVIDENCE §2487 (3d ed. 1940); *and see* George v. Bekins Van & Storage Co., 33 Cal.2d 834, 840–841, 205 P.2d 1037, 1042 (1949).

[66] CAL. EVID CODE §310.

determination is to eliminate the presumption. In such instance, since the presumption has disappeared from the case, the judge does not have to say anything about it in his instructions but leaves to the jury the determination of the existence or nonexistence of the presumed fact from the evidence in the case. If, on the other hand, the judge determines that there is not evidence sufficient to sustain a finding of the nonexistence of the presumed fact, he should instruct the jury concerning the presumption. In instructing the jury on the presumption, consideration must be given by the trial judge as to whether the basic fact from which it arises has been established. If such basic fact has been established so that its existence is not a question of fact for the jury,[67] the jury should be instructed that the presumed fact is also established. However, if the basic fact which raises the presumption is in issue, the basic fact must first be determined by the jury. Accordingly, the judge should instruct the jury that if it finds the basic fact the jury must also find the presumed fact.[68] Thus, if the issue is whether a letter has been received in the ordinary course of mail and there is no evidence sufficient to sustain a finding that the letter was not received, the basic fact giving rise to the presumption is whether the letter was correctly addressed and properly mailed. In this instance the jury should be instructed that if it finds from the evidence that the letter was correctly addressed and properly mailed that then it must find the letter was received in the ordinary course of mail.

In the case of a presumption affecting the burden of proof, 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 its fact-finding process. As in the case of the presumption affecting the burden of producing evidence, if the basic fact from which the presumption arises is established as a matter of law, the judge should instruct the jury that the presumed fact is to be assumed until the jury is persuaded to the contrary by the requisite degree of proof. Thus if the testimony of a party to a marriage as to its solemnization is uncontradicted, the judge must instruct the jury that the marriage is presumed valid unless the party objecting persuades it by a preponderance of the evidence by clear and convincing proof that the marriage is invalid.[69] If, however, "the basic fact is a question for the jury, the judge should instruct the jury that, if it finds the

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[67] Such fact may have been established by uncontradicted judicial notice.

[68] See Comment to CAL. EVID. CODE §604.

[69] See CAL. EVID. CODE §663; Estate of Chandler, 113 Cal.App. 630, 633, 299 Pac. 110, 112 (1931); Estate of Crawford, 69 Cal.App.2d 609, 610-611, 160 P.2d 65, 66 (1945); Hughson Estate, 173 Cal. 448, 160 Pac. 548 (1916); Comment to CAL. EVID. CODE §606; *and see* MC CORMICK, LAW OF EVIDENCE §317 (1954).

basic fact, it must also find the presumed fact unless persuaded of the nonexistence of the presumed fact by the requisite degree of proof."[70] Accordingly, if A testified that a marriage was solemnized between her and B, and B denies such ceremony, the jury must find the basic fact as to whether the ceremonial marriage was in fact performed. If the jury determines that such a marriage was performed, then it is required to follow the judge's instruction that the marriage is presumed to be valid. However, if B introduces evidence that the marriage was solemnized by a person who had no such authority, then the jury, under appropriate instructions, must be instructed that if it is persuaded by clear and convincing evidence that the person performing the marriage had no authority to perform it, then it should find the nonexistence of the presumed fact that the marriage was valid.

CONCLUSION

The Evidence Code's important single contribution is the abolition of the "presumption-is-evidence" doctrine with its undesirable features requiring the weighing of conflicting presumptions, the weighing of concrete evidence against a presumption, and rendering it impossible to grant nonsuits or directed verdicts against the proponent of the presumptions even when conclusive evidence is produced contradicting the existence of the presumed fact.

There can be little doubt that on the whole the Evidence Code, in dealing with presumptions, provides a significant improvement to an area which has long been a source of confusion to judges and lawyers. In the attempt to provide a workable framework in this area of the law, the framers and authors of the Code have discarded the worst features of the existing law and retained the desirable characteristics of existing statutory and decisional law, blending it, where expedient, with the salient attributes of the Uniform Rules and the important modern texts on Evidence.

In view of its many innovations with respect to the law of presumptions, judges and lawyers will of necessity have to adjust to the new rules since in many instances the effect of the Code is to repeal knowledge previously gained and utilized. This will require study and changes in attitude. Many will not regard the new rules as ideal; others will see no purpose to the classification of rebuttable presumptions into two types; and judges may find the task of classification burdensome. Whatever its deficiencies, the new Code appears to provide a sensible and workable system for dealing with presumptions—a system vastly superior to that provided for under prior California law.

[70] Comment to CAL. EVID. CODE §607; see MORGAN, BASIC PROBLEMS OF EVIDENCE 38 (1957).