

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

*relating to*

## The Uniform Rules of Evidence

Burden of Producing Evidence, Burden of Proof,  
and Presumptions

(Replacing Article III of the Uniform Rules of Evidence)

June 1964

CALIFORNIA LAW REVISION COMMISSION

School of Law  
Stanford University  
Stanford, California

### **NOTE**

This pamphlet begins on page 1001. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes.

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## CALIFORNIA LAW REVISION COMMISSION

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June 1964

To HIS EXCELLENCY, EDMUND G. BROWN  
*Governor of California*  
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing its tentative recommendation on Burden of Producing Evidence, Burden of Proof, and Presumptions. This tentative recommendation replaces Article III (Presumptions) of the Uniform Rules of Evidence.

This report also contains a research study prepared by the Commission's research consultants, Professor James H. Chadbourn of the Harvard Law School and Professor Ronan E. Degnan of the School of Law, University of California at Berkeley. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission.

This report is one in a series of reports being prepared by the Commission on the Uniform Rules of Evidence, each report covering a different article of the Uniform Rules.

In preparing this report the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence. The proposed Missouri Evidence Code (1948) promulgated by the Missouri Bar also was of great assistance to the Commission.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

Respectfully submitted,  
JOHN R. McDONOUGH, JR.  
*Chairman*



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**Research Study**

(A detailed Table of Contents for the study begins on page 1047.)



# TENTATIVE RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

*relating to*

## THE UNIFORM RULES OF EVIDENCE

### Burden of Producing Evidence, Burden of Proof, and Presumptions

#### BACKGROUND

The Uniform Rules of Evidence (hereinafter sometimes designated as the "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.<sup>1</sup> In 1956 the Legislature directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.<sup>2</sup>

A tentative recommendation of the Commission on the burden of producing evidence, the burden of proof, and presumptions is set forth herein. This recommendation replaces Article III of the Uniform Rules of Evidence. (URE Article III, consisting of Rules 13 through 16, relates to presumptions.)

A presumption is an assumption of fact that a rule of law requires to be assumed when some other fact is established. Upon this proposition, all courts and writers seem to agree. But little agreement can be found as to the nature of the showing required to overcome a presumption. Some courts and writers contend that a presumption disappears upon the introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact. Others contend that a presumption endures until the trier of fact is persuaded as to the nonexistence of the presumed fact.

In California, a presumption is regarded as evidence to be weighed with all other evidence in the case. Hence, it almost always endures until the final decision in the case. Some California decisions hold that presumptions do not place the burden of proof on the adverse party to show the nonexistence of the presumed fact. However, it seems clear that many presumptions in California do place the burden of proof on the adverse party and that, in some instances, he cannot meet that burden except by clear and convincing proof. The statutes in California

<sup>1</sup> A pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 30 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

<sup>2</sup> Cal. Stats. 1956, Res. Ch. 42, p. 263.

sometimes specify that proof of a particular fact or group of facts is "prima facie evidence" of another fact. It is difficult to determine whether these statutes are intended to create presumptions (*i.e.*, legally required conclusions) or whether they are intended to indicate that the conclusionary fact may, but need not, be found if the underlying fact is proved. In some instances, such statutes have been construed to require a finding of the conclusionary fact unless the trier of fact is persuaded as to its nonexistence.

The URE distinguishes presumptions according to the probative value of the evidence giving rise to the presumption: If the underlying evidence has probative value, the presumption affects the burden of proof; but if the underlying evidence has no probative value in relation to the presumed fact, the presumption does not affect the burden of proof.

The Commission approves the principle that some presumptions should affect the burden of proof and that others should not, but it disagrees with the basis of the classification proposed in the URE. Moreover, the URE rules are inadequate to resolve many of the uncertainties and inconsistencies in the present California law relating to presumptions. Accordingly, the Commission has undertaken to rewrite completely the URE provisions on presumptions.

Because presumptions sometimes affect the burden of proof and always affect the burden of producing evidence, the Commission has considered certain existing statutes relating to the burden of proof and the burden of producing evidence in connection with its study of presumptions. These provisions, enacted for the most part in 1872 and unchanged since that time, have been found to be inaccurate and based on obsolete theories of pleading and proof. These statutes have been revised to eliminate obsolete material and to restate accurately the existing California law relating to the burden of proof and the burden of producing evidence. The provisions proposed by the Commission do not purport to deal comprehensively with these burdens; they are intended merely to correct and recodify existing statutes on the subject.

For an analysis of the URE rules and the California law relating to the burden of producing evidence, the burden of proof, and presumptions, see the research study beginning on page 1047.

## PROPOSED CALIFORNIA EVIDENCE CODE

In order to accommodate its extensive proposals in regard to presumptions, the burden of proof, and the burden of producing evidence, the Commission has departed from the URE format in this tentative recommendation. The URE rules relating to presumptions are set forth in the appended note<sup>3</sup> so that they may be readily compared with the recommendations of the Commission.

In the material that follows, the Commission's proposals appear in a form in which they might be enacted as part of a new California Evidence Code.<sup>4</sup> Each section recommended by the Commission is followed by a comment setting forth the major considerations that influenced the Commission in recommending the provision and any important substantive changes in the corresponding California law.

### 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

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

**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.

<sup>3</sup> Uniform Rules 13-16 provide:

**RULE 13. Definition.** A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.

**RULE 14. Effect of Presumptions.** Subject to Rule 16, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the non-existence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.

**RULE 15. Inconsistent Presumptions.** If two presumptions arise which are conflicting with each other the judge shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance both presumptions shall be disregarded.

**RULE 16. Burden of Proof Not Relaxed as to Some Presumptions.** A presumption, which by a rule of law may be overcome only by proof beyond a reasonable doubt, or by clear and convincing evidence, shall not be affected by Rules 14 or 15 and the burden of proof to overcome it continues on the party against whom the presumption operates.

<sup>4</sup> The Law Revision Commission intends to recommend that its proposals relating to evidence be enacted as a new code, the Evidence Code.

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 peremptory finding against him as to the existence or nonexistence of a fact. Revised Rule 1(5), *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1, 8 (1964). 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.

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.

For example, if the party with 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. In addition, a party may introduce evidence of such overwhelming probative force that no person could reasonably disbelieve it in the absence of countervailing evidence, in which case the burden of producing evidence would shift to the opposing party to produce some evidence. These principles are in accord with well-settled California law. See discussion in WITKIN, CALIFORNIA EVIDENCE §§ 53-56 (1958). See also 9 WIGMORE, EVIDENCE § 2487 (3d ed. 1940).

## CHAPTER 2. BURDEN OF PROOF

### Article 1. General

#### § 510. Party Who Has the Burden of Proof

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

**Comment.** As used in Section 510, the burden of proof means 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. See Revised Rule 1(3) and (4) in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1, 8 (1964). If this requisite degree of conviction is not achieved as to the existence of a particular fact, the trier of fact must assume that the fact does not exist. MORGAN, BASIC PROBLEMS OF EVIDENCE 19 (1957); 9 WIGMORE, EVIDENCE § 2485 (3d ed. 1940). Usually, the burden of proof requires a party to convince the trier of fact that the existence of a particular fact is more probable than its nonexistence—a degree of proof usually described as proof by a preponderance of the evidence. Revised Rule 1(4), *supra*; WITKIN, CALIFORNIA EVIDENCE § 59 (1958). However, in some instances, a higher or lower burden may be required. See Revised Rule 1(4), *supra*. For example, the party with the burden of proof is required in some instances to meet that burden with clear and convincing proof. WITKIN, CALIFORNIA EVIDENCE § 60 (1958). The prosecution in a criminal case has the burden of proof beyond a reasonable doubt. PENAL CODE § 1096. The defendant in a criminal case sometimes has the burden of proof in regard to a fact essential to negate his guilt. However, in such cases, he usually is not required to persuade the trier of fact as to the existence of such fact; he is merely required to raise a reasonable doubt in the mind of the trier of fact as to his guilt. EVIDENCE CODE § 511; *People v. Bushton*, 80 Cal. 160, 22 Pac. 127 (1889).

The proposition in Code of Civil Procedure Section 1981 (superseded by Evidence Code Sections 500 and 510)—*i.e.*, that the party with the affirmative of the issue has the burden of proof—is inaccurate when construed to apply to the burden of persuasion referred to in Section 510 just as it is inaccurate when construed to apply to the burden of

producing evidence referred to in Section 500. See the Comment to Section 500. For example, a bailee is sometimes required to prove his freedom from negligence. *George v. Bekins Van & Storage Co.*, 33 Cal.2d 834, 205 P.2d 1037 (1949). Lack of consideration for a written instrument is another defense which must be proved by the defendant. CIVIL CODE § 1615. In determining the incidence of the burden of proof, "the truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." 9 WIGMORE, EVIDENCE § 2486 at 275 (3d ed. 1940).

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

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

**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

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

**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

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

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

##### § 522. Claim That Person Insane

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

**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).

### CHAPTER 3. PRESUMPTIONS

#### Article 1. General

##### § 600. Presumption Defined

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

**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 Revised Rule 1(1). See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1, 8 (1964). Revised Rule 1(1) 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

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

**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 Commission has concluded 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. This conclusion is not unique. In 1948, a committee of the Missouri Bar which drafted a proposed Missouri Evidence Code came to the same conclusion. MISSOURI EVIDENCE CODE (Proposed) 45-64 (Mo. Bar 1948). In that proposed code, presumptions were divided into two categories: (1) presumptions affecting the burden of proof (essentially Morgan presumptions), and (2) presumptions affecting the burden of producing evidence (essentially Thayer presumptions). In 1920, Professor Bohlen suggested that presumptions should be similarly classified. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920). The same classification is made in the Evidence Code.

The Uniform Rules of Evidence also classify presumptions. Under the URE, presumptions based on an underlying inference affect the burden of proof; presumptions not so based affect only the burden of producing evidence. The classification proposed in the URE is unsound, for it is those presumptions that are based principally on public policy, and not on an underlying inference, that must affect the burden of proof to achieve their purpose. BOHLEN, *STUDIES IN THE LAW OF TORTS* 651 (1926). If the mere production of evidence, whether believed or not, dispelled all presumptions, the public policy that is expressed in many presumptions not based on an underlying rational inference would be completely thwarted. For example, Labor Code Section 3708 provides that an employee's injury is presumed to be the direct result of the employer's negligence if the employer fails to secure the payment of workmen's compensation. Clearly, there is no rational connection between the fact to be proved—failure to secure payment of compensation—and the presumed fact of negligence. If the presumption disappeared upon the introduction of any contrary evidence sufficient to sustain a finding, even though not believed, and if the employer introduced such evidence, the court would be compelled to direct a verdict against the employee unless he actually produced evidence that the employer was negligent. The directed verdict could be required because of the lack of any evidence from which it could be rationally inferred that the employer was negligent. Yet, it seems likely that the Labor Code presumption was adopted to force the employer to do more than merely introduce some evidence—perhaps a bare denial—which is believed by no one. If the presumption did no more, the employee would be forced in virtually every case to prove the employer's negligence. The presumption has practical significance only if it survives the introduction of contrary evidence, relieves the employee of the burden of proving the employer negligent, and forces the employer to persuade the jury that he was not negligent.

Thus, a presumption affecting the burden of proof is most needed when the logical inference supporting the presumption is weak or non-existent but the public policy underlying the presumption is strong. Because the URE fails to provide for presumptions affecting the burden of proof at precisely the point where they are most needed, the Commission has disapproved URE Rules 14-16 and has substituted for them

proposed statutes classifying presumptions according to the nature of the policy considerations upon which the presumptions appear to be based.

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

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

**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

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

**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

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

**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 must 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 must 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

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

**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

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

**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 non-existence 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 must 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 must 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**

607. When by rule of law a rebuttable presumption operates in a criminal action to establish an element of the crime with which the defendant is charged, neither the burden of producing evidence nor the burden of proof is imposed upon the defendant; but, if the trier of fact finds that the facts that give rise to the presumption have been proved beyond a reasonable doubt, the trier of fact may but is not required to find that the presumed fact has also been proved beyond a reasonable doubt.

**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**

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

**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.

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 codes. See, *e.g.*, CODE CIV. PROC. § 2061 as amended in this recommendation. Others have been added to the maxims of jurisprudence in the Civil 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.

## Article 2. Conclusive Presumptions

### § 620. Conclusive Presumptions

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

**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

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

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

### § 622. Facts Recited in Written Instrument

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

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

**§ 623. Estoppel by Own Statement or Conduct**

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

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

**§ 624. Estoppel of Tenant to Deny Title of Landlord**

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

**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**

630. The presumptions in this article and the presumptions described by Section 603 are 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**

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

**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**

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

**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**

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

**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**

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

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

**§ 635. Obligation Possessed by Creditor**

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

**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**

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

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

**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**

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

**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**

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

**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., Revised Rule 63(21) in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence)*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301, 331-332 (1963). But, even in those cases, the judgments do not presumptively establish the facts determined; they are merely evidence.

#### § 640. Writing Truly Dated

640. A writing is presumed to have been 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

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

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

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

#### § 643. Authenticity of Ancient Document

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

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



**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.

#### § 644. Book Purporting to Be Published by Public Authority

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

**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

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

**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

660. The presumptions in this article and the presumptions described by Section 605 are 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.

### § 661. Legitimacy

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

**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

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

**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

663. A ceremonial marriage is presumed to be valid.

**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**

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

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

**§ 665. Arrest Without Warrant**

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

**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**

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

**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**

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

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

## EXISTING CODES: AMENDMENTS, ADDITIONS, AND REPEALS

Several sections of the Civil Code and Code of Civil Procedure contain provisions that are inconsistent with or are superseded by the statute proposed in the Commission's tentative recommendation relating to the burden of producing evidence, the burden of proof, and presumptions. These sections should be revised or repealed to conform to the tentative recommendation. In some instances, the appropriate adjustment requires the addition of new sections to either the Code of Civil Procedure or the Civil Code.

Set forth below is a list of sections that should be added, amended, or repealed in light of the Commission's tentative recommendation. The sections to be repealed are set out in strikeout type. The reason for the proposed adjustment is explained in an appended comment to each section.

### Civil Code

#### Section 164.5 (Added)

164.5. Subject to the other presumptions stated in this chapter, all property acquired during marriage is presumed to be community property of that marriage. This presumption may be overcome only by clear and convincing proof. This presumption does not apply to any property to which legal or equitable title is held by a person at the time of his death if the marriage during which the property was acquired was terminated by divorce more than four years prior to such death.

**Comment.** Section 164.5, which is a new section added to the Civil Code, states existing decisional and statutory law. The presumption stated in the first sentence of Section 164.5 is established by a number of California cases. It places upon the person asserting that any property is separate property the burden of proving that it was acquired by gift, devise, or descent, or that the consideration given for it was separate property, or that it is personal injury damages, or that for some other reason the property is not community property. *E.g., Rozan v. Rozan*, 49 Cal.2d 322, 317 P.2d 11 (1957); *Meyer v. Kinzer*, 12 Cal. 247 (1859). See THE CALIFORNIA FAMILY LAWYER § 4.8 (Cal. Cont. Ed. Bar 1961).

The second sentence of Section 164.5 also states existing case law. *E.g., Estate of Rolls*, 193 Cal. 594, 226 Pac. 608 (1924); *Meyer v. Kinzer*, *supra*.

The third sentence of Section 164.5 states the apparent effect of subdivision 40 of Code of Civil Procedure Section 1963. The meaning of subdivision 40, however, is not clear. See 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 26 (7th ed. 1960); Note, 43 CAL. L. REV. 687, 690-691 (1955).

**Sections 193, 194, and 195 (Repealed)**

193. ~~LEGITIMACY OF CHILDREN BORN IN WEDLOCK.~~ All children born in wedlock are presumed to be legitimate.

194. ~~All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage.~~

195. ~~The presumption of legitimacy can be disputed only by the people of the State of California in a criminal action brought under the provisions of Section 270 of the Penal Code, or the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact.~~

**Comment.** Sections 193, 194, and 195 are superseded by the more accurate statement of the presumption in Evidence Code Section 661. See the Comment to that section.

**Sections 3544-3548 (Added)**

3544. A person intends the ordinary consequences of his voluntary act.

3545. Private transactions are fair and regular.

3546. Things happen according to the ordinary course of nature and the ordinary habits of life.

3547. A thing continues to exist as long as is usual with things of that nature.

3548. The law has been obeyed.

**Comment.** Sections 3544-3548 are new sections added to the Civil Code and are compiled among the maxims of jurisprudence. Sections 3544-3548 restate the provisions of subdivisions 3, 19, 28, 32, and 33 of Code of Civil Procedure Section 1963 and supersede those subdivisions. The maxims are not intended to qualify any substantive provisions of law, but to aid in their just application. CIVIL CODE § 3509.

**Code of Civil Procedure**

**Section 1826 (Repealed)**

1826. ~~THE DEGREE OF CERTAINTY REQUIRED TO ESTABLISH FACTS.~~ The law does not require demonstration, that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

**Comment.** Section 1826 contains an inaccurate description of the normal burden of proof. It is superseded by Division 5 (commencing with Section 500) of the Evidence Code.

**Section 1833 (Repealed)**

1833. *Prima facie* evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example, the certificate of a recording officer is *prima facie* evidence of a record, but it may afterwards be rejected upon proof that there is no such record.

**Comment.** Section 1833 is inconsistent with Evidence Code Section 602.

**Section 1847 (Repealed)**

1847. *WITNESS PRESUMED TO SPEAK THE TRUTH.* A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

**Comment.** Section 1847 is inconsistent with the definition of a presumption in Evidence Code Section 600. The right of a party to attack the credibility of a witness by any evidence relevant to that issue is assured by Revised Rule 20. *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701, 713 (1964).

**Section 1867 (Repealed)**

1867. *MATERIAL ALLEGATION ONLY TO BE PROVED.* None but a material allegation need be proved.

**Comment.** Section 1867 is based on the obsolete theory that some allegations are necessary that are not material, *i.e.*, essential to the claim or defense. CODE CIV. PROC. § 463. Section 1867 provides that only the material allegations need be proved. Since the section is obsolete, it is repealed.

**Section 1869 (Repealed)**

1869. *AFFIRMATIVE ONLY TO BE PROVED.* Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

**Comment.** Section 1869 is inconsistent with and superseded by Evidence Code Sections 500 and 510. Moreover, it is an inaccurate statement of the manner in which the burden of proof is allocated under existing law.

**Section 1908.5 (Added)**

1908.5. When a judgment or order of a court is conclusive, the judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence.

**Comment.** Section 1908.5 recodifies the rule of pleading stated in subdivision 6 of Section 1962 of the Code of Civil Procedure. See the Comment to Section 1962.

**Sections 1957, 1958, 1959, 1960, and 1961 (Repealed)**

**1957. INDIRECT EVIDENCE CLASSIFIED.** Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions.

**1958. INFERENCE DEFINED.** An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

**1959. PRESUMPTION DEFINED.** A presumption is a deduction which the law expressly directs to be made from particular facts.

**1960. WHEN AN INFERENCE ARISES.** An inference must be founded:

1. On a fact legally proved; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

**1961. PRESUMPTIONS MAY BE CONTROVERTED, WHEN.** 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.

**Comment.** Sections 1957, 1958, and 1960 are superseded by Revised Rule 1(1) (defining "evidence") and Revised Rule 1(2) (defining "relevant evidence"). *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1, 8 (1964). Section 1959 is superseded by Evidence Code Section 600, and Section 1961 is superseded by Chapter 3 (beginning with Section 600) of the Evidence Code, which prescribes the nature and effect of presumptions.

**Section 1962 (Repealed)**

**1962.** The following presumptions, and no others, are deemed conclusive:

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another;

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their suc-

cessors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;

3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it;

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

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

6. The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence;

7. Any other presumption which by statute is expressly made conclusive.

**Comment.** Subdivision 1 of Section 1962 is repealed because it "has little meaning, either as a rule of substantive law or as a rule of evidence . . ." *People v. Gorshen*, 51 Cal.2d 716, 731, 336 P.2d 492, 501 (1959).

Subdivisions 2, 3, 4, and 5 are superseded by Evidence Code Sections 621-624.

The first clause of subdivision 6 states the meaningless truism that judgments are conclusive when declared by law to be conclusive. The pleading rule in the next two clauses has been recodified as Section 1908.5 of the Code of Civil Procedure.

Subdivision 7 is merely a cross-reference section to all other presumptions declared by law to be conclusive. This subdivision is unnecessary.

### Section 1963 (Repealed)

1963. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

1. That a person is innocent of crime or wrong;
2. That an unlawful act was done with an unlawful intent;
3. That a person intends the ordinary consequence of his voluntary act;
4. That a person takes ordinary care of his own concerns;
5. That evidence wilfully suppressed would be adverse if produced;
6. That higher evidence would be adverse from inferior being produced;
7. That money paid by one to another was due to the latter;
8. That a thing delivered by one to another belonged to the latter;
9. That an obligation delivered up to the debtor has been paid;



10. That former rent or installments have been paid when a receipt for later is produced;
11. That things which a person possesses are owned by him;
12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership;
13. That a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly;
14. That a person acting in a public office was regularly appointed to it;
15. That official duty has been regularly performed;
16. That a court or judge, acting as such, whether in this State or any other state or country, was acting in the lawful exercise of his jurisdiction;
17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties;
18. That all matters within an issue were laid before the jury and passed upon by them; and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them;
19. That private transactions have been fair and regular;
20. That the ordinary course of business has been followed;
21. That a promissory note or bill of exchange was given or endorsed for a sufficient consideration;
22. That an endorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill;
23. That a writing is truly dated;
24. That a letter duly directed and mailed was received in the regular course of the mail;
25. Identity of person from identity of name;
26. That a person not heard from in seven years is dead;
27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact;
28. That things have happened according to the ordinary course of nature and the ordinary habits of life;
29. That persons acting as copartners have entered into a contract of copartnership;
30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage;
31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate;
32. That a thing once proved to exist continues as long as is usual with things of that nature;
33. That the law has been obeyed;
34. That a document or writing more than 30 years old is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained;

35. That a printed and published book, purporting to be printed or published by public authority, was so printed or published;

36. That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the State or country where the book is published, contains correct reports of such cases;

37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest;

38. The uninterrupted use by the public of land for a burial ground, for five years, with the consent of the owner, and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose;

39. That there was a good and sufficient consideration for a written contract;

40. That property owned at the time of death by a person who had been divorced from his or her spouse more than four years prior thereto was not community property acquired during marriage with such divorced spouse, but is his or her separate property.

**Comment.** Many of the presumptions listed in Section 1963 are classified and restated in the Evidence Code. A few have been recodified as maxims of jurisprudence in Part 4 of Division 4 of the Civil Code. Others are not continued at all. The disposition of each subdivision of Section 1963 is given in the table below. Following the table are comments indicating the reasons for repealing those provisions of Section 1963 that are not continued in California law.

<i>Section 1963 (subdivision)</i>	<i>Superseded by</i>
1	Evidence Code Section 520
2	Not continued
3	Civil Code Section 3544 (added in this recommendation)
4	Evidence Code Section 521
5	Not continued
6	Not continued
7	Evidence Code Section 631
8	Evidence Code Section 632
9	Evidence Code Section 633
10	Evidence Code Section 636
11	Evidence Code Section 637
12	Evidence Code Section 638
13	Evidence Code Section 634
14	Not continued
15	Evidence Code Section 664
16	Evidence Code Section 666
17	Evidence Code Section 639
18	Not continued
19	Civil Code Section 3545 (added in this recommendation)
20	Not continued
21	Commercial Code Sections 3306, 3307, and 3408
22	Not continued
23	Evidence Code Section 640
24	Evidence Code Section 641
25	Not continued
26	Evidence Code Section 667
27	Not continued

**Section 1963**  
(subdivision)

*Superseded by*

28	Civil Code Section 3546 (added in this recommendation)
29	Not continued
30	Not continued
31	Evidence Code Section 661
32	Civil Code Section 3547 (added in this recommendation)
33	Civil Code Section 3548 (added in this recommendation)
34	Evidence Code Section 643
35	Evidence Code Section 644
36	Evidence Code Section 645
37	Evidence Code Section 642
38	Not continued
39	Unnecessary (duplicates Civil Code Section 1614)
40	Civil Code Section 164.5 (added in this recommendation)

*Subdivision 2* is not continued because it has been a source of error and confusion in the cases. An instruction based upon it is error whenever specific intent is in issue. *People v. Snyder*, 15 Cal.2d 706, 104 P.2d 639 (1940); *People v. Maciel*, 71 Cal. App. 213, 234 Pac. 877 (1925). A person's intent may be inferred from his actions and the surrounding circumstances, and an instruction to that effect may be given. *People v. Besold*, 154 Cal. 363, 97 Pac. 871 (1908).

*Subdivisions 5 and 6* are not continued because, despite Section 1963, there is no presumption of the sort stated. The "presumptions" merely indicate that a party's evidence should be viewed with distrust if he could produce better evidence and that unfavorable inferences should be drawn from the evidence offered against him if he fails to deny or explain it. A party's failure to produce evidence cannot be turned into evidence against him by reliance on these presumptions. *Hampton v. Rose*, 8 Cal. App.2d 447, 56 P.2d 1243 (1935); *Girvetz v. Boys' Market, Inc.*, 91 Cal. App.2d 827, 830, 206 P.2d 6, 8-9 (1949). The substantive effect of these "presumptions" is stated more accurately in Section 2061 of the Code of Civil Procedure as amended in this recommendation.

*Subdivision 14*. The presumption stated in subdivision 14 is not continued, for it is inaccurate and misleading. The cases have used this presumption to sustain the validity of the official acts of a person acting in a public office when there has been no evidence to show that such person had the right to hold office. See, e.g., *City of Monterey v. Jacks*, 139 Cal. 542, 73 Pac. 436 (1903); *Delphi School Dist. v. Murray*, 53 Cal. 29 (1878); *People v. Beal*, 108 Cal. App.2d 200, 239 P.2d 84 (1951). The presumption is unnecessary for this purpose, for it is well settled that the "'acts of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it.'" *In re Redevelopment Plan for Bunker Hill*, 61 Cal.2d ---, ---, 37 Cal. Rptr. 74, 88, 389 P.2d 538, 552 (1964); *Oakland Paving Co. v. Donovan*, 19 Cal. App. 488, 494, 126 Pac. 388, 390 (1912). Under the de facto doctrine, the validity of the official acts taken is conclusively established. *Town of Susanville v. Long*, 144 Cal. 362, 77 Pac. 987 (1904); *People v. Hecht*, 105 Cal. 621, 38 Pac. 941 (1895); *People v. Sassovich*, 29 Cal. 480 (1866). Thus, the cases applying subdivision 14

are erroneous in indicating that the official acts of a person acting in a public office may be attacked by evidence sufficient to overcome the presumption of a valid appointment. These cases can be explained only on the ground that they have overlooked the de facto doctrine.

In cases where the presumption might have some significance—cases where the party occupying the office is asserting some right of the officeholder—the presumption has been held inapplicable. *Burke v. Edgar*, 67 Cal. 182, 7 Pac. 488 (1885).

*Subdivision 18.* No case has been found where subdivision 18 has had any effect. The doctrine of res judicata determines the issues concluded between the parties without regard to this presumption. *Parnell v. Hahn*, 61 Cal. 131, 132 (1882) (“And the judgment as rendered . . . is conclusive upon all questions involved in the action and upon which it depends, or upon matters which, under the issues, might have been litigated and decided in the case . . .”).

*Subdivision 20.* The cases have used this “presumption” merely as a justification for holding that evidence of a business custom will sustain a finding that the custom was followed on a particular occasion. *E.g.*, *Robinson v. Puls*, 28 Cal.2d 664, 171 P.2d 430 (1946); *American Can Co. v. Agricultural Ins. Co.*, 27 Cal. App. 647, 150 Pac. 996 (1915). Revised Rule 49 provides for the admissibility of business custom evidence to prove that the custom was followed on a particular occasion. *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility)*, 6 CAL. LAW REVISION COMM’N, REP., REC. & STUDIES 601, 619 (1964). There is no reason to compel the trier of fact to find that the custom was followed by applying a presumption. The evidence of the custom may be strong or weak, and the trier of fact should be free to decide whether the custom was followed or not. No case has been found giving a presumptive effect to evidence of a business custom under subdivision 20.

*Subdivision 22.* The purpose of subdivision 22 appears to have been to compel an accommodation endorser to prove that he endorsed in accommodation of a subsequent party to the instrument and not in accommodation of the maker. See, *e.g.*, *Pacific Portland Cement Co. v. Reinecke*, 30 Cal. App. 501, 158 Pac. 1041 (1916). The liability of accommodation endorsers is now fully covered by the Commercial Code. Accommodation is a defense which must be established by the defendant. COM. CODE §§ 3307, 3415(5). Hence, subdivision 22 is no longer necessary.

*Subdivision 25.* Despite subdivision 25, the California courts have refused to apply the presumption of identity of person from identity of name when the name is common. *E.g.*, *People v. Wong Sang Lung*, 3 Cal. App. 221, 224, 84 Pac. 843, 845 (1906). The matter should be left to inference, for the strength of the inference will depend in particular cases on whether the name is common or unusual.

*Subdivision 27* has been rarely cited in the reported cases since it was enacted in 1872. It has been applied to situations where a state-

ment has been made in the presence of a person who has failed to protest to the representations in the statement. The apparent acquiescence in the statement has been held to be proof of belief in the truth of the statement. *Estate of Flood*, 217 Cal. 763, 21 P.2d 579 (1933); *Estate of Clark*, 13 Cal. App. 786, 110 Pac. 828 (1910).

Although it may be appropriate under some circumstances to infer from the lack of protest that a person believes in the truth of a statement made in his presence, it is undesirable to require such a conclusion. The surrounding circumstances may vary greatly from case to case, and the trier of fact should be free to decide whether acquiescence resulted from belief or from some other cause. *Cf. Matt. 27:13-14* (Revised Standard Version) ("Then Pilate said to him, 'Do you not hear how many things they testify against you?' But he gave him no answer, not even to a single charge . . .").

*Subdivision 29* has been cited in but one appellate decision in its 92-year history. It is unnecessary in light of the doctrine of ostensible authority. See 1 WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §§ 49-51 (7th ed. 1960).

*Subdivision 30*, in effect, declares that a marriage will be presumed from proof of cohabitation and repute. *Pulos v. Pulos*, 140 Cal. App.2d 913, 295 P.2d 907 (1956). Because reputation evidence may sometimes strongly indicate the existence of a marriage and at other times fail to do so, requiring a finding of a marriage from proof of such reputation is unwarranted. The cases have sometimes refused to apply the presumption because of the weakness of the reputation evidence relied on. *Estate of Baldwin*, 162 Cal. 471, 123 Pac. 267 (1912); *Cacioppo v. Triangle Co.*, 120 Cal. App.2d 281, 260 P.2d 985 (1953). Discontinuance of the presumption will not affect the rule that the existence of a marriage may be inferred from proof of reputation. *White v. White*, 82 Cal. 427, 430, 23 Pac. 276, 277 (1890) ("'cohabitation and repute do not make marriage; they are merely items of evidence from which it may be *inferred* that a marriage had been entered into'" (italics in original)).

*Subdivision 38* has not been applied in any reported case in its 92-year history. The substantive law relating to implied dedication and dedication by prescription makes the presumption unnecessary. See 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 27-29 (7th ed. 1960).

### Section 1981 (Repealed)

~~1981. EVIDENCE TO BE PRODUCED BY WHOM. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.~~

**Comment.** Section 1981 is superseded by Evidence Code Sections 500 and 510.

**Section 1983 (Repealed)**

1983. Whenever in any action or proceeding, civil or criminal, brought by, or in the name of, the state or the people thereof, or by or in the name of any political subdivision or agency of the state, or by any public board or officer on behalf of any thereof, to enforce any law which denies any right, privilege or license to any person not a citizen of the United States, or not eligible to become such citizen, or to a person not a citizen or resident of this state, and whenever in any action or proceeding in which the state or any political subdivision or agency thereof, or any public board or officer acting on behalf thereof, is or becomes a party, it is alleged in the pleading therein filed on behalf of the state, the people thereof, political subdivision or agency, or of such board or officer, that such right, privilege or license has been exercised by a person not a citizen of the United States, or not eligible to become such citizen, or by a person not a citizen or resident of this state, as the case may be, the burden shall be upon the party for or on whose behalf such pleading was filed to establish the fact that such right, privilege or license was exercised by the person alleged to have exercised the same, and upon such fact being so established the burden shall be upon such person, or upon any person, firm or corporation claiming under or through the exercise of such right, privilege or license, to establish the fact that the person alleged to have exercised such right, privilege or license was, at the time of so exercising the same, a citizen of the United States, or eligible to become such citizen, or was a citizen or resident of this state, as the case may require, and was at said time legally entitled to exercise such right, privilege or license.

**Comment.** Section 1983 was held unconstitutional as applied under the Alien Land Law. *Morrison v. California*, 291 U.S. 82 (1934). It has been applied but once by an appellate court since the *Morrison* case was decided. *People v. Cordero*, 50 Cal. App.2d 146, 122 P.2d 648 (1942). Section 1983 appears to have been designed principally to facilitate the enforcement of the Alien Land Law. Since that law has been held unconstitutional (*Sei Fujii v. State*, 38 Cal.2d 718, 242 P.2d 617 (1952)) and has been repealed (Cal. Stats. 1955, Ch. 316, § 1, p. 767), Section 1983 should no longer be retained in the law of California.

**Section 2061 (Amended)**

2061. ~~JURY JUDGES OF EFFECT OF EVIDENCE, BUT TO BE INSTRUCTED ON CERTAIN POINTS.~~ The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;
2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number ~~or against a presumption~~ or other evidence satisfying their minds;
3. That a witness false in one part of his testimony is to be distrusted in others;
4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution;
5. ~~That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt~~ *Which party bears the burden of proof on each issue and whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that a party establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt ;*
6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict ; and, therefore,
7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust, *and that inferences unfavorable to a party may be drawn from any evidence or facts in the case against him when such party has failed to explain or deny such evidence or facts by his testimony or has wilfully suppressed evidence relating thereto .*

**Comment.** Subdivision 5 has been revised in the light of Chapter 2 (commencing with Section 510) of the Evidence Code. Subdivisions 6 and 7 state in substance the meaning that has been given to the presumptions appearing in subdivisions 5 and 6 of Code of Civil Procedure Section 1963.





**A STUDY RELATING TO THE UNIFORM RULES OF  
EVIDENCE—BURDEN OF PRODUCING EVIDENCE,  
BURDEN OF PROOF, AND PRESUMPTIONS \***

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\* This study was made at the request of the California Law Revision Commission by Professors James H. Chadbourn of the Harvard Law School and Ronan E. Degan of the University of California at Berkeley. The opinions, conclusions, and recommendations contained herein are entirely those of the authors and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Law Revision Commission.

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# THE PRESUMPTIONS ARTICLE OF THE UNIFORM RULES OF EVIDENCE \*

## INTRODUCTION

The California Law Revision Commission has been authorized to make a study to determine whether the law of evidence in this State should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.<sup>1</sup>

The present study, made at the request of the Law Revision Commission, is directed to the question whether California should adopt

\* This portion of the study was made at the request of the California Law Revision Commission by Professor James H. Chadbourne of the Harvard Law School. The opinions, conclusions, and recommendations contained herein are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Law Revision Commission.

<sup>1</sup> Cal. Stats. 1956, Res. Ch. 42, p. 263.

The Uniform Rules are the subject of the following law review symposia: *Institute on Evidence*, 15 ARK. L. REV. 7 (1960-61); *Panel on Uniform Rules of Evidence*, 8 ARK. L. REV. 44 (1953-54); *Symposium—Minn. and the Uniform Rules of Evidence*, 40 MINN. L. REV. 297 (1956); Comment, *A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law*, 49 NW. U. L. REV. 481 (1954); *The Uniform Rules of Evidence*, 10 RUTGERS L. REV. 479 (1956); Chadbourne, *The "Uniform Rules" and the California Law of Evidence*, 2 U.C.L.A. L. REV. 1 (1954).

See also Brooks, *Evidence*, 14 RUTGERS L. REV. 390 (1960); Cross, *Some Proposals for Reform in the Law of Evidence*, 24 MODERN L. REV. 32 (1961); Gard, *Why Oregon Lawyers Should Be Interested in the Uniform Rules of Evidence*, 37 ORE. L. REV. 287 (1958); Joseph, *How the Adoption of the Uniform Rules of Evidence Would Affect the Law in Oregon: Rules 1-16*, 41 ORE. L. REV. 275 (1962); Levin, *The Impact of the Uniform Rules of Evidence on Pennsylvania Law*, 26 PA. B. ASS'N Q. 216 (1955); McCormick, *Some High Lights of Uniform Evidence Rules*, 33 TEXAS L. REV. 559 (1955); Morton, *Do We Need a Code of Evidence?* 38 CAN. B. REV. 35 (1960); Nokes, *Codification of the Law of Evidence in Common-Law Jurisdictions*, 5 INT. & COMP. L. Q. 347 (1956); Nokes, *American Uniform Rules of Evidence*, 4 INT. & COMP. L. Q. 48 (1955).

The Uniform Rules also have been scrutinized by committees appointed by the Supreme Courts of New Jersey and Utah. See REPORT OF THE COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY (1955) and FINAL DRAFT OF THE RULES OF EVIDENCE (1959), the report of the Utah Committee on the Uniform Rules of Evidence. A Commission appointed by the New Jersey Legislature also has studied the Uniform Rules. See REPORT OF THE COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE (1956). In 1960, the New Jersey Legislature enacted a revised version of the Privileges Article of the Uniform Rules and granted the New Jersey Supreme Court the power to adopt rules dealing with the admission or rejection of evidence. N.J. Laws 1960, Ch. 52, p. 452 (N.J. REV. STAT. §§ 2A :84A-1 to 2A :84A-49). Following this enactment, the New Jersey Supreme Court appointed another committee to study the Uniform Rules. The report of this committee in 1963 (REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE (March 1963)) contains a comprehensive analysis of the Uniform Rules and many worthy suggestions for improvements.

The new evidence article in the Kansas Code of Civil Procedure, enacted in 1963 following a report by the Kansas Judicial Council (see *Recommendations as to Rules of Civil Procedure, Process, Rules of Evidence and Limitations of Actions in KANSAS JUDICIAL COUNCIL BULLETIN* (Nov. 1961)), is substantially the same as the Uniform Rules. See Kan. Laws 1963, Ch. 303, Art. 4, §§ 60-401 through 60-470, pp. 670-692.

The Uniform Rules of Evidence, with a few changes necessary to conform with local conditions, were adopted in the Virgin Islands in 1957. See 5 V.I.C. §§ 771-956 (1957).

the provisions of the Uniform Rules of Evidence (hereinafter sometimes designated as the "URE") relating to presumptions—*i.e.*, Rules 13 through 16 and other related provisions of the Uniform Rules. The study undertakes both to point up what changes would be made in the California law of evidence if these URE provisions were adopted and also to subject these provisions to an objective analysis designed to test their utility and desirability. In some instances, modifications of the provisions of the Uniform Rules are suggested. The problem of incorporating these provisions of the Uniform Rules into the California codes is also discussed.

In considering these rules, it should be kept in mind that Rule 7<sup>2</sup> proclaims, *inter alia*, that "all relevant evidence is admissible" except "as otherwise provided in these Rules." (Emphasis added.) Thus, it is contemplated that where the Uniform Rules are adopted, all pre-existing exclusionary rules would be superseded. Only the Uniform Rules would be consulted as the exclusive source of law excluding relevant evidence. If nothing in the Uniform Rules permits or requires the exclusion of an item of relevant evidence, it is to be admitted, notwithstanding any pre-existing law which required its exclusion,<sup>3</sup> for Rule 7 wipes from the slate all prior exclusionary rules. The slate remains clean, except to the extent that some other rule or rules write restrictions upon it.

<sup>2</sup> Rule 7 of the Uniform Rules provides: "Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible."

<sup>3</sup> However, evidence inadmissible on constitutional grounds would, of course, remain so under the Uniform Rules. The comment on Rule 7 states: "Illegally acquired evidence may be inadmissible on constitutional grounds—not because it is irrelevant. Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule."

## THE URE PRESUMPTIONS ARTICLE

Rules 13 through 16, constituting Article III of the Uniform Rules of Evidence, provide as follows:

**RULE 13. *Definition.*** A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.

**RULE 14. *Effect of Presumptions.*** Subject to Rule 16, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the non-existence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.

**RULE 15. *Inconsistent Presumptions.*** If two presumptions arise which are conflicting with each other the judge shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance both presumptions shall be disregarded.

**RULE 16. *Burden of Proof Not Relaxed as to Some Presumptions.*** A presumption, which by a rule of law may be overcome only by proof beyond a reasonable doubt, or by clear and convincing evidence, shall not be affected by Rules 14 or 15 and the burden of proof to overcome it continues on the party against whom the presumption operates.<sup>1</sup>

<sup>1</sup>The definitions contained in subdivisions (1), (3), (4), and (5) of Rule 1 are also relevant to the Presumptions Article:

**RULE 1. *Definitions.***

(1) "Evidence" is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay.

(3) "Proof" is all of the evidence before the trier of the fact relevant to a fact in issue which tends to prove the existence or non-existence of such fact.

(4) "Burden of Proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with "burden of persuasion."

(5) "Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a directed verdict or peremptory finding against him on a material issue of fact.

## THE THAYER VIEW VERSUS THE MORGAN VIEW

For a better understanding of Uniform Rules 13-16, their background should be surveyed. This requires taking note of various theories<sup>2</sup> respecting the nature of presumptions. The two major theories will be referred to frequently throughout this study. At the outset, therefore, they should be considered rather extensively.

<sup>2</sup> Professor Morgan has discovered and stated a total of eight divergent theories which he summarizes as follows:

1. The presumption has no effect whenever there is evidence in the case from which a jury could reasonably find the non-existence of the presumed fact. It is immaterial that neither judge nor jury believes the testimony. If the evidence is introduced before the basic fact is established, there is no compelled assumption; if after the basic fact is established, the compulsion ceases. The issue as to the existence or non-existence of the presumed fact is to be determined exactly as if no such presumption were known to the law. In short, the presumption fixes only the risk of non-production of evidence sufficient to justify a finding of non-existence of the presumed fact. This view is approved by Thayer, Wigmore, and the American Law Institute and is found stated in numerous judicial opinions.

2. Where there is such evidence in the case the presumption is operative only if the jury positively disbelieves the evidence.

3. Where there is such evidence in the case, the presumption is operative unless and until the jury believes the evidence.

In these two situations what conclusion as to the non-existence of the presumed fact the jury would draw from the evidence is immaterial. Only a very few opinions exhibit either of these views, and other decisions by the same courts clearly indicate disapproval of them.

4. The effect which the first view gives to the presence in the case of evidence sufficient to justify a finding of the non-existence of the presumed fact occurs only where the evidence is "substantial." The cases expressing this doctrine do not define "substantial," but they do make it clear that the evidence must be of greater persuasive effect than the minimum which would carry the issue to the jury. At times they point out that the rule is not satisfied by testimony from interested witnesses, and in some instances seem to require evidence that would almost, if not quite, call for a directed verdict.

5. The compelled assumption persists until the jury is convinced that the non-existence of the presumed fact is as likely or as probable as its existence. This seems to be the result of decisions in Ohio and California.

6. The establishment of the basic fact fixes the burden of persuasion as well as the burden of producing evidence upon the party relying upon the non-existence of the presumed fact. This was once believed to be accepted doctrine in Pennsylvania; and it is the rule applied with reference to some presumptions in other states.

7. Where the presumption is created because the opponent has peculiar knowledge or peculiar access to the evidence of facts from which the existence or non-existence of the presumed fact may be deduced, the presumption fixes the burden of persuasion as to those facts upon the opponent, but does not affect that burden as to the presumed fact itself. This view was advocated by Professor Bohlen as to the presumption of negligence of a railroad company in an action by a passenger for injuries received in a wreck of the train, and has been applied in cases of statutory presumptions as to the responsibility of the owner of an automobile for the conduct of its driver.

8. Though the compelled assumption ceases to operate under the conditions prescribed by the first, fourth or fifth views mentioned above, it is to be given the effect of evidence tending to prove the existence of the presumed fact. [MORGAN, BASIC PROBLEMS OF EVIDENCE 33-35 (1954). See also reference to Morgan's articles in note 12, *infra* at 1055.]

The major theories are numbers one and six.

### The "Thayer Doctrine"

Writing in 1898, in his learned *Preliminary Treatise*, James Bradley Thayer of Harvard described as follows the nature and office of a presumption: "[F]ixing the duty of going forward with proof. . . . and this alone, appears to be characteristic and essential work of the presumption." [Emphasis added.]<sup>3</sup>

Thayer thus gave birth to what has since become known as the "Thayerian Doctrine." Under this doctrine, any evidence which would warrant a finding of the nonexistence of the presumed fact causes the presumption to disappear. When such evidence is introduced, the existence or nonexistence of the presumed fact is to be determined precisely as if no presumption had ever been operative in the case. It follows that the judge—and the judge alone—is to determine whether a presumption has been rebutted. If he decides that the evidence would *not* warrant a finding of nonexistence, he directs the jury to find the presumed fact. The presumption is undisputed and, therefore, requires a finding of the presumed fact. If he finds that the evidence *would* warrant a finding of nonexistence, he submits the issue to the jury, saying nothing of the presumption—for that has disappeared—and charging the jury as if no presumption had ever been operative. Put another way, a presumption exerts its force by requiring the opponent of the presumption to produce enough evidence to avoid an adverse directed verdict. But this is all a presumption does; when the opponent has satisfied this requirement, the force of the presumption is spent and the presumption disappears. It follows that the presumption should not be the subject of any charge to the jury. As Judge Learned Hand has said: "If the trial is properly conducted, the presumption will not be mentioned at all."<sup>4</sup>

Beginning with his first edition in 1904, Wigmore adopted Thayer's view and adhered to it in the subsequent editions of his monumental work.<sup>5</sup> Wigmore's early and continuous endorsement has naturally caused Thayer's view to gain wide acceptance—so much so that today it is appropriate to call this view "orthodox." The Supreme Court of Oregon has given the following colorful summary of this classic view:

[W]hen evidence is introduced to rebut the presumption—however weak the evidence may be<sup>6</sup>—the presumption is overcome and destroyed. Some text writers, law professors, and judges who have espoused the Wigmore doctrine have vied with one another in an effort to show how flimsy and unsubstantial a presumption of law really is. This "phantom of the law" has been likened to "bats flitting about in the twilight and then disappearing in the sunshine of actual facts," and to a house of cards that topples over when rebutted by evidence. It remained for Professor Bohlen to head the class when he said a presumption of law was like Maeterlinck's male bee which, after functioning, disappeared.<sup>7</sup>

<sup>3</sup> THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 337 (1898).

<sup>4</sup> *Alpine Forwarding Co. v. Pennsylvania R.R.*, 60 F.2d 734, 736 (2d Cir. 1932).

<sup>5</sup> 9 WIGMORE, *EVIDENCE* §§ 2483-2493 (3d ed. 1940) [hereinafter cited as WIGMORE].

<sup>6</sup> This is an overstatement. In order to have the effect stated, the evidence must be at least strong enough to warrant a finding of the nonexistence of the presumed facts. See the authorities cited in notes 2, 3, and 5, *supra*.

<sup>7</sup> *Wyckoff v. Mutual Life Ins. Co. of N.Y.*, 173 Ore. 592, 597, 147 P.2d 227, 229-230 (1944).

If a jurisdiction which does not presently adhere to the Thayer doctrine wished to adopt it by legislation, the appropriate text for a statute to accomplish this objective might be formulated as follows:

A presumption does not continue to exist when evidence is introduced which would support a finding of the nonexistence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption had ever been involved.

The following example illustrates how this statute would operate. Suppose plaintiff, having the burden of proof to show the death of *X*, proves that *X* has been absent for a period of seven years and that no tidings have been received from *X*. This, of course, gives rise to a presumption (the so-called "Enoch Arden presumption") that *X* is dead.<sup>8</sup> Defendant, conceding the seven years' absence and want of tidings, has *X*'s brother, *Y*, testify that *Y* saw "*X*" recently at an airport in a distant city; that "*X*" was boarding a plane and *Y* got only a fleeting glimpse of him; that *Y* was unable to attract "*X*"'s attention and received no sign of recognition from him. Now, defendant's evidence, "would support a finding of the nonexistence of the presumed fact" (that is, if the jury found on the basis of this evidence that *X* is alive and if the trial judge refused a new trial for insufficiency of the evidence to support the verdict, the appellate court would not reverse the judgment). This being so, the presumption disappears. However, the facts which once raised the now-vanished presumption (*X*'s absence and want of tidings) remain in the case as circumstantial evidence of sufficient force to require the submission of the case to the jury. That is, these facts have logical value as the foundation for a permissible deduction of death which the jury may or may not infer. Summarizing the situation in terms of labels, the *presumption* of death is dispelled; the *inference* of death remains; the inference is adequate to make a *prima facie* case.<sup>9</sup> This is, therefore, a case to be submitted to the jury,<sup>10</sup> and the issue is to be determined from the evidence—*i.e.*, plaintiff's evidence of disappearance and defendant's evidence of his recognition witness—"exactly as if no presumption had ever been involved." In charging the jury, therefore, the judge must omit all reference to the presumption; he must charge the jury of plaintiff's burden of proof; and he may, if the law of his jurisdiction permits, make such reasonable comment on the weight of the evidence as his discretion suggests.

<sup>8</sup> CAL. CODE CIV. PROC. § 1963 (26); *Benjamin v. District Grand Lodge No. 4*, 171 Cal. 260, 152 Pac. 731 (1915); *Solomon v. Redona*, 52 Cal. App. 300, 198 Pac. 643 (1921); Comment, 4 CAL. L. REV. 148 (1916); Note, 6 So. CAL. L. REV. 163 (1933).

<sup>9</sup> The ambivalence of the italicized terms is, of course, acknowledged, but it is hoped that the context indicates the sense in which they are used.

<sup>10</sup> This does not mean that the case always goes to the jury when the presumption is rebutted. If the presumption is a so-called non-logical-core presumption or a mere presumption of convenience, the facts giving rise to the presumption possess no logical force and would not make a *prima facie* case for plaintiff. The presumption being rebutted, the plaintiff must therefore be nonsuited. Very few presumptions are of this type. See note 16, *infra* at 1084.

Furthermore, even when (as in the usual case) the presumption is a logical-core presumption, the rebutting evidence may be strong enough to warrant a directed verdict for the opponent of the presumption. See the text, *infra* at 1077.



### The "Morgan Theory"

Dissent from Thayerian orthodoxy began with an article published by Professor Bohlen in 1920.<sup>11</sup> Since that time, other respected writers—notably Morgan<sup>12</sup> and McCormick<sup>13</sup>—have likewise become dissident, and the second major theory of presumptions, which may appropriately be called the "Morgan Theory," has emerged.

Morgan attacks the Thayer doctrine on the following grounds: A presumption, as conceived by Thayer, is a paradox—so strong that it controls absent countervailing evidence, yet so weak that it vanishes in the face of merely enough evidence to forestall a directed verdict. (The word "merely" is used because even evidence of very questionable credibility may preclude a directed verdict.) As Morgan expresses this in his own words: "It seems absurd to say that considerations of sufficient worth to cause a court or a legislature to create a presumption upon the establishment of a basic fact having logical significance can be utterly destroyed by the mere introduction of evidence which has no persuasive effect upon the judge or jury, or which, indeed, neither judge nor jury believes."<sup>14</sup> Thus, he contends, a presumption should "have enough vitality to survive the introduction of opposing evidence which the trier of fact deems worthless or of slight value."<sup>15</sup> However, "a presumption, if it is to be an efficient legal tool, must (1) be left in the hands of the judge to administer and not be submitted to a jury for a decision as to when it shall cease to have compelling force, (2) be so administered that the jury never hear the word, presumption, used, since it carries unpredictable connotations to different minds."<sup>16</sup> The rule, Morgan holds, which best meets these tests is "a rule which gives a presumption the effect of fixing the burden of persuasion,"<sup>17</sup> for:

A party with that burden cannot discharge it by the introduction of evidence which has no convincing power with the trier of fact. His evidence must be credited and must have persuasive force.

<sup>11</sup> Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920), reprinted in BOHLEN, *STUDIES IN THE LAW OF TORTS* 636-653 (1926).

<sup>12</sup> Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933); *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931); *Techniques in the Use of Presumptions*, 24 IOWA L. REV. 413 (1939); *How to Approach Burden of Proof and Presumptions*, 25 ROCKY MT. L. REV. 34 (1952); *Further Observations on Presumptions*, 16 SO. CAL. L. REV. 245 (1943); *Presumptions*, 12 WASH. L. REV. 255 (1937).

<sup>13</sup> MCCORMICK, *EVIDENCE*, Ch. 36 (1954) [hereinafter cited as MCCORMICK]; McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C. L. REV. 291 (1927); *What Shall the Trial Judge Tell the Jury About Presumptions?*, 13 WASH. L. REV. 185 (1938).

See also Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71 (1940); Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324 (1952); Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. PA. L. REV. 1 (1954); McBaine, *Presumptions; Are They Evidence?*, 26 CAL. L. REV. 519 (1938); McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A. L. REV. 13 (1954); Reaugh, *Presumptions and the Burden of Proof*, 36 ILL. L. REV. 819 (1942). Compare Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953).

See also the lucid explanation of and critical evaluation of Thayer's doctrine in Justice Traynor's dissenting opinion in *Speck v. Sarver*, 20 Cal.2d 585, 590, 128 P.2d 16, 19 (1942).

<sup>14</sup> A.L.I., *CODE OF EVIDENCE, TENTATIVE DRAFT No. 2*, p. 218 (1941).

<sup>15</sup> A.L.I., *MODEL CODE OF EVIDENCE* 57 (1942) [hereinafter cited as *MODEL CODE*].

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

If a presumption is to have any appreciable effect other than merely fixing the burden of producing evidence, it can have no less effect than would be given to an item of evidence of sufficient weight to tip mental scales which are in equilibrium. This is not to say that the presumption is evidence or is to be treated as evidence. It is to say merely that a presumption is a procedural device for securing a decision of a disputed question of fact when the mind of the trier is in equilibrium, that is, when the trier thinks that the existence and non-existence of the fact are equally probable.

\*                     \*                     \*                     \*

Surely it is reasonable to give to a presumption the perfectly definite effect of (1) fixing the risk of non-production of evidence sufficient to justify a finding of the non-existence of the presumed fact and (2) determining the result where without it the mind of the trier is in equilibrium as to the existence or non-existence of the fact. For it must be remembered that the reasons which cause the creation of presumptions are very similar to those which cause the fixing of the burden of persuasion. Such a rule is easy of application. The judge need never mention the word, presumption, to the jury.<sup>18</sup>

McCormick's analysis differs somewhat from Morgan's, albeit he reaches substantially the same conclusion. McCormick's approach may be summarized as follows: Thayer's doctrine that the judge shall not charge the jury respecting presumptions works an injustice when taken in connection with the rule (presently in force in most states) which forbids the judge to comment upon the weight of evidence or the credibility of the witnesses. Thus, suppose *P*, possessing the burden of proof on an issue, relies wholly on a presumption; that is, *P* establishes the basic facts necessary to invoke the presumption and rests. *D* testifies, admitting *P*'s basic facts but directly contradicting the presumed fact. Now, according to Thayer, *P*'s presumption has vanished; *P*'s only remaining stake is the logical inference, if any, which may be derived from *P*'s basic facts—the facts that previously raised the now-spent presumption. Although these facts may constitute cogent circumstantial evidence, this is most difficult for the jury to understand. Juries are notoriously suspicious of inferential, circumstantial evidence and overly credulous of direct evidence. In the case under consideration, therefore, there is the danger that the jury will think that *P*'s evidence could not possibly be "a preponderance" sufficient to satisfy *P*'s burden. Despite all this, the judge is helpless to advise the jury respecting *P*'s situation. Under Thayer's doctrine, he can say nothing of a presumption; under the no-comment rule, he can say nothing of the weight of *P*'s evidence. Being thus tongue-tied, he can do no more than tell the jury of *P*'s burden of proof. McCormick suggests that this is unjust to *P*. He maintains that the best solution is to (1) give the presumption the effect of shifting the burden of proof, and (2) advise the jury of the presumption, telling them that the presumption means

<sup>18</sup> *Id.* at 57-59.

*D* has the burden of proof.<sup>19</sup> This unloads the dice as far as *P* is concerned, does not operate unfairly upon *D*, and calls for a charge to the jury in terms they can readily understand. In other words:

[T]he presumption is a "working" hypothesis which works by shifting the burden to the party against whom it operates of satisfying the jury that the presumed inference is untrue. This often gives a more satisfactory apportionment of the burden of persuasion on a particular issue than can be given by the general rule that the pleader has the burden. One looks rather to the ultimate goal, the case or defense as a whole, the other to a particular fact-problem within the case. Moreover, an instruction that the presumption stands until the jury are persuaded to the contrary, has the advantage that it seems to make sense, and so far as we may judge by the other forms thus far invented of instructions on presumptions by that name, I think we can say that it is almost the only one that does.<sup>20</sup>

The discussion thus far has been directed to exploring the origins and some of the implications of the two major presumption theories. Before discussing the present California law in regard to presumptions, it remains to consider the impact of these competing theories, first, upon the Model Code of Evidence of the American Law Institute and, next, upon the Uniform Rules of Evidence of the National Conference of Commissioners on Uniform State Laws.

<sup>19</sup> McCORMICK §§ 314-317.

<sup>20</sup> McCORMICK § 317 at 671-672.

## THE MODEL CODE OF EVIDENCE

The draftsmen of the American Law Institute's Model Code of Evidence originally recommended to the Institute a proposal to adopt the Morgan theory as to most presumptions.<sup>1</sup> This proposal was warmly debated at the 1941 meeting of the Institute. Judge Lummus of Massachusetts led the fight against the proposal. Professor Morgan, Institute Reporter, conducted the defense. The debate points up the issues between Thayer and Morgan so sharply that it is profitable to quote the following exchanges between Judge Lummus, Senator Pepper and Professor Morgan:

Judge Lummus: The situation as I conceive it is this: . . . I think the Reporter and I will both agree that the alternative practically is either the rule which the Reporter, with the authority of the majority of his Advisers, has submitted here or the unadulterated Thayerian rule. And having that choice, the question is which one will you take. Now, the Thayerian doctrine, as I understand it, is that the presumption having been created by the establishment of the basic fact, is rebutted whenever the opposing party presents evidence which will warrant a finding contrary to the presumed fact. That does not mean that the facts which give rise to the presumption have no further effect. Take the simple case of the mailing of a letter. It creates according to most courts a presumption of the receipt of the letter because the mails ordinarily work well. If the supposed recipient of the letter testifies that he never got it, that evidence, warranting as it does a verdict or a finding that the letter was not received, destroys the conclusive effect of the presumption, the compulsion of finding receipt by the addressee is gone. It becomes a question of fact then, and the fact of mailing and the fact of experience which caused the creation of the presumption, namely, that letters are commonly delivered to the addressee, are evidence just the same after the presumption is gone. The presumption is gone but the evidence remains, and the jury may say that the letter was in fact delivered even though the addressee says he never got it. So that under the Thayerian doctrine there still remains whatever force the fact which gives rise to the presumption has as a matter

<sup>1</sup> According to the proposal, presumptions were to be classified into two types as follows: (1) presumptions in which the basic facts are probative of the presumed fact, (2) presumptions in which the basic facts are nonprobative of the presumed fact. The first type (constituting, of course, most presumptions) was to have the Morgan effect of shifting the burden of proof. The second type was to have the Thayer effect. The reason for thus classifying presumptions and according them this difference in treatment was the decision of the Supreme Court of the United States in *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639 (1929), which led the draftsmen to believe that it would be "unconstitutional to give a statutory presumption the effect of fixing the burden of persuasion, where the basic fact had no logical value as evidence of the presumed fact." A.L.I., CODE OF EVIDENCE, TENTATIVE DRAFT No. 2, pp. 216-223 (1941).

of logical inference. . . . [U]nder the Thayerian rule . . . in all cases the burden of proof in the sense of the burden of persuasion remains on the same party with which it started. That has been the law of many, if not most states, by judicial decision. The only state according to the Reporter that has followed the rule the Reporter has laid down is Pennsylvania. The adoption of the Reporter's rule would change the law of a multitude of states, and would make the law of any state that adopts it conform to the Pennsylvania doctrine. I agree that this Pennsylvania doctrine interpreted by the Reporter in his rule is workable. I don't think there is any greater difficulty in applying it than there is in applying the Thayerian rule; but the Thayerian rule is equally workable and equally simple. The judge never ought to use the word "presumption" to the jury under either rule. But just what advantage has this rule of the Reporter over the Thayerian rule that would lead the whole country to overrule all its former decisions and adopt a rule that so far as I know prevails only in one state? . . .

Mr. Pepper: Judge Lummus, would you be willing to simply state the facts where the application of the Thayerian rule in its entirety without this modification would produce result A and the rule as modified by the blackletter would produce result B. Is it possible for us to make it concrete in any way?

Judge Lummus: Take the same illustration of the mailing of a letter. I take it that under the Thayerian rule it is proof that the letter is mailed that creates the presumption. The addressee comes in and says he never got the letter.

Mr. Pepper: Stop just for a moment. It having been mailed and proved, if the case stops there, then what?

Judge Lummus: Then the court is obliged to rule that the letter was delivered. That is the presumption and the effect of the presumption is to compel that conclusion.

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Mr. Pepper: And if that is the only issue of fact in the case and there is no evidence at all to rebut the presumption, it does not even go to the jury.

Judge Lummus: No, it does not go to the jury, and that is true under the Thayerian rule or the Reporter's rule. Now, if there is evidence of the addressee that he never got the letter, then under the Thayerian rule the presumption disappears and it becomes a pure question of fact whether the letter was delivered and upon that question the jury may consider not only the evidence of the addressee that he never got the letter, but also the likelihood resulting from the regular course of the mails that he did get the letter and they may decide it either way, but the burden of proof, if it is started with the party who has to prove the letter was delivered, remains there and the judge must tell the jury that in deciding that question of fact they must find the letter was not delivered, unless by the weight of the evidence it is shown to be delivered.

\* \* \* \* \*

[B]ut under the Reporter's rule, where there was evidence that the letter had not been received, the burden of proof would change . . . to come upon the party who says the letter was not delivered and he would have to prove by a greater weight of evidence that it was not delivered. . . . The difference between the Thayerian rule and the Reporter's rule comes right there and, as I conceive it, nowhere else and my proposition is that the difference is not so desirable or so important as to cause us to throw overboard the law of a great majority of the states in order to adopt the law of Pennsylvania.<sup>2</sup>

\* \* \* \* \*

Mr. Morgan: . . . What I object to in the Thayerian rule is this: the creation of a presumption for a reason that the court deems sufficient, a rule of law if this basic fact stands by itself there must be a finding of a presumed fact, whether the jury would ordinarily find it from the basic fact or not; but then the total destruction of the presumption just the minute some testimony is put in which anybody can disbelieve, which comes from interested witnesses, and which is of a sort that is usually disbelieved. It seems to me it is futile to create a presumption if it is to be so easily destroyed. . . . I think that you ought to give greater effect to a presumption than the mere burden of putting in evidence which may be disbelieved by the trier of fact. I say that the slightest definite weight you can give, not letting the jury guess one way or the other about the weight of it, is to fix the burden of persuasion because the burden of persuasion is important . . . only where the mind of the jury or the trier of fact is in equilibrium. If the jury is satisfied either way, it makes no difference who has the burden of persuasion, but when the mind of the jury or the mind of the trier of fact is in equilibrium, then the party having the burden of persuasion loses; so that the most effect that this gives to a presumption when evidence is introduced contrary to it is the effect which a piece of evidence would have that would throw the case out of equilibrium; and it is my firm conviction that if a presumption is worth creating it is worth that much value even in the face of evidence to the contrary? . . . I agree that we would be making a change . . . . But there are numbers of states that have rules that certain kinds of presumptions fix the burden of persuasion; and if we are going to get at this theoretically, we have to have some easily applied rule so as to get out of this welter of confusion in the cases.<sup>3</sup>

The upshot was that the Institute voted 59-42 to disapprove the proposed draft and to adopt the Thayer rule as to *all* presumptions.<sup>4</sup> The Model Code of Evidence was therefore a Thayer-theory code as far as presumptions are concerned.<sup>5</sup>

<sup>2</sup> 18 A.L.I. PROCEEDINGS 209-213 (1941).

<sup>3</sup> *Id.* at 221-222.

<sup>4</sup> *Id.* at 226. The Institute did make an exception respecting the presumption of legitimacy, providing that this presumption fixed the burden of proof. See note 12, *infra* at 1102.

<sup>5</sup> MODEL CODE, Ch. VIII.

## THE UNIFORM RULES OF EVIDENCE

The substitution of the 72 Uniform Rules of Evidence for the entire Model Code came about in the following manner. In 1949, the Institute referred the Code to the National Conference of Commissioners for study and possible redrafting; it also authorized the Conference to use the Code "as the basis for the preparation of a uniform code of evidence."<sup>6</sup> At its 1949 meeting, the Conference decided that its policy would be to prepare a new evidence code with appropriate credit to be given to the Institute.<sup>7</sup> At the 1950 meeting, the designation of "Uniform Rules of Evidence" was selected.<sup>8</sup> From the beginning, the Conference recognized its obligation to use the Institute Code "as a basis from which to work."<sup>9</sup>

That thorough candid work by the nation's best talent commands respect. But if its departures from traditional and generally prevailing common law and statutory rules of evidence are too far-reaching and drastic for present day acceptance, they should be modified in such respects as will express a common ground of acceptability in the jurisdictions and by the tribunals which the rules are expected to serve.<sup>10</sup>

Guided by these objectives of acceptability and uniformity, the Conference proceeded to effectuate "the policy of retaining such parts of the Model Code as appear to meet the requirements of such objectives, and to reject, revise or modify the rest."<sup>11</sup> A committee appointed by the Institute worked in cooperation with and advised the committee appointed by the Conference. The drafting was completed and the Uniform Rules were promulgated in August 1953, at which time they were endorsed not only by the whole Conference but also by the American Bar Association.

The presumption rules of the Uniform Rules of Evidence, as finally approved by the Conference are in substance the very "Morgan" rules which the Institute, voting its preference for the Thayer view, rejected. In view of this background, it must be apparent that Thayer's doctrine should be regarded as (prima facie at least) a reasonable alternative to the Uniform Rules. Hence, in order to evaluate these rules objectively and determine their suitability for adoption in California, it is necessary both to have an understanding of the Thayer doctrine and to consider that doctrine as a possible alternative.

<sup>6</sup> HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 316 (1951).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Id.* at 317.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

## THE CALIFORNIA VIEW

Before attempting to analyze California presumption law in any detail, it seems desirable to give a generalized, overall view. As of today, California is neither a Thayer nor a Morgan state. To demonstrate that California is not a Morgan state, it is necessary only to call to witness innumerable judicial declarations that presumptions do not shift the burden of proof.<sup>12</sup>

It requires a more extended statement to show that California is not a Thayer state. Thus, Code of Civil Procedure Section 1959 defines a presumption as follows: "A presumption is a deduction which the law expressly directs to be made from particular facts." Section 1961 provides: "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." Section 1962 specifies certain conclusive presumptions. Section 1963 provides in part: "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence."

The leading California case on presumptions is *Smellie v. Southern Pac. Co.*,<sup>13</sup> in which the plaintiff relied on a presumption that he had acted with due care. Defendant testified against the presumed fact. On defendant's motion for a directed verdict, one of the many questions involved was whether plaintiff's presumption was thus dispelled by defendant's evidence. The court noticed defendant's argument that plaintiff's presumption, "being merely a disputable presumption was entirely overcome and dispelled by the testimony of" defendant;<sup>14</sup> and that "since the statute itself (sec. 1963, Code Civ. Proc.), before enumerating the disputable presumptions, declares that said presumptions 'are satisfactory, if uncontradicted' and that they 'may be controverted by other evidence', it must follow that if they are contradicted or controverted they fade out and disappear from the case."<sup>15</sup> Noting this Thayerian argument, the court turned to the question "'directly raised and presented as to whether this presumption . . . has been overcome and dispelled as a matter of law by the testimony'" of

<sup>12</sup> *People v. Hardy*, 33 Cal.2d 52, 63, 198 P.2d 865, 871 (1948) ("there can be no justification in the law for placing on the defendant the burden of overcoming the presumption 'by a preponderance of the evidence'"); *Bourguignon v. Peninsular Ry.*, 40 Cal. App. 689, 695, 181 Pac. 669, 671 (1919) (defendant "is not obliged to overcome the presumption by a preponderance of evidence"); *Estate of Hansen*, 38 Cal. App.2d 99, 116, 100 P.2d 776, 785 (1940) ("the authorities hold that the establishment of a presumption does not have the effect of shifting the burden of proof").

See also authorities cited in note 4, *infra* at 1079. Compare, however, the text, *infra* at 1102-1104.

<sup>13</sup> 212 Cal. 540, 299 Pac. 529 (1931). The case was before the Supreme Court three times prior to the final decision: 269 Pac. 657 (1928); 276 Pac. 338 (1929); 287 Pac. 343 (1930). There are many ramifications and divergent applications of its several doctrines. At this preliminary stage, only so much of the case is considered as seems essential to the proposition that this case involves a decisive repudiation of Thayer's theory. Other aspects of the case are treated throughout this study.

<sup>14</sup> *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 548, 299 Pac. 529, 532 (1931).

<sup>15</sup> *Id.* at 553, 299 Pac. at 534.



defendant.<sup>16</sup> Answering this question by rejecting defendant's argument, the court firmly stated that "it is not correct to say that under the code section and the effect given to it by the court [presumptions] vanish from the case as a matter of law when contradicted or controverted by the party against whom they are invoked." Rather, "in such case" the "compelling effect" of a presumption may be "destroyed" only "by the facts as found to exist."<sup>17</sup> In other words, in such cases the presumption survives opposing testimony and is dispelled only by a verdict or finding.

Justice Richards dissented from "that portion of the main opinion holding that the presumption . . . persisted . . . notwithstanding the direct testimony of the witness Ireland [defendant] to a fact which controverted that presumption."<sup>18</sup> His reasoning is as follows:

Section 1959 of the Code of Civil Procedure, defines a presumption to be a deduction which the law expressly directs to be made from particular facts; and while section 1957 classes presumptions as a form of indirect evidence, section 1961 declares that "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." Section 1962 defines conclusive presumptions, while section 1963 deals with all other presumptions, and in so doing states: "All other presumptions are satisfactory [that is to say, satisfactory evidence] if *uncontradicted*. They are denominated disputable presumptions and may be controverted by other evidence." The term "satisfactory evidence" is defined to be that evidence which produces conviction in an unprejudiced mind. (6 Words and Phrases, 3d series, p. 953.) The term "controvert" and "contradict" as used in the foregoing sections of the code are obviously used synonymously therein and the word "contradict" is also used with like meaning in sections 2049 and 2051 of said code. These words in their ordinary and usual sense carry the meaning of "oppose", "dispute", "take issue with", "assert the contrary of" (Webster's), or, as defined in 2 Words and Phrases, *supra*, pages 457, 482, mean "to deny or attempt to dispute or confuse". We are thus brought to the conclusion that a disputable presumption under the express terms of sections 1961 and 1963 of the Code of Civil Procedure, ceases to be satisfactory evidence, and as such no longer of binding effect in the case, when "controverted", "contradicted", "disputed", "opposed", "denied," or "taken issue with" by the production in the case of other evidence, direct or indirect. This means nothing more nor less than that when such evidence as to the fact in issue appears and is presented, the presumption is dispelled and disappears.<sup>19</sup>

On this basis, Justice Richards branded the majority view as "heresy" and called for a return to "orthodoxy."

<sup>16</sup> *Id.* at 549, 299 Pac. at 532.

<sup>17</sup> *Id.* at 553, 299 Pac. at 534.

<sup>18</sup> *Id.* at 565, 299 Pac. at 539.

<sup>19</sup> *Id.* at 566-567, 299 Pac. at 539-540 (emphasis in original).

Remembering that the opinion last quoted is the minority opinion and that the *Smellie* case is the leading California case, it may be asserted with some assurance that California is not now a Thayer jurisdiction.<sup>20</sup> But if not Morgan and if not Thayer, what kind of *tertium quid* is the California law on presumptions? What should it be?

The diversities and anomalies of local presumption law and practice constitute a subject so fraught with complexity and so characterized by confusion that it is unusually important to set up and to adhere rigidly to an outline as the framework for discussing the subject.<sup>21</sup> The basis for such an outline may be found in the circumstance that California presumption law has, for the most part, developed in three major procedural contexts:

1. Motion for nonsuit or directed verdict (hereinafter called "The First Stage").
2. Submission of the case to the jury (hereinafter called "The Second Stage").
3. Postdecision review of verdict or findings (hereinafter called "The Third Stage").

In the following analysis, the subject is divided into these three parts.

### The First Stage

In discussing California presumptions at the First Stage, two radically different situations must be considered:

1. Directed verdict for plaintiff for establishing his cause of action; directed verdict for defendant for establishing his affirmative defense.
2. Directed verdict (or nonsuit) for defendant for failure of plaintiff to establish his cause of action; directed verdict (or peremptory instruction) for plaintiff for failure of defendant to establish his affirmative defense.

<sup>20</sup> Decisions prior to the *Smellie* case throw little, if any, light on this question. For example, a statement by Chief Justice Field in the two early cases of *Biddle Boggs v. Merced Min. Co.*, 14 Cal. 279, 375 (1859), and *Nieto v. Carpenter*, 21 Cal. 455, 489 (1863), is to this effect: "Presumptions are indulged to supply the absence of facts, but never against ascertained and established facts." Is this in accord with Thayer's theory or Morgan's, or does it differ from both? In *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 529-530, 39 Pac. 922, 925 (1895), the court states:

But disputable inferences or presumptions, while evidence, are evidence the weakest and least satisfactory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The facts being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled.

Does this mean that evidence contrary to the presumption dispels it or that only the verdict or finding against it dispels it?

The statement last quoted is occasionally cited without further explanation, however, and in contexts which do not impart further meaning to it. See, e.g., *Simonton v. Los Angeles Trust & Sav. Bank*, 205 Cal. 252, 258, 270 Pac. 672, 675 (1928); *Williams v. Hasshagen*, 166 Cal. 386, 390, 137 Pac. 9, 11 (1913).

On the point that the presumption is weak evidence, these cases are in a decided minority. See Comment, 18 CAL. L. REV. 418 (1930).

<sup>21</sup> Thayer's caveat is worth repeating here. Speaking of presumption law in general he warned as follows: "Among things so incongruous . . . and so beset with ambiguity there is abundant opportunity for him to stumble and fall who does not pick his way and walk with caution." THAYER, PRELIMINARY TREATISE ON EVIDENCE 352 (1898).

### Directed Verdict for Plaintiff for Establishing his Cause of Action; Directed Verdict for Defendant for Establishing his Affirmative Defense

It is clear that in appropriate cases plaintiff may receive a directed verdict as the reward for establishing his cause of action, and it is equally clear that in appropriate cases defendant may receive a directed verdict as the reward for establishing his affirmative defense. Two simple, illustrative cases are as follows:

1. Action for breach of contract. Plaintiff testifies to facts showing the contract, defendant's nonperformance, and damages. Defendant produces no evidence. Plaintiff receives a directed verdict.<sup>1</sup>
2. Action on a money obligation. Defendant pleads payment. Defendant testifies to facts showing payment. Plaintiff introduces no evidence. Directed verdict for defendant.<sup>2</sup>

In either case, the motion for directed verdict would, of course, have been denied if substantial contradicting evidence had been produced (since substantial conflicts in the evidence are resolvable only by the jury). It is equally clear that in such cases the judge, upon the motion for directed verdict, must look at *all* the evidence, the movant's and the opponent's. If he grants the motion at all, he must do so on the basis of the strength of the movant's evidence. Having examined the evidence of both parties, the judge inquires as to (1) whether the moving party has adequately supported his proposition by his evidence,

<sup>1</sup> See *Scott v. Wood*, 81 Cal. 398, 401, 22 Pac. 871, 872 (1889); *Curcic v. Nelson Display Co.*, 19 Cal. App.2d 46, 64 P.2d 1153 (1937); *Gibson v. Mailhebau*, 96 Cal. App. 455, 274 Pac. 566 (1929).

See also *Walters v. Bank of America*, 9 Cal.2d 46, 49, 69 P.2d 839, 840 (1937), to the following effect:

The trial court, in a proper case, may direct a verdict in favor of a party upon whom rests the burden of proof, in this case, the plaintiff. Substantially the same rules apply to directed verdicts in favor of plaintiffs as apply to such verdicts in favor of defendants. . . . A motion for a directed verdict may be granted upon the motion of the plaintiff, where, upon the whole evidence, the cause of action alleged in the complaint is supported, and no substantial support is given to the defense alleged by the defendant.

<sup>2</sup> *Kohn v. National Film Corp.*, 60 Cal. App. 112, 117, 212 Pac. 207, 209 (1922), supports the above analysis so far as a motion by defendant for directed verdict on his affirmative defense is concerned:

The motion for a directed verdict may be made either by the plaintiff where, upon the whole evidence, the cause of action alleged in the complaint is supported and no support is given to the defense alleged by the defendant, or it may be made by the defendant whenever a complete defense has been made out by uncontradicted evidence. The latter statement is called forth because of the insistence of appellant's counsel that the motion for a directed verdict is never proper as coming from a party who has the burden of proof, and applying his statement to this case, he argues that, because the defense of payment was affirmative on the part of the defendant, a verdict could not be directed by the court under any state of the evidence. This position is illogical. To illustrate: Let us suppose that after plaintiff had introduced testimony sufficient to establish a *prima facie* case, the defendant had proposed to prove payment of the obligation; assume that the plaintiff, in order to obviate the necessity of such proof of payment to be made, stipulated in lieu thereof that payment had been made as alleged by the defendant. In that state of the case, but one verdict would be legally possible, to wit, a verdict for the defendant.

As to directed verdict for defendant on the affirmative defense of contributory negligence, see *Ringo v. Johnson*, 99 Cal. App.2d 124, 221 P.2d 267 (1950); *Wiswell v. Shinnors*, 47 Cal. App.2d 156, 117 P.2d 677 (1941); *Gayton v. Pacific Fruit Express Co.*, 127 Cal. App. 50, 15 P.2d 217 (1932).

and (2) whether the adversary has raised a substantial conflict. If the answer to (1) is yes, and (2) is no, the verdict is directed.

This process obviously lodges with the judge the power of deciding that the movant's testimony is true and, to the extent that this testimony is circumstantial, of deciding that inferences favorable to the movant must be drawn. Nevertheless, a majority of jurisdictions, including California, approve such directed verdicts.<sup>3</sup> As Wigmore puts it, the movant's evidence must be strong enough so that "the jury acting as reasonable men, must be persuaded and must render a verdict on that issue for the proponent."<sup>4</sup> He adds the following explanation:

In the ordinary case, this overwhelming mass of evidence, bearing down for the proponent, will be made up of a variety of complicated data, differing in every new trial and not to be tested by any set formulas. The judge's ruling will be based on a survey of this mass of evidence as a whole; and it will direct the jury on that issue to render a verdict on that *mass of evidence* for the proponent. The propriety of this has sometimes been doubted . . . but the better authority gives ample recognition to this process.<sup>5</sup>

In the above hypothetical cases, after plaintiff in the first illustration or after defendant in the second illustration has produced his evidence, the adversary is obviously in a position of peril. With what language should this peril be described? This question invites a semantic debate in which manifold verbal variations have been employed.<sup>6</sup>

Under the terminology of the Uniform Rules of Evidence, the adversary's position would be described in terms of his possession of the "burden of producing evidence." Rule 1(5) defines this burden as follows:

"Burden of producing evidence" means the obligation of a party to introduce evidence when necessary to avoid the risk of a directed verdict or peremptory finding against him on a material issue of fact.

The adversary in the above hypothetical cases stood in peril of a directed verdict at the close of the evidence against him; at that time, he therefore possessed the "burden of producing evidence" in the sense of Uniform Rule 1(5).

What would be the situation in the postulated cases if, in the one case, plaintiff relied on an inference or a presumption<sup>7</sup> rather than direct evidence to support his cause of action, or if, in the other case, defendant did likewise to support his affirmative defense? In the following discussion the designation "proponent" is applied to the plain-

<sup>3</sup> 9 WIGMORE § 2495; Bobbe, *The Uncontradicted Testimony of an Interested Witness*, 20 CORNELL L. Q. 33 (1934); Sunderland, *Directing a Verdict for the Party Having the Burden of Proof*, 11 MICH. L. REV. 198 (1913).

<sup>4</sup> 9 WIGMORE § 2487 at 280.

<sup>5</sup> *Ibid.*

<sup>6</sup> See, for example, *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871 (1889).

<sup>7</sup> The terms "inference" and "presumption" have sometimes been treated as synonymous. Recent cases, however, have criticized this usage and have distinguished the terms. For criticisms of the loose usage, see *Anderson v. I. M. Jameson Corp.*, 7 Cal.2d 60, 59 P.2d 962 (1936); *Crooks v. White*, 107 Cal. App. 304, 290 Pac. 497 (1930).

tiff as to his cause of action or defendant as to his affirmative defense, and "opponent" is applied to the adversary of such proponent.

If the proponent establishes a presumption and the opponent produces no evidence, the proponent is entitled to a directed verdict or a peremptory instruction. Code of Civil Procedure Section 1959 defines a presumption as follows:

A presumption is a deduction which the law expressly directs to be made from particular facts.

Section 1961 states:

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.

Undoubtedly, therefore, the proponent relying upon a presumption not "controverted" is entitled to a directed verdict or to peremptory instructions.<sup>8</sup> Nothing in the URE is opposed to this conclusion. Thus, URE Rule 13 defines a presumption as follows:

A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.

URE Rule 14 states as follows:

Subject to Rule 16, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the non-existence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.

<sup>8</sup> Dicta in the following cases state the mandatory character of presumptions: *Chakmakjian v. Lowe*, 33 Cal.2d 308, 201 P.2d 801 (1949) (Labor Code presumption of negligence); *Black v. Meyer*, 204 Cal. 504, 269 Pac. 173 (1928) (presumption of payment from possession of instrument); *Light v. Stevens*, 159 Cal. 288, 113 Pac. 659 (1911) (same); *People v. Theodore*, 121 Cal. App.2d 17, 262 P.2d 630 (1953) (presumption of identity of person from identity of name); *Estate of Kennedy*, 106 Cal. App.2d 621, 235 P.2d 837 (1951) (presumption of continuity of foreign law); *Donovan v. Security-First Nat'l Bank*, 67 Cal. App.2d 845, 155 P.2d 856 (1945) (presumption of consideration); *Citizens Nat'l Trust & Sav. Bank v. Brown*, 54 Cal. App.2d 688, 129 P.2d 466 (1942) (presumption of regularity); *Moore v. Miller*, 51 Cal. App.2d 674, 125 P.2d 576 (1942) (presumption highway is outside business or residence district); *Hocker v. Glover*, 113 Cal. App. 152, 298 Pac. 72 (1931) (presumption that money paid was due); *Gibson v. Mailhebauu*, 96 Cal. App. 455, 274 Pac. 566 (1929) (presumption of death from probate and issuance of letters); *Ross v. Gentry*, 94 Cal. App. 742, 271 Pac. 1098 (1928) (presumption letter duly mailed received); *People v. Webster*, 13 Cal. App. 348, 109 Pac. 637 (1910) (presumption of intended consequences).

As McCormick points out, direct holdings are rare since "the opponent seldom fails to come forward with rebutting evidence." *McCORMICK* § 310 at 649.

Without pausing at this point to explore Rule 14 fully, it may be noted that under both branches of the rule the party against whom the presumption operates is required to come forth with *at least some* evidence. In the absence of such evidence, the presumption "continues to exist" and has the mandatory effect stated in Rule 13.<sup>9</sup>

There is no difference here between the Thayer, Morgan, and California views, nor is there any difference here between the views expressed in the Model Code and in the Uniform Rules. All agree that a presumption (absent countervailing evidence) is mandatory and requires a finding of the presumed fact.<sup>10</sup>

What is the situation if the proponent relies upon an inference and the opponent introduces no evidence against the inferred fact? It is clear that such an inference does not operate like a presumption. An unopposed presumption always requires a finding of the presumed fact. An unopposed inference, however, does not. Thus, Code of Civil Procedure Section 1958 defines an inference as follows:

An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

Code of Civil Procedure Section 1960 states when an inference arises:

An inference must be founded:

1. On a fact legally proved; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

Justice Traynor explains as follows the operation of inferences:

It is not always possible for a party to a lawsuit to introduce evidence directly bearing upon the existence of a fact that he is attempting to prove. The evidence available to him may serve only to establish the existence of certain primary facts that are logically connected with the material fact. If a jury can reasonably infer from these primary facts that the material fact exists, the party has introduced sufficient evidence to entitle him to have the jury decide the issue. The jury is not compelled to draw the inference, however, even in the absence of contrary evidence and may refuse to do so.<sup>11</sup>

<sup>9</sup> What if the opponent "controverts" the presumption in the sense of Code of Civil Procedure Section 1961? Is the proponent then entitled to a directed verdict? Clearly not. The last clause of Section 1961 carries the idea that, if the presumption is controverted, the jury is not bound to find according to the presumption; if the jury is not so bound, the case is not an appropriate one for the directed verdict. (Distinguish the question as to whether the opponent is entitled to a directed verdict. This is treated in a later portion of this study, *infra* at 1070-1072.)

<sup>10</sup> This view of the effect of an un rebutted presumption is not, however, universal. Some courts indicate that some un rebutted presumptions simply make a jury issue. McCormick suggests the label "permissive presumptions" to describe this variety of presumption. MCCORMICK § 308.

In a jurisdiction possessing the minority view as to directing a verdict for proponent (see note 3, *supra* at 1066), the mandatory character of a presumption would be enforced by a conditional charge. The same would be true in any jurisdiction when there is a jury issue as to the basic facts of the presumption. See MCCORMICK § 315.

<sup>11</sup> *Blank v. Coffin*, 20 Cal.2d 457, 460-461, 126 P.2d 868, 870 (1942).

Chief Justice Waste expresses the same thought in the following language: "It should be kept in mind that an inference is a permissive deduction while a presumption is a deduction directed to be drawn by law."<sup>12</sup>

These expositions make it clear that an unopposed inference does not have binding effect in every case (as does an unopposed presumption). Does it follow, however, that the effect of an unopposed inference can never be binding in any case whatsoever? This does not seem to be the case. Inferences are, of course, of varying strength. In some cases an unopposed inference or a combination of inferences is strong enough to require a directed verdict or a peremptory instruction. Although the proponent's evidence is circumstantial, it may be strong enough to require a directed verdict for him in the absence of any evidence from his adversary. If this is correct, the difference between unopposed inferences and unopposed presumptions is this: Such presumptions are always binding; such inferences usually are not binding, but in exceptional cases they are.

A recent illustration of this exceptional situation is *Burr v. Sherwin Williams Co.*<sup>13</sup> The following extract reveals the problem and the holding:

The procedural effect of *res ipsa loquitur* is presented by the contention that the court erred in telling the jurors that the inference of negligence based upon the doctrine is mandatory rather than permissive. They were instructed that from the occurrence of the damage involved in this case, as established by the evidence, "there arises an inference" of negligence by the defendants and that it is "incumbent upon the defendants to rebut the inference." It is settled, of course, that *res ipsa loquitur* raises an inference, not a presumption, and the general rule is that whether a particular inference shall be drawn is a question of fact for the jury, even in the absence of evidence to the contrary. . . . This, however, does not preclude the conclusion that *res ipsa loquitur* may give rise to a special kind of inference which the defendant must rebut, although the effect of the inference is somewhat akin to that of a presumption.<sup>14</sup>

\* \* \* \* \*

It is our conclusion that in all *res ipsa loquitur* situations the defendant must present evidence sufficient to meet or balance the inference of negligence, and that the jurors should be instructed that, if the defendant fails to do so, they should find for the plaintiff.<sup>15</sup>

Thus, in California, there are not only permissive inferences, but also mandatory inferences. The mandatory inference when unopposed operates just like the presumption where that is unopposed. That the two devices have different labels while operating in similar fashion need

<sup>12</sup> *Engstrom v. Auburn Auto Sales Corp.*, 11 Cal.2d 64, 69, 77 P.2d 1059, 1062 (1938).

<sup>13</sup> 42 Cal.2d 682, 268 P.2d 1041 (1954).

<sup>14</sup> *Id.* at 688, 268 P.2d at 1044 (citations omitted).

<sup>15</sup> *Id.* at 691, 268 P.2d at 1046.

not be discussed here; it will, however, be of concern in other contexts later in this study.<sup>16</sup>

The principal subject of this portion of the study concerns directed verdicts or peremptory instructions for the party possessed of the burden of proof (for plaintiff as to his cause of action and for defendant as to his affirmative defense). The point has been made that such rulings in favor of such proponents can be based on the strength of such proponent's evidence. If it were otherwise, and if the proponent's evidence had to be excluded from consideration for the purpose of ruling on his motion, then it would follow that the proponent could win a peremptory ruling only in those rare situations in which the opponent establishes proponent's proposition (that is, for example, when defendant establishes plaintiff's cause of action or when plaintiff establishes defendant's affirmative defense). But, to repeat, peremptory instructions for such proponents are not, in general, limited to those situations in which their opponents "prove themselves out of court." This point is belabored here because of the importance it will assume when further reference to the *Smellie* case is made.<sup>17</sup>

**Directed Verdict (or Nonsuit) for Defendant for Failure of Plaintiff to Establish his Cause of Action; Directed Verdict (or Peremptory Instruction) for Plaintiff for Failure of Defendant to Establish his Affirmative Defense**

It is an everyday occurrence, of course, to nonsuit plaintiff or direct a verdict for defendant on the basis of the weakness of plaintiff's evidence in support of his alleged cause of action.<sup>18</sup> It is equally proper, though less common, to give peremptory instruction for plaintiff on the basis of the weakness of defendant's evidence in support of his affirmative defense.<sup>19</sup> The process involved in these cases is, however, quite different from that explored previously, *i.e.*, the portion of the study concerned with directing a verdict for the plaintiff in the one case and for the defendant in the other on the basis of the *strength* of his evidence. There, the moving party invited the judge to consider both the strength of his own evidence and the weakness of his adversary's evidence; the invitation was accepted; the motion was granted if the movant's evidence was sufficiently strong and the adversary's sufficiently weak. Here, the evidence of the moving party is, as a general proposition, disregarded; the motion, if granted, is granted solely on the basis of the weakness of the evidence of the nonmoving party. The following example illustrates this distinction: Action for personal injuries. Liability of defendant depends upon whether a certain traffic light was red at a particular time. Plaintiff testifies that he observed the light at the time and that the light was red. Defendant testifies in like manner, except that he swears the color was green. Defendant moves for a nonsuit or for a directed verdict. How much of the evidence

<sup>16</sup> See the text, *infra* at 1075-1076.

<sup>17</sup> See the text, *infra* at 1072-1078.

<sup>18</sup> See, *e.g.*, *Perumean v. Wills*, 8 Cal.2d 578, 67 P.2d 96 (1937).

<sup>19</sup> See, *e.g.*, *Crabbe v. Mammoth Channel Gold Mining Co.*, 168 Cal. 500, 143 Pac. 714 (1914) (instructions on contributory negligence refused; in effect, a directed verdict for plaintiff on the issue). See also *Hatzakorzian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 239 Pac. 709 (1925) (trial by court; finding of contributory negligence; judgment for defendant reversed; court's reasoning would require a peremptory instruction in a jury case).



should the judge consider? What should be his point of view in considering it? The answers are clearly as follows: The judge should consider only plaintiff's evidence; he should assume that such evidence is true. Having done so, he should grant defendant's motion only if plaintiff's evidence is not "of sufficient substantiality to support a verdict in favor of plaintiff, if given."<sup>20</sup> As Justice Langdon says, in *Estate of Flood*:<sup>21</sup>

First, the trial court, on a motion by a defendant for a directed verdict, cannot weigh all the evidence introduced by both sides; all evidence in conflict with the plaintiff's evidence must be disregarded. Second, the trial court, in determining such motion, cannot judge the credibility of witnesses, but must give to the plaintiff's evidence all of the value to which it would be legally entitled if the witnesses were believed. If extraordinary situations may be conceived in which these rules would yield to exceptions, the instant case is not one of them, and it must be governed by the rules, which must now be considered as settled in this state by a long line of authorities.

The situation of defendant relying upon an affirmative defense and the plaintiff moving for a directed verdict or peremptory instruction is entirely comparable. Consider, for example, an action on a promissory note. Defendant pleads payment. Defendant testifies to payment in cash at such and such a date. Plaintiff testifies contradicting defendant's testimony. Plaintiff moves for a directed verdict. Motion denied. The judge must disregard plaintiff's evidence and assume defendant's to be true.

Thus, as a general rule, when the defendant moves for a directed verdict for failure of plaintiff to establish his cause of action, or when plaintiff so moves for failure of defendant to establish his affirmative defense, the movant's evidence must be disregarded.

An exception is made in California, however, when the nonmoving party relies upon an inference. The movant gives evidence tending to dispel the inference. The moving party's evidence is reviewed and, in rare cases, is found to require a directed verdict for him.<sup>22</sup> In cases

<sup>20</sup> *Mairo v. Yellow Cab Co.*, 208 Cal. 350, 351, 281 Pac. 66 (1929).

<sup>21</sup> 217 Cal. 763, 769, 21 P.2d 579, 581 (1933). See also *Farmer v. Fairbanks*, 71 Cal. App.2d 70, 162 P.2d 26 (1945).

<sup>22</sup> See *Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d 868, 870 (1942), in which Justice Traynor states that if the evidence contrary to the inferred fact is "clear, positive, uncontradicted, and of such nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law." It seems clear that to apply this rule on a motion for a directed verdict requires the court to consider the movant's evidence. (This is questioned, however, in *Nash v. Wright*, 82 Cal. App.2d 467, 186 P.2d 686 (1947).)

Justice Traynor points out that in most cases "the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference." Research confirms this observation. In the following cases, however, the inference was held to be dispelled as a matter of law on the basis of the evidence of the opponent of the inference: *Engstrom v. Auburn Auto Sales Corp.*, 11 Cal.2d 64, 77 P.2d 1059 (1938); *Johnston v. Black Co.*, 33 Cal. App.2d 363, 91 P.2d 921 (1939); *Fahey v. Madden*, 56 Cal. App. 593, 206 Pac. 128 (1922); *Martinelli v. Bond*, 42 Cal. App. 209, 183 Pac. 461 (1919); *Maupin v. Solomon*, 41 Cal. App. 323, 183 Pac. 198 (1919).

The above rule, stated by Justice Traynor in *Blank v. Coffin*, is vigorously attacked in a separate opinion by Justice Carter and is warmly defended by Professor McBaine in Note, *Inferences: Are They Evidence?*, 31 CAL. L. REV. 108 (1942).

of direct conflicts in the evidence, resolution of the conflict is, of course, a jury function never to be performed by the judge on motion for directed verdict. In the above hypothetical case of the traffic light, if the judge directed a verdict for defendant, he would be branding the plaintiff's direct testimony as untrue and the defendant's as true. That he cannot do as long as California adheres to the idea that direct conflicts in the evidence are resolvable only by the jury. Although there is not a direct conflict in the inference situation, such as plaintiff-says-red and defendant-says-green, there is an indirect conflict. Thus, if plaintiff relies on an inference to establish his cause of action, his position may be described as follows: (a) fact *x* is true; (b) from fact *x*, fact *y* should be inferred. Defendant's position may then be: (a) yes, fact *x* is true, but (b) my direct evidence shows that *y* is not true. In this setting, a directed verdict for defendant based on his evidence does not involve calling plaintiff a liar. The process, however, does involve accepting defendant's evidence as true. Certain points should be borne in mind about inference cases. Plaintiff does not directly contradict this evidence, but he does so indirectly with the logical force of his inference. Although movant's evidence is considered on his motion for directed verdict, it is not surprising that upon such consideration such evidence is usually and properly found to be insufficient to warrant a directed verdict.<sup>23</sup>

### The Smellie Case<sup>1</sup>

Smellie was killed when the automobile in which he was riding as the guest of defendant Ireland (driver and owner) was struck by the train of defendant Southern Pacific Company. The action was by Smellie's widow and children against Ireland and Southern Pacific to recover damages for his death. At the trial, plaintiffs called Ireland under Code of Civil Procedure Section 2055. Upon cross-examination by counsel for the railroad, Ireland testified that he brought his car to a stop, that both he and Smellie looked, and Smellie said, "'It's all clear; let's go.'"<sup>2</sup> At the close of plaintiffs' case, defendants moved for directed verdict. The trial court granted the motion. Judgment was entered for defendants. After four hearings in the Supreme Court,<sup>3</sup> the judgment was finally reversed.

<sup>23</sup> Professor McBaine puts the following as a clear case calling for a directed verdict: Suppose in a personal injury suit by *P*, a minister of the Gospel, against *D*, for injuries received by *P* due to the negligent operation of *D*'s automobile by *C*, with *D*'s consent, that there is evidence by *P* that the automobile was owned by *D* and was driven, negligently, by *C*, *D*'s employee, and that as a result of the negligence *P* is injured. Suppose that *D* is a judge of a high court, and he testifies positively and clearly, and is unimpeached and unimpeachable, that *C*, a chauffeur, had been in his employ only one day at the time of the injury to *P*; that when employing *C*, the day before *D* emphatically told *C* that he must never take the car for his own use and that *C* did not have permission to use the car when *P* was struck shortly before midnight. Suppose that *A*, *C*'s friend, testifies for *D* that he was in the car at the time in question, that *C* called at his house with the car and that he and *C* were on their way to a night club when *P* was struck by the car which was being driven by *C*. [Note, *Inferences: Are They Evidence?*, 31 CAL. L. REV. 108, 109 (1942).]

<sup>1</sup> Smellie v. Southern Pac. Co., 212 Cal. 540, 299 Pac. 529 (1931).

<sup>2</sup> *Id.* at 547, 299 Pac. at 531.

<sup>3</sup> The first three opinions of the Supreme Court in the Smellie case are reported as follows: 269 Pac. 657 (1928); 276 Pac. 338 (1929); 287 Pac. 343 (1930). See McBaine, *Presumptions; Are They Evidence?*, 26 CAL. L. REV. 519 (1938); Comment, 20 CAL. L. REV. 189 (1932); Comment, 18 CAL. L. REV. 418 (1930).

Plaintiffs argued that on defendants' motion the court was "in duty bound to disregard" Ireland's testimony and "submit the issue [of contributory negligence] to the consideration of the jury."<sup>4</sup> The Supreme Court agreed with this contention. The court pointed out that "when the rules applicable to nonsuit and directed verdict come into operation . . . , the evidence produced by the defendant and favorable to his cause is eliminated from consideration for the purpose of the ruling of the court."<sup>5</sup> Therefore, the question, whether upon defendant's motion for a directed verdict Ireland's testimony was to be considered or eliminated from consideration, turned upon a determination as to whether Ireland was to be regarded as plaintiffs' witness (in which event the testimony will be considered) or defendants' witness (in which event the testimony will be eliminated from consideration). This determination depended upon the application and construction of Code of Civil Procedure Section 2055, permitting plaintiff to call defendant "as if under cross-examination." The court held that the proper meaning is that, although plaintiff calls defendant, as to any testimony of defendant adverse to plaintiff, defendant is to be regarded as his own witness for purposes of ruling on a motion for nonsuit or directed verdict. Therefore, the court held, defendant Ireland's testimony should have been eliminated from consideration for the purposes of ruling on defendant's motion for directed verdict. This being done, there is a jury issue (since, apart from Ireland's testimony, there were no circumstances showing contributory negligence of Smellie as a matter of law).

This is the pith of the majority opinion. The court, however, also expressed its rationale in terms of a presumption which was applicable to the case. In so doing, the court developed general rules as to when a presumption is and is not dispelled as a matter of law. The presumption is that Smellie was in the exercise of due care (took ordinary care of his own concerns<sup>6</sup>). This presumption operates in favor of plaintiff. How may defendant rebut it as a matter of law? The court's answer is that, since defendant's evidence is eliminated from consideration on defendant's motion for directed verdict, defendant rebuts the presumption only when *plaintiff's* evidence is irreconcilable with the presumption (that is, when plaintiff's evidence affords "no indication that the testimony was the product of mistake or inadvertence" and is "wholly irreconcilable with the presumption").<sup>7</sup> Thus, although presumptions "disappear when contradicted or controverted by the evidence of the party relying upon them, . . . it is not correct to say that . . . they vanish from the case as a matter of law when contradicted or controverted by the party against whom they are invoked."<sup>8</sup> The overall conclusion, therefore, is as follows:

<sup>4</sup> Smellie v. Southern Pac. Co., 212 Cal. 540, 548, 299 Pac. 529, 532 (1931).

<sup>5</sup> *Id.* at 552-553, 299 Pac. at 534.

<sup>6</sup> CAL. CODE CIV. PROC. § 1963(4).

<sup>7</sup> Smellie v. Southern Pac. Co., 212 Cal. 540, 552, 299 Pac. 529, 534 (1931). The quotations are derived from *Mar Shee v. Maryland Assur. Corp.*, 190 Cal. 1, 210 Pac. 269 (1922), in which the action was by the beneficiary of a policy insuring Fong Wing against accidental death, excluding murder. The defense was that Fong Wing was murdered. The plaintiff's evidence showed that Fong Wing died as a result of two gunshot wounds. This was held to dispel the presumption of accidental death.

<sup>8</sup> Smellie v. Southern Pac. Co., 212 Cal. 540, 553, 299 Pac. 529, 534 (1931).

“Our conclusion, therefore, is that the testimony of a witness called under section 2055 of the Code of Civil Procedure is not, when weighing it against a presumption, to be considered, nor is it, really, evidence of the party calling such witness, and that the evidence thus produced does not dispel a presumption contrary thereto, but in favor of the party calling such adverse witness. This testimony is, of course, evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or if the case is before a jury, by the jury. When the action is before a jury, however, the duty of weighing this evidence is with the jury and not with the court upon a motion for a nonsuit or directed verdict.”<sup>9</sup>

There is a basic error in the court’s analysis, an error which has had a substantial impact on the evolution of the California view respecting presumptions. Thus, the issue on which the trial court directed the verdict and to which Ireland’s testimony related was the issue of contributory negligence. Defendants had the burden of proof upon that issue. It was an affirmative defense.<sup>10</sup> Consequently, the rules properly applicable to defendants’ motion for directed verdict were those rules stated above in the discussion of directed verdict for the party possessed of the burden of proof.<sup>11</sup> Under these rules, it was wholly immaterial whose witness Ireland was; his testimony should be considered in any event. As has been expounded at length above, *all* of the evidence is considered on *this kind* of motion for directed verdict. The court fell into the error of failing to distinguish the vital difference between a motion for directed verdict in favor of the party carrying the burden of proof and a motion for directed verdict against such party. Confronted by the former, the court applied the rules applicable to the latter. The result is the fallacious generalization that favorable evidence produced by the party moving for a directed verdict must be eliminated from consideration in all cases.

Still dominated by this basic error, the court, when expressing its proposition in terms of presumptions, formulated the generalization that *as a matter of law* the opponent of a presumption cannot rebut it by his own evidence on a motion for directed verdict. However, the court did feel compelled to qualify this last generalization to except from its operation what the court called “exceedingly rare” cases. The following passage shows this qualification:

[I]t does not necessarily follow that the presumption may not be overcome or “dispelled” as a matter of law by proof of the party against whom the presumption is invoked. For example: Subdivision 26 of said section 1963 declares the disputable presumption “that a person not heard from in seven years is dead”.

<sup>9</sup> *Id.* at 559, 299 Pac. at 537.

<sup>10</sup> *Rush v. Lagomarsino*, 196 Cal. 308, 237 Pac. 1066 (1925); *Olsen v. Standard Oil Co.*, 188 Cal. 20, 204 Pac. 393 (1922); *Schneider v. Market Street Ry.*, 134 Cal. 432, 66 Pac. 734 (1901); *Anderson v. Southern Pac. Co.*, 129 Cal. App. 206, 18 P.2d 703 (1933); *Gayton v. Pacific Fruit Express Co.*, 127 Cal. App. 50, 15 P.2d 217 (1932).

The rule that contributory negligence is an affirmative defense seems to have been established as early as 1874 by *Robinson v. Western Pac. R.R.*, 48 Cal. 409 (1874). The history of the rule is traced in Note, 41 CAL. L. REV. 748 (1953).

<sup>11</sup> See the text, *supra* at 1065-1070.

When the issue is whether a certain person is living or dead, as might be the case (see *Benjamin v. District Grand Lodge, etc.*, 171 Cal. 260 [152 Pac. 731]; *Ashberry v. Sanders*, 8 Cal. 62 [68 Am. Dec. 300]), the proof of the plaintiff at the trial might be overwhelming and uncontradicted that the person whose status was involved had not been heard from in seven years, whereupon the plaintiff would rest. The defendant would then proceed by ushering into the courtroom the person involved in the controversy, known by court, jury and counsel to be such person, or otherwise conclusively proved to be such, and present him to the court and jury as one alive and in being. Under such circumstances it would be absurd to submit the issue of the life or death of such person to the jury. Another case illustrating the point is *Clendenning v. Parker*, 69 Cal. App. 685 [231 Pac. 765]. It is obvious that such cases are exceedingly rare.<sup>12</sup>

The foregoing discussion is not meant to dispute the final result in the *Smellie* case. Ireland's testimony was sufficiently suspect to require the denial of defendants' motion even under the rules properly applicable to a consideration of a motion for a directed verdict for the party with the burden of proof. Such evidence should have been considered. However, in view of Ireland's interest and in view of the possibilities of errors of misunderstanding or of faulty memory (especially acute when, as here, one witness is testifying to what another person now dead once said), the trial court should have concluded that the evidence was not of that unquestionable character required for a properly directed verdict grounded on its strength.<sup>13</sup>

Nonetheless, the faulty reasoning of the court has introduced unwarranted complexities and inconsistencies in the existing California law relating to presumptions.

A striking instance of such complexity and inconsistency concerns the present difference between inferences and presumptions. To illustrate this point, suppose that in the *Smellie* case plaintiffs were relying upon an inference. (The court's error, noted above, in applying the wrong rule will be disregarded, and it will be assumed that plaintiff had the burden of negating his own contributory negligence.) In that event, Ireland's evidence should be considered when defendants moved for directed verdict because an opponent of an inference may rebut the same by *his* evidence.<sup>14</sup> On the other hand, when (according to *Smellie*) plaintiffs relied on a presumption and defendant moved for directed verdict, defendant's evidence must be eliminated from consideration.

The difference between the two situations is thus expounded by Chief Justice Waste in *Engstrom v. Auburn Auto Sales Corp.*:<sup>15</sup>

The rule governing the dispelling of an inference is materially different from that relating to the dispelling of a presumption. . . .

<sup>12</sup> *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 552, 299 Pac. 529, 534 (1931).

<sup>13</sup> *Id.* at 559-560, 299 Pac. at 537. The court discusses these elements of weakness in the evidence.

<sup>14</sup> See note 22, *supra* at 1071.

<sup>15</sup> 11 Cal.2d 64, 69-70, 77 P.2d 1059, 1062-1063 (1938) (citations omitted).

Generally speaking, however, it may be said that a *presumption* is dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of such party's own witness, when such testimony was not the product of mistake or inadvertence. . . . However, a presumption is not dispelled by evidence produced by the opposite party but remains as evidence in the case sufficient to support a judgment, except in rare cases in which the rebutting evidence is absolutely conclusive. (*Smellie v. Southern Pac. Co., supra.*) (Illustrative of such rare cases would be a situation, referred to in the Smellie case, . . . wherein one party relies on the presumption that a person unheard of for seven years is dead and the other party to meet and overcome such presumption actually produces the person in court.) . . .

On the other hand, an *inference* is dispelled as a matter of law when it is rebutted by clear, positive and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side.

The question naturally arises whether there is any reason in logic or in policy for this difference in treatment of an inference and a presumption situation. It would seem that whatever factors support the rationale of considering the evidence of the opponent of an inference apply *mutatis mutandis* to the situation of the opponent of a presumption. The opponent's evidence should be considered in both situations and in both situations the test of the strength of his evidence requisite to win him a directed verdict should be the same.<sup>16</sup> If this suggestion has nothing else to commend it, it at least possesses the merits of simplicity and uniformity—qualities of premium value in this area of prior confusion and complexity.

How would Thayer's view, assuming it were to be adopted in California, operate in this area of presumption-inference confusion? For the purpose of illustration, suppose that a vital element of plaintiff's cause of action is that plaintiff gave the defendant written notice. (Indeed, suppose that this is the only issue in the case, other relevant matters not being in issue because removed from the case by stipulation or admissions in the pleadings.) At the trial, plaintiff testifies that he wrote out the requisite notice, placed it in a sealed, stamped envelope directed to defendant at defendant's address, and mailed the envelope.<sup>17</sup> Plaintiff rests. Defendant testifies, denying unequivocally that he ever received the letter. Defendant proves further that the postman who would normally have delivered the letter has been discharged for drunkenness on duty resulting in misdeliveries and nondeliveries of

<sup>16</sup> Justice Traynor, dissenting in *Speck v. Sarver*, 20 Cal.2d 585, 596, 128 P.2d 16, 22 (1942), advocates this treatment in the following passage: "When the evidence against the presumption is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved the court should instruct the jury, as it would regarding inferences, that the non-existence of the fact presumed has been established as a matter of law." (Emphasis added.)

<sup>17</sup> This gives rise to the following presumption stated in Code of Civil Procedure Section 1963(24): "That a letter duly directed and mailed was received in the regular course of the mail."

mail entrusted to him. Plaintiff offers no evidence in rebuttal. Defendant moves for directed verdict. Under the present California law, upon defendant's motion the judge must disregard defendant's evidence and deny the motion.<sup>18</sup> Under the Thayer view, however, defendant's evidence should be considered because the evidence of the opponent of a presumption may cause the presumption to disappear. The test to determine dissipation of the presumption is whether defendant's evidence would support a finding of nonreceipt. In the supposed case, it would; hence, the presumption vanishes. Plaintiff's inference, however, remains. Under the inference rule, defendant's evidence must, of course, be considered. The test here is whether such evidence is "clear, positive and uncontradicted evidence which is not open to doubt."<sup>19</sup> The evidence seems to meet this standard; hence, defendant's motion for directed verdict should be granted.<sup>20</sup>

In his separate opinion in the *Smellie* case,<sup>21</sup> Justice Richards shows that Thayer's view (which Richards advocates) would permit defendant Ireland's testimony to dispel plaintiff's presumption. The case would then be an inference case to be handled under the inference rule as above suggested.

This suggested treatment neither impinges upon the right to jury trial as previously understood nor does it open the door wide to directed verdicts. It is difficult to win such a verdict even in inference cases, for, as Judge Traynor points out, in most inference cases the determination will be for the jury.<sup>22</sup> Therefore, adoption of Thayer's view (which would convert California presumption cases of the type above considered into inference cases) is rational and entails no threat to rights respecting a jury trial as previously understood. The Thayer doctrine would sweep away the peculiar California rule that only conclusive evidence or evidence from the party relying upon the presumption rebuts the presumption as a matter of law; this obstacle to the uniform administration of the mechanism of the directed verdict moved for by the opponents of both inferences and presumptions would thereby be eliminated.<sup>23</sup>

It is doubtful whether adoption of the Morgan view in California would alleviate the presumption-inference confusion. In the hypotheti-

<sup>18</sup> See the text, *supra* at 1075-1076.

<sup>19</sup> *Engstrom v. Auburn Auto Sales Corp.*, 11 Cal.2d 64, 70, 77 P.2d 1059, 1063 (1938).

<sup>20</sup> See note 22, *supra* at 1071.

<sup>21</sup> *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 564, 299 Pac. 529, 539 (1931).

<sup>22</sup> See note 22, *supra* at 1071.

<sup>23</sup> The view advocated would require an alteration of thought patterns about inferences and presumptions. At present, there is a tendency to think of an inference as relatively weak because of its permissive aspect and of a presumption as strong because of its mandatory character. Taking the next step, it appears, quite naturally, that it must require more to dispel a presumption than to dispel an inference as a matter of law. See, for example, the *Engstrom* case, 11 Cal.2d 64, 77 P.2d 1059 (1938), illustrating this wholly natural sequence of ideas. On the other hand, the new approach would require a reversal of this line of thinking and the acceptance of the new position that, even though the inference is permissive, it takes a stronger showing to dispel it as a matter of law than is required to dispel the presumption.

Granted that there is a sort of dialectical or conceptual difficulty here, it is nothing more than the paradox of the Thayer view previously mentioned. See the text, *supra* at 1055.

cal case just considered, the Morgan view would shift the burden of proof from plaintiff to defendant. How would this affect that case? Would this mean that the California court would now apply the correct directed verdict rule<sup>24</sup> and consider defendant's evidence? It would not seem so. In the *Smellie* case, defendant had the burden of proof; yet, the court refused to consider his evidence. But even if the Morgan view would clear up the inference-presumption confusion, it would greatly alter the current law respecting the burden of proof. Later, it will be recommended that the Morgan view be rejected for this reason.<sup>25</sup> At this point, it is sufficient to anticipate that recommendation, incorporate it by reference, and rest upon it.

### The Second Stage

The term "Second Stage" designates that stage of the case at which the judge charges the jury, submitting the case for their verdict without peremptory instructions as to what verdict to return or what determination to make on any issue of fact. Are instructions concerning the operation of any applicable presumption or presumptions either necessary or desirable at this stage? Protagonists of the Thayer theory hold that such instructions are neither necessary nor desirable.<sup>1</sup> Likewise, advocates of the Morgan view hold that their view requires no such instructions and makes them undesirable.<sup>2</sup>

The California view, however, requires some form of instruction upon presumptions. As has been shown, the presumption persists despite positive, direct evidence of the opponent contradictory of the presumed fact. As Justice Shenk puts it in the *Smellie* case, ordinarily the presumption is dispelled only "by the facts as *found* to exist,"<sup>3</sup> that is, by the verdict (or in a nonjury case, by the finding). Since the presumption thus persists until the verdict or other decision, there is, of course, the necessity to tell the jury this and, further, to tell the jurors what significance this should have upon their deliberations.

### The Equivalence-or-Better Instruction

But what should the charge be? The statutes are of little help. Under Code of Civil Procedure Section 1961, the jury is bound to find according to the presumption unless it is "controverted." Section 1963 states that a presumption is "satisfactory, if uncontradicted." Thus, the burden is to "controvert" or to "contradict." By what quantum or degree of persuasion is controversion or contradiction sufficient to overcome the presumption? The cases answer this in terms of "equivalence of convincing force"—*i.e.*, the opponent of the presumption is burdened with the necessity of producing at least a state of equilib-

<sup>24</sup> See the text, *supra* at 1065-1070.

<sup>25</sup> See the text, *infra* at 1082-1084.

<sup>1</sup> See Judge Lummus' statement, *supra* at 1059-1060. Of course, if the facts giving rise to the presumption are in dispute, an instruction is necessary. See McCORMICK § 315.

<sup>2</sup> See Morgan's statement, *supra* at 1055-1056, 1060. McCORMICK, however, argues that presumption instructions should be given. McCORMICK §§ 314-317.

<sup>3</sup> *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 553, 299 Pac. 529, 534 (1931) (emphasis added), discussed in the text, *supra* at 1063.



rium.<sup>4</sup> Suppose that *P* has the burden of proof and relies upon a presumption. *D* has offered sufficient evidence to avoid a directed verdict against him. The case is now to be submitted to the jury who should be told that, because of the presumption, defendant must produce at least a balance of evidence in order to win.

Defendant's so-called "burden" resulting from the presumption is really no greater than defendant's "burden" in any case where plaintiff bears the burden of proof. Defendant's "burden" is, in other words, only the risk that plaintiff will discharge *plaintiff's* burden. Unless defendant's proofs equal or exceed plaintiff's, then plaintiff's exceed defendant's. The requirement of defendant to produce at least an equivalence to win is, therefore, only an alternative form of the proposition that plaintiff will win with a preponderance; it is merely a way of telling the jury that less than an equivalence from the defendant means a preponderance from plaintiff.

Possibly, the emphasis in the charge to the jury on the presumption and the emphasis upon defendant's risk that plaintiff will discharge plaintiff's burden gives the plaintiff some sort of psychological advantage. This possibility is enhanced if the instruction is given in the form suggested by Professors Morgan<sup>5</sup> and McBaine<sup>6</sup> as the appropriate means of implementing the California view:

"Since *A* [the facts upon which the presumption rests] is established, you must begin with the assumption that *B* [the facts presumed] exists. But that assumption may be destroyed by evidence. If from all the evidence you find either that the non-existence of *B* is *more* probable than its existence or that the non-existence of *B*

<sup>4</sup> *People v. Hardy*, 33 Cal.2d 52, 64, 198 P.2d 865, 872 (1948) (to rebut a presumption in a criminal case, defendant must "produce sufficient evidence to raise a reasonable doubt in the minds of the jury" but need not rebut by a "preponderance of the evidence"); *Bonneau v. North Shore R.R.*, 152 Cal. 406, 411, 93 Pac. 106, 108, (1907) (to "avoid the effect of the presumption" opponent must "produce evidence of equal or greater weight to meet or overcome it, or it will prevail"); *Patterson v. San Francisco etc. Ry.*, 147 Cal. 178, 183, 81 Pac. 531, 533 (1905) ("If the railroad company introduces sufficient evidence simply to balance such a presumption without overcoming it by a preponderance of evidence, the presumption is overcome."); *Estate of Hansen*, 38 Cal. App.2d 99, 116, 100 P.2d 776, 785 (1940) (overcoming presumption of undue influence requires "evidence which, at least, will have the effect of balancing the *prima facie* showing"); *Jolley v. Clemens*, 28 Cal. App.2d 55, 69, 82 P.2d 51, 59 (1938) (Presumption of negligence from presence of car on wrong side of road gave defendant "the *onus procedendi*, that is, burden of introducing evidence to account for its presence there, and also the *onus probandi* to the extent, but to the extent only, of an explanation sufficient to balance the presumption. This, however, is not the same thing as to require him to establish his justification by the preponderance of the evidence."); *Bourguignon v. Peninsular Ry.*, 40 Cal. App. 689, 695, 181 Pac. 669, 671 (1919) (Supreme Court in denying hearing says that the rule as to any presumption is that the opponent is "not obliged to overcome the presumption by a preponderance of evidence, but it is sufficient for him to give such proof . . . of his contention . . . as to offset the presumption in the minds of the jury and produce a balance in their minds on the question of its truth"); CALJIC (2d ed. 1958) No. 307 (same as *People v. Hardy*, *supra*).

It is error to charge merely as to the existence of the presumption, omitting any explanation of indication that it might be rebuttable. *People v. Wong Sang Lung*, 3 Cal. App. 221, 84 Pac. 843 (1906).

<sup>5</sup> Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933).

<sup>6</sup> McBaine, *Presumptions; Are They Evidence?*, 26 CAL. L. REV. 519, 562 (1938); *Burden of Proof: Presumptions*, 2 U.C.L.A. L. REV. 13, 28 (1954).

is as probable as its existence, you will then find that *B* does not exist, otherwise you will find that *B* does exist."<sup>7</sup>

Whatever benefit plaintiff derives from this may be justified by the argument that, if the presumption is strong enough to give plaintiff automatic victory without evidence from defendant, it is strong enough to require the jury to begin its deliberations with an assumption in plaintiff's favor.

The above charge is tailored for the situation in which the party interested in establishing the nonexistence of *X* does not have the burden of proof on this issue. If he possesses such burden of proof, he must, of course, establish his proposition by a preponderance.<sup>8</sup>

Under the California view that a presumption is evidence which may outweigh positive evidence against it, the jury should also be charged respecting this. This doctrine is explored (and condemned) later.<sup>9</sup>

The California view imposes difficulties of explanation upon the judge and of comprehension upon the jury which are certainly considerable, if not wholly insurmountable. To corroborate this point, the following general exposition of the operation of presumptions is offered:

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence. If it is not controverted, the jury is bound to find in accordance with the presumption.

The fact that a presumption arises is never to be taken to mean a change in the burden of proof.

If the burden of proof of the issue to which a presumption relates rests on the party in whose favor the presumption arises, then it is not necessary for the other party to overcome the presumption by a preponderance of the evidence. In that case, the presumption together with any other evidence supporting it must have more convincing force than the contrary evidence in order to justify a finding in accordance therewith. If the party in whose favor the presumption arises does not have the burden of proof of

<sup>7</sup> McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A. L. REV. 13, 28 n.35, quoting from Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 70 (1933). [Brackets in original. Emphasis added.]

The charge is designed for the situation in which the opponent of the presumption has introduced enough evidence to avoid a directed verdict. Absent such evidence, the court would simply charge the jury to find fact *B*.

<sup>8</sup> This point is clearly brought out in the following passage from *Hooper v. Bronson*, 123 Cal. App.2d 243, 248-249, 266 P.2d 590, 594-595 (1954), a case in which the presumption operated in favor of defendant and plaintiffs possessed the burden of proof: "Plaintiffs' argument is that the instruction tells the jury that plaintiffs' evidence must preponderate over the presumption; whereas, they say, under the authorities just cited their evidence need only balance the presumption. However, in each of those cases the presumption involved was one that ran *in favor of the party carrying the burden of proof*, and served to establish for such party a prima facie case. In order to defeat the prima facie case made by such presumption the defending party need only produce evidence which balances the presumption. But where the presumption resides with the defending party, it is necessary for the party having the affirmative of the issue to overcome the presumption by a preponderance of the evidence, and an instruction to that effect is proper."

Compare *Anderson v. Southern Pac. Co.*, 129 Cal. App. 206, 18 P.2d. 703 (1933), which seems to be in error on this point.

<sup>9</sup> See the text, *infra* at 1088-1095.

the issues to which it relates, then it is necessary for the other party to overcome the presumption by a preponderance of contrary evidence.<sup>10</sup>

(This charge is obviously designed as a preliminary explanation of the operation of presumptions and the impact of the burden of proof and is intended to be followed by specific instructions as to the presumptions and burdens applicable to the particular case.)

The operation generally described in the third paragraph must certainly confuse the average jury. Assuming a rare jury which could understand and attempt to apply the process to a specific presumption, a sense of futility is the reward. As McCormick puts it:

The overriding objection, however, is the impression of futility that it conveys. It prescribes a difficult metaphysical task for the jury, which they would only attempt to perform if they were hesitant and doubtful as to how to proceed, and having performed it, if the doubt remains, the reward is the instruction to disregard the presumption. It seems to me that it is more calculated to mystify than to help the average jury.<sup>11</sup>

If California were to adopt either the Morgan view or the Thayer view, the jury instruction quoted above would become invalid.

<sup>10</sup> BAJI (4th ed. 1956) No. 22 (Rev.). This portion of revised instruction No. 22 incorporates the substance of No. 22-B which provided:

[As to any conclusive presumption that is appropriate in this action, in due time I shall instruct you clearly concerning the same and its effect. Otherwise,] Whenever in these instructions I refer to a presumption, I mean one that may be rebutted. The fact that such a presumption arises must never be taken to mean any change in the rule of burden of proof.

[To explain this point more fully:

If the presumption favors the party who has the burden of proof on the issue to which it relates, and if the presumption is contradicted by any other evidence, then all the evidence favoring that party on that issue, whether consisting of the presumption alone or of it and other evidence, must have more convincing force than contrary evidence to justify a finding on that issue in favor of that party.

But as to any party who does not have the burden of proof on that issue, it is not necessary for him to overcome such a presumption by a *preponderance* of the evidence. If the evidence favoring him and opposed to the presumption has convincing force at least equal to that of the presumption and other evidence, if any, supporting it, then the finding must be in his favor on that issue.

If the party who is favored by a presumption does not have the burden of proof on the issue to which the presumption relates, then it stands as true until and unless it is overcome by a preponderance of the evidence.]

An earlier version of BAJI No. 22-B was given with slight modification and approved in *Reynolds v. Roll*, 122 Cal. App.2d 826, 838-839, 266 P.2d 222, 230 (1954).

<sup>11</sup> McCORMICK § 317 at 669-670. There is, however, weighty opinion to the contrary. See, e.g., Justice Traynor dissenting in *Speck v. Sarver*, 20 Cal.2d 585, 593, 128 P.2d 16, 20 (1942) ("If the opposing party introduces no substantial evidence to combat the presumption, the court will instruct the jury that the facts exist as a matter of law. If he introduces such evidence the case goes to the jury with instructions that if it disbelieves the evidence of the opposing party, the presumption stands and the verdict should be in favor of the party with the burden of proof. If, however, the jury believes it is as probable that the facts do not exist as that they do, it should find in favor of the party against whom the presumption operates. This view of the effect of presumptions is the sounder one."); McBaine, *Presumptions; Are They Evidence?*, 26 CAL. L. REV. 519, 563 (1938) ("Such instructions will not confuse or bewilder a jury."); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 70 (1933) ("comparatively simple language which anyone having sufficient intelligence to serve as a jurymen should readily understand").

**Morgan View.** Under the Morgan view it would be necessary to:

*Delete the second paragraph.* This one-sentence paragraph, embodying the idea that a presumption does not shift the burden of proof, is diametrically opposed to the Morgan idea that this is precisely what a presumption does do.

*Delete all of the third paragraph.* The first sentence in this paragraph posits the situation of a party possessed both of a presumption and the burden of proof on the issue to which the presumption relates. This situation is impossible under the Morgan view. Under that view, if the party has the presumption, his opponent has the burden of proof on the issue to which the presumption relates. This also disposes of the second sentence of this paragraph. The third sentence of this paragraph posits the situation of a party against whom a presumption is operative, yet who does not possess the burden of proof on the issue to which the presumption relates. Again, this is an impossible situation under the Morgan view that, if a presumption operates against a party, he has the burden of proof on the issue to which the presumption relates.

Thus, under the Morgan view, the complex general exposition of the operation of presumptions and the specific applications contemplated by the quoted charge would all be eliminated. Instead, simple instructions as to the burden or burdens of proof would be substituted. These would constitute the entire charge so far as the impact of presumptions on the case is concerned. (This, of course, is subject to the obvious proviso that no conclusive or uncontradicted rebuttable presumptions were involved. If such were involved, peremptory instructions to find the presumed fact naturally would be included.)

**Thayer View.** Under the Thayer view, the quoted charge would be inappropriate because the judge determines whether presumptions are rebutted. If there were an uncontroverted rebuttable presumption or a conclusive presumption applicable to the case, the charge would simply direct the jury to find the presumed fact. If there were a rebuttable or conclusive presumption but the opponent's evidence was limited to contradicting the basic facts giving rise to the presumption, the charge would be in conditional peremptory form ("If you find fact A, you must find fact B."). Nothing else would be required in the charge so far as the impact of presumptions upon the case is concerned.

Manifestly, under either the Morgan or the Thayer view of presumptions, the jury-charge phase of the case would be greatly simplified. Assuming that such simplification is desirable, which is the better method of achieving it? Adoption of the Morgan view would entail the following difficulties:

First, basic changes in pre-existing theory as to burden of proof would be necessary. Under the present theory and system, the burden of pleading determines the burden of proof; the latter burden, being so fixed by the pleadings at the outset of the case, does not and cannot shift.<sup>12</sup> In order to follow Morgan, the first premise would not have to be altered, but the latter must be relinquished entirely.

<sup>12</sup> For general discussions, see CLARK, CODE PLEADING § 96 (2d ed. 1947); McCORMICK § 318; 9 WIGMORE § 2486.

Second, the matter of charging the jury on multiple burdens of proof on the various issues in the case would require much more attention from the trial attorney and the judge than is the case today (or was ever the case before). Currently, this is a routine part of the charge, seldom presenting much difficulty. Under the new view, this would not be so. Attorney and judge would have to be ever alert for the presumption or presumptions that either overtly or subtly enter the case and change the burdens of proof.

Third, the issues in a case would have to be splintered for the purpose of fixing the burdens of proof. Today the burdens of proof in a case usually go to the cause of action as a whole or to an affirmative defense as a whole. A presumption, however, may be operative only as to a subsidiary issue (*e.g.*, that a letter mailed was received). Under the new view, each such issue must be identified in the instructions and be made the subject of special charges respecting the burden of proof upon it. In cases involving several presumptions, this would probably result in considerable complexity and prolixity in the charge.

Fourth, the transition to the new view would be attended by considerable confusion. The term "presumption" has been used loosely in California's statutes and decisions. No one would go so far as to suggest that whenever the word presumption appears this should be the invariable index of a shift in burden of proof. For example, abstract maxims are often phrased in terms of presumption (*e.g.*, "What ought to be done is presumed to have been done."<sup>13</sup> It is difficult to imagine making this so-called presumption the basis for any shift in the burden of proof.) Again, Code of Civil Procedure Section 1847 proclaims that "a witness is presumed to speak the truth." It would be manifestly absurd to make the testimony of each witness the subject of a separate burden of proof.<sup>14</sup> In view of the loose and variegated usage of the term "presumption," it would be necessary to go through a winnowing process of interpretation and decision to evolve a body of law as to which presumptions do and which do not operate to shift the burden of proof—to determine what, so to speak, are "true" presumptions in the sense of the new rule.

Fifth, the dualism of Morgan's proposal would present difficulties. His proposal is in two parts and so is Uniform Rule 14, which adopts his view. Part (a) covers presumptions based on probability ("logical-core" presumptions in Chafee's phrase<sup>15</sup>); part (b) covers presumptions not so based (often called "presumptions of convenience"). Part (a) provides that probability-based presumptions shift the burden of proof. Part (b) provides that nonprobability presumptions have the Thayer effect. It is not at all clear which presumptions fall into the

<sup>13</sup> BROOM, *LEGAL MAXIMS* xxxvi (4th ed. 1864). Other instances of loose and variegated presumption semantics may be found in Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 *MICH. L. REV.* 195 (1953).

For a discussion of nonstatutory presumptions in California, see Kidd, *Some Recent Cases in Evidence*, 13 *CAL. L. REV.* 468, 476-479 (1925).

<sup>14</sup> Consider also Code of Civil Procedure Section 1861 to the effect that the "terms of a writing are presumed to have been used in their primary and general acceptance." Should this be thought of as creating a special burden of proof?

<sup>15</sup> Chafee, *The Progress of the Law*, 35 *HARV. L. REV.* 302, 311 (1922).

second group,<sup>16</sup> but it seems to be generally thought by experts on the subject that the number is small. The proposed bifurcation would create uncertainty and complexity. It is, however, probably a necessary feature of the Morgan system, in view of indications by the United States Supreme Court that due process is violated by giving a non-logical-core presumption the effect of shifting the burden of proof.<sup>17</sup>

Such, then, would be some of the difficulties of the transition if California were to change over to the Morgan view by enacting Uniform Rule 14. On the other hand, adoption of the Thayer view in California would accomplish the major objectives of the Morgan advocates and would at the same time avoid the objections just outlined to the Morgan view.

Morgan's three major criteria for a workable view of a presumption as an efficient trial tool are the following:

[A] presumption, if it is to be an efficient legal tool, must (1) be left in the hands of the judge to administer and not be submitted to a jury for a decision as to when it shall cease to have compelling force, (2) be so administered that the jury never hear the word, presumption, used, since it carries unpredictable connotations to different minds, and (3) have enough vitality to survive the introduction of opposing evidence which the trier of fact deems worthless or of slight value.<sup>18</sup>

The Thayer view accomplishes the first two; the third is not achieved. However, the third objective is the least important of the three and is not worth what it would cost in terms of the consequences above mentioned.

At first, it may seem paradoxical to say, as do the Thayerians, that a presumption is so strong that it compels a finding absent counter-vailing evidence and, yet, is so weak that it disappears merely upon the introduction of enough evidence to avoid a directed verdict. This thesis

<sup>16</sup> Thus, as to the presumption respecting the order of death of persons meeting death in a common disaster, Hale and Morgan treat this as a nonprobability presumption. Hale, *Evidence—Presumptions*, 17 SO. CAL. L. REV. 384 (1944); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 924 (1931). *But cf.* Comment, 31 CAL. L. REV. 316, 319 (1943). For a case applying the presumption, see *Grand Lodge A.O.U.W. v. Miller*, 8 Cal. App. 25, 96 Pac. 22 (1908). Professor McBaine regards the presumption of sanity as one in which the basic fact—"the existence of a particular human being"—"has no probative value." McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A. L. REV. 13, 23 (1954). *Cf.* REPORT OF THE COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY at 26 (1955) (presumption rests "on the rational basis that insanity is the rare exception rather than the rule").

As to the presumption of due care, consider Comment, 20 CAL. L. REV. 189, 191 n.12 (1932), to the effect that: "The presumption that arose in the Smellie case, that one takes care of his own concerns, is clearly one without a logical core and there is not a fact or a group of facts to be weighed against evidence contrary to the presumption." Is this sound? See also Comment, 31 CAL. L. REV. 316 (1943); MCCORMICK § 309 (dealing with other presumptions, seeking reasons for their creation and their proper classification).

The New Jersey Commission to Study the Improvement of the Law of Evidence advocates treating all "ordinary presumptions" alike because of "the small number [which do not have a logical basis] and the inevitable confusion in making the distinction" between those which do not and those which do. REPORT OF THE COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE at 23 (November 1956).

<sup>17</sup> See note 1, *supra* at 1058.

<sup>18</sup> MODEL CODE at 57.

seems to manifest a distrust of the axioms of experience, the truisms and the commonplaces which undergird most presumptions. To the extent that this doctrine is a judicial creation and presumptions are legislative creations, the courts and the legislatures seem to be in conflict—the legislatures attempting to give virility to presumptions, the courts emasculating them. It is believed, however, that these difficulties lie only upon the surface; they are minimized, if they do not disappear altogether, when examined more closely.

The phenomenon of plaintiff's reaching a point in the development of the case at which he is entitled to a directed verdict provided the defendant remains silent and yet losing his right because defendant speaks is an everyday occurrence. For example, suppose the sole issue in a case is the death of *X*. Plaintiff has a doctor testify that *X* was well known to the witness and that the witness attended *X* in his last illness and saw him die. Now, if no further evidence is introduced, plaintiff is entitled to a directed verdict. This evidence—standing alone—possesses such overwhelming force that plaintiff will win a directed verdict if defendant remains silent. Yet, if defendant comes forward with evidence, for example, that *X* and *Y* were twins and the doctor treated *Y*, defendant takes away from plaintiff the benefit plaintiff would derive from the probative force of his evidence standing alone. Defendant could accomplish this purpose even if his evidence were of very questionable credibility.

Assuming the legislature creates a presumption of death from seven years' absence without tidings and assuming plaintiff relies solely on this presumption to establish the death of *X*, there is really nothing paradoxical in equating the presumptive evidence of death with direct evidence of death. In both situations, absent any evidence from defendant, plaintiff wins. In both situations, if defendant introduces sufficient evidence to avoid a directed verdict, the case goes to the jury. Arguably, it is paradoxical to view the two situations as substantially different. Thus, it is unreasonable to impute to the legislature the intention that the indirect evidence proclaimed by it to constitute a presumption should have greater force than plaintiff's direct evidence; it is irrational to take something which is naturally weaker than something else (seven years' disappearance is weaker, naturally, than the doctor's direct evidence) and infuse it with artificial force to make it stronger.<sup>19</sup>

Viewed in this light, the Morgan thesis involves doctrinal and conceptual anomalies. If the entire law of burden of proof were to be reshaped, it might reasonably be said that, whenever plaintiff's non-presumptive evidence is strong enough standing alone to entitle him to a directed verdict, the burden of proof shifts to defendant. It would, then, be reasonable and consistent to say that a presumption (since it is mandatory, absent countervailing evidence) shifts the burden of proof. Is it, however, either reasonable or consistent to say that though plaintiff's evidence standing alone would entitle him to a directed verdict, the burden remains with plaintiff because his evidence is non-presumptive; yet, when such evidence is presumptive, the burden shifts? For example, if the issue is notice and plaintiff's messenger

<sup>19</sup> In the case of a non-logical-core presumption, the anomaly would arise of taking something possessed of no logical force and assimilating it to something possessed of greater force than direct evidence.

testifies he delivered the notice to defendant in person, the burden does not shift. Should it shift when the messenger testifies he mailed the notice?

It is believed that the widespread misgivings respecting the theoretical soundness of the Thayer doctrine result from stating its alleged basic inconsistency as an abstract proposition. When the doctrine is put in procedural context and its operation is viewed vis-à-vis the pattern of cases involving nonpresumptive evidence, it will be seen that the doctrine merely requires that the artificial force infused into presumptions is to be treated as the equivalent of the natural force of evidence which—standing alone—would entitle its beneficiary to a directed verdict. It seems reasonable for courts to give judicially created presumptions this effect (and this effect only). It seems likewise reasonable for the courts to interpret legislative intention that legislative presumptions should have this effect (and this effect only). Finally, it seems reasonable for a legislature to create presumptions and provide they should have this effect (and this effect only). Indeed, someone reading of Code of Civil Procedure Section 1963 creating presumptions and Section 1961 stating their effect might (if he were unaware of the tortuous and confused background of judicial construction) reasonably conclude that this is precisely what the California Legislature has done.

Summarizing the foregoing discussion in terms of which theory is "right," the judgment is in favor of Thayer's theory.<sup>20</sup> For these reasons, an attempt to achieve the third of Morgan's three objectives set forth above does not seem advisable.

Adoption of Thayer's view in California would not produce the objectionable situation which, in large measure, leads McCormick to advocate the Morgan view. McCormick, it will be recalled, lays much stress upon vices of Thayerian doctrine in those states (the majority) which forbid the judge to comment to the jury on the weight of the evidence or the credibility of the witnesses.<sup>21</sup> As of 1934, California took its place in the enlightened minority on this matter by amending Section 19 of Article VI of the California Constitution to read as follows:

Sec. 19. The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness

<sup>20</sup> Why, it may reasonably be asked, does a court create or a legislature enact a rule of presumption? Under Morgan's theory, the answer must be that the situation is thought appropriate for a shifting of the burden of proof. Under Thayer's theory, the answer is more difficult. However, it is submitted that the natural force of the basic facts would not be regarded by the courts, operating under their normal rules as to directed verdicts, as sufficient to call for a directed verdict. Yet the situation is appropriate for treating these facts as possessing that much force—hence, the presumption. The situation may be thought appropriate because of a variety of reasons, *e.g.*, the probabilities involved, procedural convenience, fairness to the parties, or cutting the Gordian knot of an impasse. See McCORMICK § 309.

For one or for a combination of such considerations, it is thought desirable to treat the evidence of the basic facts of the presumption as possessing as much probative force as direct evidence of the presumed fact would possess. But, of course, under Thayer's theory the presumption would have *no more* force than the direct evidence, and its operation in the case would be equivalent to that of the direct evidence.

<sup>21</sup> See the text, *supra* at 1056-1057.



as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses.

Thus, under Thayer's view in California, if *P*, possessed of the burden of proof, relied on a "logical-core" presumption which *D*'s evidence dispelled, the judge could instruct the jury upon the inference value of plaintiff's circumstantial evidence, telling the jury, in effect, that such evidence could be found by them to preponderate over defendant's direct evidence.<sup>22</sup> In other words, if the Thayer view were adopted in California, it would not operate unfairly to *P*, even if we concede that this would be the effect in a no-comment state. McCormick himself would probably concede this, as the following excerpt shows:

Usually, where a presumption is faced with adverse circumstantial evidence, if there is an issue to go to the jury at all, it is because the facts on which the presumption rests create a general probability that the presumed fact exists. The judge might mention these foundation facts, and point out the general probability of the circumstantial inference, as one of the factors to be considered by the jury. As has already been pointed out, however, the trial judges in most states must tread warily to avoid an expression of opinion on the facts. In some of these the practice frowns on any explanation of the allowable circumstantial inferences from particular facts, as being "on the weight of the evidence." Where, however, the judge retains his full common law powers, or short of that, is authorized to explain the allowable inferences, this form of instruction may serve most of the useful purposes of a charge upon the presumption itself.<sup>23</sup>

Thus, while California presently does have a problem respecting charging the jury in presumption cases—the problem of the complexity and incomprehensibility of the equivalence-or-more instruction currently in vogue—the situation does not require the remedy advocated by Morgan and the Uniform Rules. In view of the enlightened position respecting the judge's power of comment, the solution can rationally be either: (a) Application of Thayer's doctrine as to the effect of the

<sup>22</sup> For an example of such a charge, see the following given in *Leming v. Oilfields Trucking Co.*, 44 Cal.2d 343, 353, 282 P.2d 23, 29 (1955): "[Y]ou are not compelled to draw this inference, but you may do so if your reason and discretion so dictate; and if you draw such an inference, you are not required to abandon it in the face of any contradictory evidence."

Comment by the judge on the inference value of the facts giving rise to the presumption is entirely consistent with Thayer's theory and is advocated by the greatest of all Thayerians. See 9 WIGMORE § 2498a, subsec. 21. The difference between charging the jury as to presumptions and as to the inference value of the facts giving rise to presumptions is more than a mere semantic difference. One process involves a simple, comprehensive charge in words of clear meaning. The other introduces all of the ambiguities and uncertain connotations of the word "presumption." For example, consider the effect upon the jury of these two charges, the first an inference-value charge, the second a presumption charge:

1. "Mailed letters are usually delivered. You are entitled to consider that. You are not compelled to find that *D* received the letter, but you may do so."

2. "A letter duly directed and mailed is presumed to have been received, but this presumption is rebuttable."

<sup>23</sup> MCCORMICK § 317 at 670.

presumption, with no mention of the presumption in the charge; (b) Comment by the judge on the inference value (if any) of the facts which once raised the now-rebutted presumption.

In the area now covered by cumbersome, befuddling presumption instructions, the new Thayer system would substitute a simple charge stating only the issues, the burdens of proof on these issues, and adding (in the judge's discretion) appropriate comment on the probative value of circumstantial evidence.<sup>24</sup> The new system would involve no changes in the burden of proof. Inauguration of the system could be accomplished by relatively simple legislation. To understand it would, of course, require some effort and study, but here the attorney and judge would find guidance and help from Wigmore, himself a confirmed advocate of Thayer's doctrine. In sum, the system is *relatively* simple and workable. It can be understood (with some thought and, if need be, some homework in Wigmore). The bench and bar should be willing to surrender the tradition that the jury should be charged on presumptions to obtain this simplified, rational technique in this hitherto confused and baffling area.

### The Presumption-Is-Evidence Doctrine

*Westberg v. Willde*<sup>1</sup> is a good illustrative case of the California doctrine that a presumption is evidence and that the jury should be so advised. This was a death action resulting from an intersection collision. Defendant testified that he entered the intersection first. There was testimony on the part of plaintiffs that decedent entered first. There was conflicting evidence as to the speed of both vehicles.

The trial judge charged the jury in part as follows:

"The presumption is that every man obeys the law, and the presumption in this case is that the plaintiffs' son, Morris E. Westberg, was traveling at a lawful rate of speed, and on the proper side of the highway at all times. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until, and unless it is overcome by satisfactory evidence."<sup>2</sup>

Verdict and judgment for plaintiffs. Defendant appeals, claiming error in the charge. Judgment affirmed, the charge being approved as follows:

This instruction is in almost the precise words of the instruction set out in the opinion in the case of *Olsen v. Standard Oil Co.*, 188 Cal. 20, 25 [204 Pac. 393], which was approved by this court in the following language:

"The defendant claims that this is erroneous. We think it is correct. The rule that contributory negligence of the plaintiff must be alleged in the answer, or it will not be available to the defendant as a defense, is based on this presumption. So, also, is the rule that

<sup>24</sup> The court should, of course, also give peremptory instructions in accordance with all presumptions not rebutted.

<sup>1</sup> 14 Cal.2d 360, 94 P.2d 590 (1939). The troublesome question of when the presumption of due care is applicable is beyond the scope of the present study. Good discussions are: Weinstock & Chase, *The "Presumption of Due Care" in California*, 4 HASTINGS L. REV. 124 (1953); Note, 41 CAL. L. REV. 748 (1953); and Note, *Presumptions as Evidence in California Negligence Cases*, 2 STAN. L. REV. 559 (1950).

<sup>2</sup> *Westberg v. Willde*, 14 Cal.2d 360, 364, 94 P.2d 590, 593 (1939).

the burden of proving it by a preponderance of the evidence is on the defendant. The code expressly declares that this presumption is disputable, that it 'may be controverted by other *evidence*', and that unless so controverted the jury is bound to find in accordance with it. (Code Civ. Proc. secs. 1961, 1963, subs. 1, 33.) The instruction is, therefore, strictly in accordance with the code on the subject."

In later cases we expressly approved our decision in that case.

From these decisions, and others of this court which might be cited, the rule is firmly established in this state that a presumption is evidence and is sufficient to support a verdict of a jury or a finding of the court, unless overcome by satisfactory evidence.<sup>3</sup>

Changing the facts, suppose that (1) plaintiff requested the above instruction but the judge refused to give it, (2) defendant won the verdict and judgment, (3) plaintiffs appealed for alleged error in refusing the charge. The clear import of the recent case of *Gigliotti v. Nunes*<sup>4</sup> is that plaintiff was entitled to have the charge given and that the judgment would be reversed for the error of refusing to give it.

Defendant had the burden of pleading and the burden of proof on the issue of contributory negligence. Assuming the jury was charged that defendant had the burden of proof, what would the requested instruction contribute? How could this instruction possibly be of such significance that a new trial is required when it is refused? If defendant has the burden of pleading and the burden of proof on an issue, of what possible significance is a presumption operating against him on this issue? Judge Lummus, in a penetrating and colorful opinion in a Massachusetts case,<sup>5</sup> gives what must seem at first blush to be the obvious answer, namely, "None." His analysis is as follows:

When the statute cast upon the defendant the burden of proving by a preponderance of the evidence contributory negligence on the part of the plaintiff, it did everything for the plaintiff that a presumption of his due care could do, and according to most authorities on the subject of presumptions it did more. The statutory presumption of due care, therefore, is wholly overshadowed by that burden of proof, and can have no practical effect. If it never had been created, or should be abolished, neither party would be a whit the better or the worse. The statutory presumption of due care is like a handkerchief thrown over something covered by a blanket also. . . . For this reason, if the burden of proof is correctly stated to the jury, there can be no reversible error in dealing with the presumption of due care, whether the judge adopts what seems the better course of refusing to mention it at all, or, as the judge did in this case, indulges in what must needs be an academic discussion of its theoretical operation . . . .<sup>6</sup>

Thus, in Massachusetts, the refusal to charge respecting the existence of the presumption is of no significance—indeed, according to Judge Lummus, such refusal is the preferable course for the trial judge to

<sup>3</sup> *Id.* at 364-365, 94 P.2d at 593 (citations omitted).

<sup>4</sup> 45 Cal.2d 85, 286 P.2d 809 (1955).

<sup>5</sup> *Brown v. Henderson*, 285 Mass. 192, 189 N.E. 41 (1934).

<sup>6</sup> *Id.* at 196-197, 189 N.E. at 43 (citations omitted).

follow. Yet, in California, such refusal requires a new trial. The clue to the explanation of these radically different results lies in this apparently innocent expression in the California charge: "This presumption is in itself a species of evidence." Apparently, this means that in California the presumption is not only an item of admissible evidence, but also an item of such weight that its exclusion constitutes reversible error. As the court states in the *Gigliotti* case: "Because the evidence . . . was in such sharp conflict as to some of the circumstances of the accident, and would have amply supported a different verdict, the error in refusing to give the due care presumption instruction is prejudicial."<sup>7</sup> Obviously, the court thus equates the presumption charge to evidence in plaintiff's behalf—evidence of such weight that depriving plaintiff of it constitutes prejudicial, reversible error.

This California doctrine has been severely and persistently criticized by writers in textbooks and law reviews and by two judges of the California Supreme Court. Summarily stated, the main points of the criticism are: (1) The doctrine calls upon the jury to perform an impossible task; (2) It confuses the jury; (3) It enlarges the burden of proof; (4) It is derived from an erroneous interpretation of certain sections of the Code of Civil Procedure. A more detailed statement of these points follows.

*The doctrine calls upon the jury to perform an impossible task.* A presumption is a rule of law. As such, it cannot be weighed as evidence. It can no more be balanced against evidence "than ten pounds of sugar can be weighed against half-past two in the afternoon."<sup>8</sup> Justice Traynor expresses his criticism as follows:

It is a mental impossibility to weigh a presumption as evidence. Juries can decide upon the probable existence of a fact only by a consideration of actual probative evidence bearing thereon. A rule of law that the fact will be presumed to exist in the absence of evidence cannot assist them in determining from an examination of evidence whether or not the fact exists. It is impossible to weigh a rule of law on the one hand against physical objects and personal observations on the other to determine which would more probably establish the existence or non-existence of a fact.<sup>9</sup>

*The jury is confused by the requirement of performing a task which is at once impossible and inexplicable.* As Morgan states:

But will this not put upon [the jury] an impossible psychological task? How can one weigh a presumption against, or with, or as, evidence? Just what will be the mental process? Is the presumption to be treated as if a witness had testified directly to the presumed fact? Surely it cannot be meant that the presumed fact is to be weighed as evidence, for that would be treating it as a fact, and obviously the most that can be attributed to it is a tendency to establish the fact. . . . Is telling the jury that the establishment of *A* raises the presumption that *B* exists and that the presumption is evidence of *B* effective to convey any intelligible idea to them?

<sup>7</sup> *Gigliotti v. Nunes*, 45 Cal.2d 85, 94, 286 P.2d 809, 815 (1955).

<sup>8</sup> Simile contributed by Dean Prosser, courtesy of an unidentified English judge. Prosser, *Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183, 225 (1949).

<sup>9</sup> *Speck v. Sarver*, 20 Cal.2d 585, 594, 128 P.2d 16, 21 (1942).

Is it not a conglomeration of words which will parse as a sentence and appears to say something, but which actually is "full of sound signifying nothing"? Suppose that a jury should ask the judge just what the instruction means; would he not be put to it even to give them an illustration of its application?<sup>10</sup>

*The doctrine enlarges the burden of proof.* The jury may equate the presumption to evidence of enormous if not unlimited weight, and thereby in effect increase the normal burden of proof. On this point, Morgan makes the following observation:

If the charge means what it says, the jury can give the presumption as much or as little weight as it chooses. . . . Isn't such a rule without any justification save in those cases where the jury's emotions would lead them to the result which the court considers socially desirable?<sup>11</sup>

As Justice Traynor puts it:

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.<sup>12</sup>

*The doctrine is derived from an erroneous interpretation of the Code of Civil Procedure.* As to this point, respecting certain sections of the Code of Civil Procedure requiring the view that a presumption is evidence, Justice Traynor speaks as follows:

The California cases have treated presumptions as evidence primarily on the ground that certain code sections compel this result. (See *McBaine, supra*, 26 Cal. L. Rev. 519, 557-561.) Code of Civil Procedure section 1961 states: "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." Section 1963 lists 40 rebuttable presumptions that "may be controverted by other evidence." These sections embody the general rule that a rebuttable presumption establishes the existence of a fact unless credible evidence contrary to the fact presumed is presented. They in no way establish that the presumption itself is evidence. The references to "other evidence" [serve] to distinguish evidence controverting the presumption from evidence of the primary facts that give rise to

<sup>10</sup> Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 73 (1933).

Consider also the following questions, equally pertinent and equally unanswerable: Can a given presumption "have one measure of probative value in one case and a different one in some other case? Has it specific or variable weight? If a variable weight, what are its variable factors?" Note, 18 MICH. L. REV. 780 (1920).

<sup>11</sup> Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 74 (1933).

<sup>12</sup> *Speck v. Sarver*, 20 Cal.2d 585, 594, 128 P.2d 16, 21 (1942), noted in 31 CAL. L. REV. 105 (1942).

the presumption and from evidence that may be introduced in support of the fact presumed.

Section 2061 of the Code of Civil Procedure provides: "The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions: . . . (2) That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds." Certainly there is no statement here that a presumption must be treated as evidence. This section does no more than establish the rule that gives to presumptions greater vitality than they would have if they disappeared upon the introduction of any evidence contrary to the facts presumed. It provides in effect that a rebuttable presumption remains in the case and controls the determination of a jury that disbelieves the evidence contrary to the fact presumed.

Finally, section 1957 provides: "Indirect evidence is of two kinds: 1. Inferences, and 2. Presumptions." This section is a broad classification of indirect evidence and is not concerned with the legal effect of a presumption. At the time of its adoption in 1872, legal writers used the terms presumptions and inferences interchangeably to apply to a logical deduction that could be drawn from a set of facts. (1 Greenleaf, *Evidence* [Redfield ed.] 21; 1 Phillipps, *Evidence*, [3d ed.] 436-437; 1 Starkie, *Evidence*, [3d ed.] 404. See Thayer, *supra*, 546-548; Wigmore, *supra* § 2491; McBaine, *supra*, 26 Cal. L. Rev. 519, 521-527.) That this meaning of presumption was intended by the Legislature when it enacted section 1957 in 1872 is indicated by section 1832, enacted at the same time, which states: "Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred." This section defines indirect evidence as an inference, but uses the terms "inference" and "presumption" as synonyms. Section 1957 does not therefore establish rebuttable legal presumptions as evidence in view of other sections of the Code of Civil Procedure which specifically set forth the effect of legal rebuttable presumptions. (Code Civ. Proc. §§ 1959, 1961, 1963.)<sup>13</sup>

It cannot be denied that these criticisms possess much force. Something can be said, however, in behalf of the California doctrine. For example, given a death case in which plaintiff relies on the presumption of due care (which we may assume to be applicable), defendant relies upon his own testimony which tends to show decedent's recklessness. The jury must pass upon the credibility and weight of defendant's testimony. In so doing, it is, of course, proper for the jury to

<sup>13</sup> *Speck v. Sarver*, 20 Cal.2d 585, 594-596, 128 P.2d 16, 21-22 (1942).

consider defendant's interest. Should not the jury also properly consider as a sort of maxim of experience or common sense the instinct of self-preservation? As a sort of frame of reference for appraising defendant's credibility, should it not consider that defendant asks the jury to believe a course of conduct on the part of deceased which departs from the normal pattern? If so, and if the jurors interpret the charge as inviting them to do no more than this, the charge does not suggest the impossible, nor confuse, nor increase defendant's burden of proof. The weakness in this argument is that the jury may read much more into the charge than above suggested. The jurors may think that, though they believe defendant and though, believing him, they think decedent's recklessness brought about his downfall, still they may so weight the presumption that it somehow becomes overriding.

The California doctrine reached what may be hoped is its high-water mark in the recent case of *Scott v. Burke*.<sup>14</sup> This was an action by passengers against their driver for an Arizona highway accident. (No guest statute was applicable.) The plaintiff passengers were asleep when the car left the highway. The defendant driver now claims to have amnesia resulting from the accident. There were no eyewitnesses. After instructing the jury on the doctrine of *res ipsa loquitur* and the presumption of due care, the court stated:

“ [T]hese instructions direct your attention to two conflicting rebuttable presumptions relating to the conduct of the defendant (one) that he exercised due care at the time of the accident which presumption arises in the event that you find that as a result thereof he is unable to remember the facts pertaining to the same, and (two) that he was negligent if you find that he was driving on the wrong side of the road, or that he permitted the automobile to leave the road in question entirely, or that he fell asleep at the wheel. If you find the facts to exist which give rise to these presumptions, then these conflicting presumptions constitute evidence, the effect of which is to be determined by you, not by the court; they are to be weighed and considered by you in the light of and in connection with all of the other evidence, and you are to give them, and each of them, such weight as you deem proper.”<sup>15</sup>

Upon plaintiffs' appeal from a judgment for defendant, this charge was approved by a majority of the Supreme Court, Justices Traynor and Edmunds dissenting and stating, in part, as follows:

How could the jury understand this instruction in which new evidence is spontaneously generated? By what mental process could it weigh these rules of law or logic against the facts upon which it was told they were based?

\* \* \* \* \*

These presumptions were not witnesses whose demeanor might be observed. The facts upon which they were based were not in conflict, so the jury could not look to them to determine which presumption was superior. . . .

<sup>14</sup> 39 Cal.2d 388, 247 P. 2d 313 (1952), noted in 41 CAL. L. REV. 748 (1953).

<sup>15</sup> *Scott v. Burke*, 39 Cal.2d 388, 393, 247 P.2d 313, 316 (1952).

Upon plaintiffs rested the burden of proving that it was more probable than not that the accident was caused by defendant's negligence. That burden was enlarged by the instruction that there was a presumption of due care and that the presumption was evidence. Plaintiffs were thus placed under the burden, not only of proving by a preponderance of the evidence that defendant was negligent, but also of somehow dispelling additional "evidence" that the jury could not rationally evaluate.<sup>16</sup>

Thus far, the presumption-is-evidence dogma has been considered in cases in which the presumption is operative *against* the party already possessed of the burden of proof (plaintiff's presumption of his decedent's due care—defendant carries the burden on the issue of contributory negligence; defendant's presumption of his due care—plaintiff carries the burden on the issue of negligence). Such presumptions, Judge Lummus contends, should be regarded as supererogatory. Justice Traynor agrees. "It is clear," he says,

that a rebuttable presumption is only a procedural device to aid the party with the burden of proof. It would be meaningless if applied against him because he already has the greater burden of introducing sufficient evidence to prove the existence of the facts by the preponderance of the probabilities.<sup>17</sup>

The presumption-is-evidence doctrine and its attendant vices could of course be eliminated in these cases simply by branding these presumptions as the oddities and anomalies which they are in theory and refusing to acknowledge their existence. Abandonment of the notion that presumptions can be "directed against the party with the burden of proof"<sup>18</sup> would accomplish the needed reform.

There remains for consideration, however, the impact of the presumption-is-evidence precept in cases in which the presumption is a genuine, essential one operating *in favor of* the party carrying the burden of proof. Are the results of the precept undesirable here, and should a reform measure be formulated? If so, it would seem that the reform must be a direct, frontal attack on the presumption-is-evidence formula itself. Again, instruction and wisdom may be derived from Justice Traynor. On this aspect of the problem, he speaks as follows:

<sup>16</sup> *Id.* at 404-405, 247 P.2d at 323.

<sup>17</sup> *Speck v. Sarver*, 20 Cal.2d 585, 593, 128 P.2d 16, 20 (1942).

<sup>18</sup> *Ibid.* In California, the presumption of plaintiff's due care is a hangover from days when plaintiff had the burden on the issue of contributory negligence and when, of course, the presumption made sense. The courts changed this burden but, having done so, failed to perceive that the presumption thus became superfluous. See Note, 41 CAL. L. REV. 748 (1953); Note, *Presumptions as Evidence in California Negligence Cases*, 2 STAN. L. REV. 559 (1950). See also Weinstock & Chase, *The "Presumption of Due Care" in California*, 4 HASTINGS L. REV. 124 (1953).

The best law review discussion of presumptions against the party with the burden of proof is Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71 (1940).

Compare the text, *infra* at 1102-1104. There would be no harm in continuing to recognize anomalous presumptions, provided the presumption-is-evidence dogma is eliminated. In other words, the objection is not so much to anomalous presumptions per se, but rather to such presumptions taken in connection with the correlative doctrine that presumptions are evidence.



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. The presumption should serve only to force the party without the burden of proof to come forward with evidence contrary to the facts presumed, not somehow to outweigh the very evidence that he introduces to prove his point.<sup>19</sup>

The California doctrine that a presumption is evidence is unsound in theory and harmful in practice.<sup>20</sup> It is an instrument of injustice which should be eliminated. Such elimination cannot be accomplished merely by withdrawing the recognition previously accorded superfluous presumptions. A direct attack is necessary. Legislation is required. The efforts of Professor McBaine<sup>21</sup> and of Justices Traynor and Edmunds<sup>22</sup> have not persuaded the Supreme Court to change the rule and, apparently, will not do so in the immediate future.<sup>23</sup>

The solution here is a legislative enactment that "a presumption is not evidence." This could be accomplished by amending Code of Civil Procedure Section 1823 to read as follows:

Judicial evidence is the means sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.  
*A presumption is not evidence.*

If Section 1823 were so amended, the following changes should be made in order that other sections of the Code of Civil Procedure would conform to the new pattern:<sup>24</sup>

(1) Repeal Section 1957, which now provides:

Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions.

(2) Amend Section 1961 to read 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.

<sup>19</sup> Speck v. Sarver, 20 Cal.2d 585, 594, 128 P.2d 16, 21 (1942).

In the *Gigliotti* case, 45 Cal.2d 85, 286 P.2d 809 (1955), discussed in the text, *supra* at 1089-1090, the majority held the presumption was operative in favor of the party with the burden. Justice Traynor disagreed.

<sup>20</sup> See, however, Judge William Palmer's proposed rationale of the California view in *Battle of the Presumptions*, 17 L.A. BAR ASS'N BULL. 267 (1942). For criticism of Judge Palmer's view, see also Hale, *Evidence—Presumptions*, 17 So. CAL. L. REV. 384, 386-387 (1944); Morgan, *Further Observations on Presumptions*, 16 So. CAL. L. REV. 245, 261-265 (1943).

Another defense of the California view is tendered in Note, 31 CAL. L. REV. 316 (1943).

<sup>21</sup> McBaine, *Presumptions; Are They Evidence?*, 26 CAL. L. REV. 519 (1938).

<sup>22</sup> Dissenting opinions in *Scott v. Burke*, 39 Cal.2d 388, 402, 247 P.2d 313, 321 (1952), and *Speck v. Sarver*, 20 Cal.2d 585, 590, 128 P.2d 16, 19 (1942).

<sup>23</sup> *Gigliotti v. Nunes*, 45 Cal.2d 85, 286 P.2d 809 (1955).

<sup>24</sup> For more extensive amendments to these sections, see the text, *infra* at 1106-1107.

(3) Amend the introductory paragraph of Section 1963 to read as follows:

All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by ~~other~~ evidence. The following are of that kind:

(4) Amend Section 2061(2) to read as follows:

That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or ~~other~~ evidence satisfying their minds;

An alternative means of eliminating the presumption-is-evidence doctrine is to adopt Uniform Rule 1. Subdivision 1 of this rule defines "evidence" as follows:

"Evidence" is the means from which inferences may be drawn as a basis of proof in duly constituted judicial or fact-finding tribunals, and includes testimony in the form of opinion, and hearsay.

The definition of presumption is stated in Uniform Rule 13:

A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.

By definition, a presumption is an assumption based upon a fact or group of facts. By definition, evidence is the means by which inferences may be drawn. Thus, the inference itself is not evidence;<sup>25</sup> it is simply a mental operation or logical process. The evidence is the means, or, in more common parlance, the facts giving rise to the inference. By parity of reasoning, under Uniform Rule 14 the assumption (presumption) is not evidence; again, it is but a mental operation or reasoning process. In such case, the only evidence involved is the evidence of the fact or group of facts giving rise to the presumption—the so-called "basic" fact or facts from which the presumption is drawn. It is not essential, however, to rely wholly on this rather sterile exercise in word juggling to support the proposition that under the URE a presumption is not evidence. The official Comment on Uniform Rule 1(1) (which would become a significant source of information in construing the rules were they to be adopted) states as an important principle "that presumptions are not evidence."

In order to allay all doubt, however, it might be well to add this proposition to the rule itself.

<sup>25</sup> Compare, however, statements by Justice Schauer in *Scott v. Burke*, 39 Cal.2d 388, 247 P.2d 313 (1952), and by Justice Carter in *Blank v. Coffin*, 20 Cal.2d 457, 126 P.2d 868 (1942), that inferences are evidence. This theory of inferences is severely criticized by McBaine, Note, *Inferences: Are They Evidence?*, 31 CAL. L. REV. 108 (1942).

The Comment to Uniform Rule 1 makes it clear that an inference is a deduction from evidence and is not itself evidence: "All deductions from evidence are inferential, i.e., inferred from what is perceived or demonstrated."

The older terminology for today's "inference" was "presumption of fact." See McBaine, *Presumptions; Are They Evidence?*, 26 CAL. L. REV. 519, 524 (1938).

If Uniform Rule 1 were to be adopted, it would be desirable to make the following changes also:

(1) Repeal the following definitional sections of Part 4 of the Code of Civil Procedure: Sections 1823, 1824, 1825, 1827, 1828, 1829, 1830, 1831, 1832, 1833, 1834, 1836, 1837, 1838, and 1839.

(2) Repeal Section 1957 and amend Sections 1961, 1963, and 2061(2) as indicated above.

This alternative approach of adopting Uniform Rule 1 as a means of abrogating the presumption-is-evidence doctrine would not be advisable unless it were coupled with the simultaneous adoption of a substantial number of the Uniform Rules of Evidence.

### The Third Stage

The "Third Stage" is that stage of the case after the verdict of the jury or findings by the court. What is the significance of a presumption when the case has evolved to this point?

The verdict or the findings are, of course, reviewable on appeal or are reviewable by the trial court upon a motion for new trial. The California doctrine is that upon such review the presumption is counted as evidence. The cases are legion where this has been said and done.<sup>1</sup> The two following quotations will reveal the doctrine and its application.

[W]here it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact

<sup>1</sup>Lieber v. Rigby, 34 Cal. App.2d 582, 584, 94 P.2d 49, 50-51 (1939) (finding of joint tenancy; affirmed):

At least since the decision of our Supreme Court in *Smellie v. Southern Pac. Co.*, 212 Cal. 540 [299 Pac. 529], our courts are committed to the rule that a rebuttable presumption is a species of evidence which standing alone will support a finding against contradictory evidence produced by the other party. The finding of the trial court that the account was one in joint tenancy is therefore sufficiently supported by the presumption based on the voluntary act of the deceased husband in creating the account, even though appellants' evidence in the absence of the presumption might compel the opposite conclusion.

Cases from other jurisdictions cited by appellants to the effect that contradictory evidence introduced by the adverse party may destroy the presumption of joint tenancy and necessitate a finding against it are out of harmony with the law of this state as announced in the *Smellie* case and the decisions which have uniformly followed it since its pronouncement. *Estate of Braue*, 45 Cal. App.2d 502, 506, 114 P.2d 386, 388 (1941), quoting from *Estate of Pitcairn*, 6 Cal.2d 730, 734, 59 P.2d 90, 93 (1936) (order admitting witnessed will to probate; witnesses deny due execution; affirmed): ". . . A presumption is recognized in this state to be independent evidence which may be weighed against positive testimony, and in a proper case the lower court may follow the presumption of due execution from proof of genuineness of the signatures, though the witnesses attack the will." See also *People v. Chamberlain*, 7 Cal.2d 257, 60 P.2d 299 (1936) (verdict of guilt of first degree murder; verdict of sanity of defendant; motion for new trial of sanity issue denied; affirmed; prosecution relied entirely upon presumption of sanity and cross-examination of defendant-witnesses); *U.S. Fid. & Guar. Co. v. Industrial Acc. Comm'n*, 181 Cal. 147, 183 Pac. 540 (1919) (award upheld on basis of presumption of innocence, *non constat* countervailing evidence); *Sarraille v. Calmon*, 142 Cal. 651, 76 Pac. 497 (1904) (finding of nonpayment upheld on basis of presumption, *non constat* evidence of payment); *People v. O'Brien*, 122 Cal. App. 147, 9 P.2d 902 (1932), noted in 21 CAL. L. REV. 65 (1932), (same type of case as *People v. Chamberlain*, *supra*; here, however, appellate court says defendant's argument and authorities from other states is "instructive and forceful" but must be rejected because in California "presumption is evidence"; different ruling probable if court not bound by presumption-is-evidence dogma).

has been proven; and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption.<sup>2</sup>

The presumptive evidence of the time of the making of the indorsement and guaranty and the consideration therefor, may be resorted to in aid of the findings, even though it be assumed, as counsel for the defendant contends, that it stands alone and was opposed by direct evidence to the contrary. The general rule that as against a proved fact, or a fact admitted, a disputable presumption has no weight, is subject to the exception that where, as in the present case, an endeavor made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all of the evidence including the presumption. . . . Therefore, giving all the weight and credence contended for by counsel for the defendant to the evidence adduced in support of the defense made, there still remains a substantial conflict in the evidence which, under the familiar rule, cannot be availed of upon appeal to disturb the findings of the trial court.<sup>3</sup>

If the recommendation of this study were adopted and a statute were enacted to the effect that "a presumption is not evidence," the rationale of such cases would be changed without, however, necessarily changing the results. Under the new rationale, the facts giving rise to the presumption would be evidence possessing probative force; the presumption itself would not be evidence. The results hitherto reached in any cases of this type would be changed only if the courts previously deciding such cases had given artificial weight to the presumption and had reached the decision rendered solely because of this excess of ersatz weight.<sup>4</sup>

<sup>2</sup> *People v. Milner*, 122 Cal. 171, 179, 54 Pac. 833, 837 (1898).

<sup>3</sup> *Pacific Portland Cement Co. v. Reinecke*, 30 Cal. App. 501, 504-505, 158 Pac. 1041, 1043 (1916).

<sup>4</sup> For a case which would probably be decided differently under the new view, see *People v. O'Brien*, 122 Cal. App. 147, 9 P.2d 902 (1932), noted in 21 CAL. L. REV. 65 (1932).

## INCONSISTENT PRESUMPTIONS

The problem of inconsistent presumptions arises most frequently and is discussed most frequently in the context of a two-marriage situation. For example, *P* proposes to share in *H*'s estate, claiming to be his widow. *D* denies *P* and *H* were validly married. *P* proves a ceremonial marriage with *H* on June 1, 1955. *D* proves a ceremonial marriage between *H* and *X* (a young woman in good health) in 1952. The validity of *P*'s marriage with *H* depends upon whether *H*'s marriage with *X* was dissolved by death or by judicial decree on or before June 1, 1955. The situation can be described in terms of familiar presumptions. If the *H-X* marriage was undissolved on June 1, *H* committed bigamy on that date. The presumption of *H*'s innocence, however, means that the dissolution of the *H-X* marriage is presumed. On the other hand, it is presumed that "a thing once proved to exist continues as long as is usual with things of that nature."<sup>5</sup> Therefore, it must be presumed that *X* was alive on June 1 and that the *H-X* marriage was undissolved on that date. Here is the California solution of this problem. (a) As between the rival presumptions, the stronger prevails. *P*'s presumption is the stronger. (b) This presumption is mandatory, that is, it requires a finding in *P*'s favor in a case (such as this one) where the presumption is not controverted. (c) This presumption fixes the burden of proof upon the party assailing the second marriage. Chief Justice Angellotti states all these results and their rationale in the following passage from *Wilcox v. Wilcox*:<sup>6</sup>

[A]s was said in *Hunter v. Hunter*, 111 Cal. 261, 267: "The presumption of the continuation of life is, however, overcome by another. It is presumed that a person is innocent of crime or wrong. (Code Civ. Proc., sec. 1963.) There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to

<sup>5</sup> CAL. CODE CIV. PROC. § 1963 (32).

<sup>6</sup> 171 Cal. 770, 773-775, 155 Pac. 95, 97 (1916). See also Note, 26 CAL. L. REV. 270 (1938). Cf. *Bancroft v. Bancroft*, 9 Cal. App.2d 464, 50 P.2d 465 (1935), noted in 10 So. CAL. L. REV. 98 (1936). As to the presumptions in prosecutions for bigamy, see *People v. Burke*, 43 Cal. App.2d 316, 110 P.2d 685 (1941), noted in 15 So. CAL. L. REV. 112 (1941). As to conflicting presumptions of undue influence and consideration, see *Donovan v. Security-First Nat'l Bank*, 67 Cal. App.2d 845, 155 P.2d 856 (1945); *Estate of Roberts*, 49 Cal. App.2d 71, 120 P.2d 933 (1942).

For a collection of cases from other jurisdictions, see Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 932 n.41 (1931).

prove the negative—that the first marriage had not ended before the second marriage.” . . . In *McKibbin v. McKibbin*, 139 Cal. 448, . . . [this court quoted] from 1 Bishop on Marriage and Divorce, as follows: “Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proof, the law raises a strong presumption of its legality—not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of presumption, the truth of law and fact that it is illegal and void.” These cases must be taken as establishing it to be the law in this state that the burden of proof is on the party assailing a marriage on the ground that a former husband or wife is still alive, to show not only the former marriage, but also that it has not been dissolved by death or judicial decree, and that the *prima facie* presumption in favor of the validity of the marriage assailed outweighs the presumption of the continuance of life of the former husband or wife.

In any retooling of the California law of presumptions, caution should be exercised to preserve the carefully wrought and wholly satisfactory rules above stated. These rules would be endangered if Thayer’s theory were adopted in its unadulterated form. According to the tenets of this theory, presumptions cannot conflict; what appear to be conflicting presumptions are really inconsistent presumptions operating to cancel each other out.<sup>7</sup> Thus, in the above case under the Thayer view, *D*’s presumption would cancel *P*’s and vice versa, and the case should be decided exactly as if neither presumption had ever been operative.<sup>8</sup> This would deprive *P* of the aid and comfort of her presumption of innocence. Furthermore, if *P* had the burden of proof and no evidence of the dissolution of the *H-X* marriage, she would possibly be subject to nonsuit.

These results are not here advocated. Although generally throughout this study the Thayer theory has been recommended, in this instance the adoption of Uniform Rule 15 seems preferable. URE Rule 15 provides:

If two presumptions arise which are conflicting with each other the judge shall apply the presumption which is founded on the

<sup>7</sup>9 WIGMORE § 2493 (“Presumptions are sometimes spoken of as ‘conflicting.’ But, in the sense above examined, presumptions do not conflict. . . . [T]he successive invocation of different presumptions, may create a complicated situation difficult to work out; but it can more properly be spoken of as a case of successive presumptions than of conflicting presumptions . . . .”); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 916-917 (1931) (“If the sole effect of a presumption is to fix the burden of producing evidence, it is a necessary corollary that conflicting presumptions are legal impossibilities. Certainly if a presumption operates only to fix the burden of producing evidence to avoid a directed verdict, that burden can not be put upon both parties at the same time as to the same issue.”). See also McBaine, *Burden of Proof: Presumptions*, 2 U.C.L.A. L. REV. 13, 28 (1954).

<sup>8</sup>McCORMICK § 312; Comment to Uniform Rule 15 (“The courts adopting the Thayer theory of presumptions insist that conflicting presumptions cancel each other.”); MODEL CODE, Rule 704, Illustration No. 2, at 317-318.

weightier considerations of policy and logic. If there is no such preponderance both presumptions shall be disregarded.<sup>9</sup>

<sup>9</sup>The following idea seems to underlie the URE proposal: Under Rule 14(a), a presumption fixes the burden of proof. As applied to inconsistent presumptions, this would mean placing this burden on both parties. This cannot be. Therefore, a special solution must be found, namely: If one presumption is stronger, apply that and that only, fixing the burden of proof accordingly; if neither is stronger, then disregard both.

Thus, the need for Rule 15 is tied in with Rule 14(a). In this study, rejection of Rule 14(a) is recommended. Therefore, these special considerations are inapplicable to this proposal.

Possibly, the word "inconsistent" should be substituted for the word "conflicting" as a concession to the purists among the advocates of Thayer's views. The concept of inconsistent presumptions is compatible with that theory. For example, the American Law Institute's Model Code, which adhered strictly to Thayer's doctrine, recognized inconsistent presumptions (MODEL CODE, Rule 701(3)) and adopted Thayer's view that they cancelled each other (MODEL CODE, Rule 704(2)). The code, however, rejected any notion of conflicting presumptions. (MODEL CODE, Rule 704. See Comment *b* to Paragraph (2): "Since it is impossible that both adversaries should have the burden of producing evidence at the same time upon the same issue, this Rule makes conflicting presumptions impossible. The establishment of the basic fact of a presumption will discharge the burden created by the previous establishment in the action of the basic fact of an inconsistent presumption and will itself create no burden.") This distinction between inconsistent and conflicting presumptions is, of course, a refinement approaching, if not crossing, the borders of fantasy. As a practical matter, therefore, this distinction should be disregarded as an overrefinement.

## ALLOCATING THE BURDEN OF PROOF

Under the orthodox Thayer view, a presumption neither fixes the burden of proof nor causes the burden, however fixed, to shift. Nonetheless, the California courts have from time to time spoken in terms of a presumption determining the situs of the burden of proof. An acute illustration is the following excerpt from *Beers v. California State Life Ins. Co.*,<sup>10</sup> as action against the insurer by the beneficiary of a life insurance policy:

It must be borne in mind that the defendant entered the trial charged with the burden of overthrowing the presumption that the deceased was sane and that her death was not suicidal but from a natural cause. (Code Civ. Proc., sec. 1963, subd. 28 . . . .) It rested upon the defendant to overcome said presumption, or, in other words, to support the affirmative defense of suicide "by a preponderance of clear and satisfactory evidence, direct or circumstantial."

Another instance is *Wilcox v. Wilcox*<sup>11</sup> in which the court refers to the presumption of the validity of a second marriage as "casting the burden of proof" upon the party attacking such marriage.

The presumption of legitimacy is another and classic illustration.<sup>12</sup> No doubt there are others.<sup>13</sup> The question thus arises as to the status of such decisions if a statute were to be enacted declaring Thayer's theory of presumptions to be the law of this State.

Wigmore, in reviewing the various tests for apportioning the burden of proof, reaches the following conclusion:

<sup>10</sup> 87 Cal. App. 440, 456-457, 262 Pac. 380, 387 (1927).

<sup>11</sup> 171 Cal. 770, 155 Pac. 95 (1916), quoted *supra* at 1099-1100.

<sup>12</sup> Estate of McNamara, 181 Cal. 82, 183 Pac. 552 (1919) ("clear and satisfactory proof" required to rebut presumption); Estate of Walker, 180 Cal. 478, 181 Pac. 792 (1919) (same); Comment, 23 So. CAL. L. REV. 538, 574-576 (1950).

The American Law Institute adopted Thayer's theory generally; nevertheless, it felt compelled to include a special rule as to the presumption of legitimacy stating that the opponent of this presumption does have the burden of proof. MODEL CODE, Rule 703.

<sup>13</sup> Estate of Duncan, 9 Cal.2d 207, 217, 70 P.2d 174, 179 (1937) (community property presumption; "complete demonstration" not required; burden is "the burden of producing clear and satisfactory proof that the property was the separate property of decedent"); *Simonton v. Los Angeles Trust & Sav. Bank*, 205 Cal. 252, 270 Pac. 672 (1928) (quantum necessary to overcome community property presumption); *McDonald v. Hewlett*, 102 Cal. App.2d 680, 687, 228 P.2d 83, 87 (1951) (presumption of Civil Code Section 2235 gives trustees "the burden of showing by evidence that the transaction was fair"); *Everett v. Standard Acc. Ins. Co.*, 45 Cal. App. 332, 344, 187 Pac. 996, 1001 (1919) ("the presumption of innocence of crime and of fraud cast upon appellant the burden of proof").

*Kidd, Some Recent Cases in Evidence*, 13 CAL. L. REV. 468, 473-476 (1925); *Prosser, Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183, 218-225 (1949); Comment, 18 CAL. L. REV. 418, 422 n.15 (1930).

It is sometimes suggested that it is because of the presumption of due care that defendant has the burden of proof on the issue of contributory negligence. (See, e.g., the authorities cited in note 1, *supra* at 1088.)

This, however, is refuted by the history of this presumption. (See note 18, *supra* at 1094.)



There is, then, no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness.<sup>14</sup>

If this be the general process by which the burden of proof has been allocated, it must be evident that it is not necessarily significant that in a given case the court has expressed its result in terms of a presumption. Such result could have been reached without any reference to a presumption. The reference, when made, may well be regarded as purely literary—a linguistic choice for expressing a result, not a criterion for reaching it. Therefore, the results in cases of the type above mentioned could and should be regarded as unaffected by the new view of presumptions precisely because in originally reaching these results it was entirely unnecessary to think or speak in terms of presumptions.<sup>15</sup>

The new view would leave untouched the present treatment of the presumption<sup>16</sup> of the innocence of defendant in a criminal action. That treatment is now prescribed in the two following sections of the Penal Code:

1096. A defendant in a criminal action 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, but the effect of this presumption is only to place

<sup>14</sup> 9 WIGMORE § 2486 at 278.

<sup>15</sup> Note, for example, how Justice Traynor indicates in the following passage that fixing the burden of proof and applying a presumption are separate processes:

There are situations where, either by the application of a presumption or by shifting the burden of proof itself, it is reasonable to require of defendant an explanation if he is to escape a judgment against him. Thus, when bailed goods are lost or destroyed, it is reasonable to require the bailee to prove that the loss was not owing to his negligence. (*George v. Bekins Van & Storage Co.*, 33 Cal.2d 834, 839-841 [205 P.2d 1037].) Again, when a carrier has undertaken to carry a passenger safely it is reasonable to enforce that duty by requiring the carrier to explain an accident. (See Prosser, *Res Ipsa Loquitur in California*, 37 Cal.L.Rev. 183, 185.) The relationship between an unconscious patient and those who have undertaken to treat him may also be one that justifies placing the burden of proof on the attendants if they are to escape liability for an unusual injury inflicted while the patient is unconscious. [*Raber v. Tumin*, 36 Cal.2d 654, 664, 226 P.2d 574, 580 (1951).]

If the Morgan view were to be adopted, of course, the presumption would become a mechanism for fixing the burden of proof. In that event, Uniform Rule 16 would be a meaningful part of the system. That rule provides as follows:

**RULE 16. Burden of Proof Not Related as to Some Presumptions.** A presumption, which by a rule of law may be overcome only by proof beyond a reasonable doubt, or by clear and convincing evidence, shall not be affected by Rules 14 or 15 and the burden of proof to overcome it continues on the party against whom the presumption operates.

The evident purpose of Rule 16 is to provide that presumptions may be held to cast a burden of proof greater than merely a preponderance of the evidence.

According to Thayer's theory, such an enactment would be neither necessary nor desirable; under that view, presumptions do not fix or shift the burden of proof.

<sup>16</sup> Wigmore, however, suggests that it is a fallacy to regard the presumption of innocence as a genuine presumption. 9 WIGMORE § 2511.

upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

1096a. In charging a jury, the court may read to the jury section 1096 of this code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given.

## CONCLUSION

The present California law on presumptions is unsatisfactory by virtue of being confused, unduly complex, or potentially or actually unfair. The areas in which such problems are created are now listed in descending order of importance:

- (a) The doctrine that a presumption is evidence, weighable as such.
- (b) The doctrine that the jury is to be charged that the opponent of a presumption who does not possess the burden of proof nevertheless bears the burden to rebut the presumption by evidence of equivalent or superior convincing force.
- (c) The doctrine that a presumption is rebuttable as a matter of law only by conclusive evidence from the rebutter or by evidence from his adversary.

If the proposals advanced in this report were adopted the following consequences would result:

- (a) The presumption-as-evidence doctrine would be eliminated. In its stead we would have the doctrine that the facts giving rise to the presumption may be circumstantial evidence possessed of more or less probative force.
- (b) No charge would be given the jury respecting a presumption, as such. Instead of the present complex charges, we would have a simple charge covering the burden of proof plus—in the court's discretion—a charge on the value and weight of the circumstantial evidence mentioned above.
- (c) The peculiar doctrine respecting rebutting a presumption as a matter of law would be eliminated.

## MODIFICATIONS OF THE CODE OF CIVIL PROCEDURE

In order to effectuate the revisions suggested in this study, it is recommended that the Code of Civil Procedure be amended as follows:

### Section 1823:

1823. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact. *A presumption is not evidence.*

**Section 1957**, defining indirect evidence, should be repealed.<sup>17</sup>

**Section 1961**, in its present form, should be repealed; it should be replaced by the substance of Uniform Rules 14(b) and 15. The section would then read as follows:

1961. ~~PRESUMPTIONS MAY BE CONTROVERTED, WHEN: 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.~~

1. Except as provided in this section or in section 1962,<sup>[18]</sup> a presumption does not continue to exist when evidence is introduced which would support a finding of the nonexistence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption had ever been involved.

2. If two presumptions arise which are inconsistent with each other, the judge shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance both presumptions shall be disregarded.

<sup>17</sup> Section 1957 provides:

Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions.

<sup>18</sup> Code of Civil Procedure Section 1962 provides:

The following presumptions, and no others, are deemed conclusive:

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another;
2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;
3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it;
4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation;
5. Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate;
6. The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence;
7. Any other presumption which by statute is expressly made conclusive.

**Section 1963:**

All other presumptions are satisfactory, if uncontradicted. They are ~~denominated~~ disputable. ~~presumptions, and may be controverted by other evidence.~~ The following are of that kind:

**Section 2061(2):**

The jury, subject to the control of the Court, in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the Court on all proper occasions:

\* \* \* \* \*

2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a ~~pre-~~ ~~sumption~~ or other evidence satisfying their minds;.

# THE BURDEN OF PRODUCING EVIDENCE, THE BURDEN OF PROOF, AND PRESUMPTIONS \*

## INTRODUCTION

In the examination of existing statutes in Title I of Part IV of the Code of Civil Procedure,<sup>1</sup> it was repeatedly noticed that the Uniform Rules of Evidence deal almost exclusively with rules governing the admission and exclusion of evidence. Part IV of the Code of Civil Procedure is far more comprehensive. It contains some sections which at least superficially regulate the burden of producing evidence and the burden of persuasion. Other provisions in Part IV affect the weight to be given certain evidence and the manner in which the jury is to be instructed on consideration of the evidence.

Although Part IV is constructed on a very elaborate classification system, that system represents the analysis of evidence law of a century ago. Writers, courts, and lawyers today use different classifications and different terminology. The purpose of this portion of the study is to extract from Part IV of the Code of Civil Procedure those sections which relate not to the admission or exclusion of evidence, which is the subject of the Uniform Rules, but to the allocation of burdens and the weight and management of evidence.

\* This portion of the study was made at the request of the California Law Revision Commission by Professor Ronan E. Degnan of the School of Law, University of California at Berkeley. The opinions, conclusions, and recommendations contained herein are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Law Revision Commission.

<sup>1</sup> See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1, 46-57 (1964).

## INITIAL ALLOCATION OF BURDENS

### Generally

In general, there are three types of "burdens" which may be involved in problems of proof. The first is the burden of pleading—who has the obligation to inject the issue into the case? The second is the burden of producing evidence on the issue—who will suffer an adverse finding if the record is silent on the point? The third is the burden of persuasion—if there is evidence in the record on a particular issue, who must persuade the trier of fact that the evidence sustains a finding in his favor on that issue?

In most cases, these three burdens devolve on a single litigant for any given issue—normally, the plaintiff in civil cases and the prosecution in criminal cases. Analytically, however, these are separate questions, and it is necessary to treat them as such for the purpose of this portion of the study.

The separation of these three burdens can be illustrated by reference to the prevailing rule applicable in California that a complaint for money due upon a contract must include an allegation by the plaintiff that the amount is unpaid.<sup>2</sup> The defendant, however, bears the burden of producing evidence of payment (*i.e.*, he will lose on that issue unless he produces some evidence).<sup>3</sup> The defendant also bears the burden of persuading the trier of fact that payment was actually made. Whether the defendant must also plead payment or may produce his evidence of payment under a general denial of the plaintiff's allegation of nonpayment is uncertain; the cases go both ways.<sup>4</sup>

A similar lack of uniformity may be observed in decisions in defamation cases. In some cases, it has been assumed (if not expressly held) that an allegation of falsity is required because it "is an essential ingredient of the wrong complained of."<sup>5</sup> However, such holdings and dicta seem effectively repudiated by the Supreme Court in *Lipman v. Brisbane Elementary School Dist.*<sup>6</sup>

The burden of proof with respect to the issue of truth or falsity is on the defendant. As a general rule, the burden of pleading a particular matter and the burden of proving it correspond, and section 461 of the Code of Civil Procedure provides in part that "the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances." It follows that a plaintiff need not allege the statements are false. Holdings to the contrary are disapproved.

<sup>2</sup> See *Hurley v. Ryan*, 119 Cal. 71, 51 Pac. 20 (1897); *Fancher v. Brunger*, 94 Cal. App.2d 727, 211 P.2d 633 (1949).

<sup>3</sup> *Sarraille v. Calmon*, 142 Cal. 651, 76 Pac. 497 (1904); *Stuart v. Lord*, 138 Cal. 672, 72 Pac. 142 (1903).

<sup>4</sup> *Pastene v. Pardini*, 135 Cal. 431, 434, 67 Pac. 681, 683 (1902) (must plead); *Bank of Shasta v. Boyd*, 99 Cal. 604, 606, 34 Pac. 337, 338 (1893) (proof of payment admissible under a general denial).

<sup>5</sup> *E.g.*, *Glenn v. Gibson*, 75 Cal. App.2d 649, 657, 171 P.2d 118, 123 (1946). See 2 CHADBURN, GROSSMAN & VAN ALSTYNE, CALIFORNIA PLEADING § 996 (1961).

<sup>6</sup> 55 Cal.2d 224, 233, 11 Cal. Rptr. 97, 101, 359 P.2d 465, 469 (1961). (Citations omitted.)

### Statutory Allocation of Initial Burdens

There are very few instances in the Code of Civil Procedure in which the Legislature deliberately faces the problem of the allocation of burdens. Section 461 is one of them.<sup>7</sup> Another is Section 457, which specifically separates the burden of proof from the burden of pleading.<sup>8</sup> This section allows the plaintiff in a contract action to allege the performance of all conditions precedent in the most conclusory of terms. Thus, the plaintiff need produce evidence on the point only if the allegation is directly controverted. In short, the burden of pleading is on the defendant, but the burden of proof is on the plaintiff.<sup>9</sup>

There also are a few provisions in other codes in which the Legislature has used terms expressly referring to the burden of proof. Examples of these are set out in the appended note.<sup>10</sup>

### Issue of Insanity

There has been little tendency in criminal cases to reallocate burdens; the prosecution continues to bear nearly all of them. One exception to this rule is the issue of insanity. Seemingly without legislative aid, the courts have evolved the view that sanity is conclusively presumed unless the defendant presents some contrary evidence. *People v. Harris*<sup>11</sup> seems to have crystallized this view:

But the law presumes all men are sane; not some degree of sanity but that they have full mental capacity to commit any crime or degree of crime which the facts in the case establish. Express or affirmative proof of the sanity of a defendant is not required to be made by the prosecution. The presumption which the law raises

<sup>7</sup> Code of Civil Procedure Section 461, mentioned in the *Lipman* case, *supra* note 6, provides:

In the actions mentioned in the last section the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

<sup>8</sup> The text of this section is as follows:

In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance.

See also Section 1983, which provides, in substance, that when a person is charged with exercising a right restricted to citizens when he was not a citizen or eligible to become one, the prosecution must charge that he was not a citizen and that he did the act, but upon proof that he did the act, the burden of proving citizenship or eligibility for it falls upon the defendant. This statute was held unconstitutional as applied in *Morrison v. California*, 291 U.S. 82 (1934); the purpose of the present reference is only to emphasize how seldom the Legislature expressly determines the point.

<sup>9</sup> Compare the provision of Rule 9(c) of the Federal Rules of Civil Procedure (28 U.S.C.A.): "A denial of performance or occurrence shall be made specifically and with particularity."

<sup>10</sup> CAL. CIV. CODE § 1615 ("The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it."); CAL. LABOR CODE § 3708 (an employer subject to the workmen's compensation law who does not "secure" compensation is subject to a common law action in which the employer is "presumed" negligent and the "burden of proof is upon the employer, to rebut the presumption of negligence"); CAL. PENAL CODE § 496 (receiving stolen property, vague reference to burden of proof, again in connection with a presumption); CAL. REV. & TAX. CODE §§ 6091, 6241 (sales and use tax provisions, the "burden of proving" that a sale of tangible personal property is not a sale at retail is upon the person making the sale).

<sup>11</sup> 169 Cal. 53, 145 Pac. 520 (1914).



is the full equivalent of proof of it as a fact, and, until the contrary is shown, the prosecution, by the presumption, has proven the sanity of the defendant beyond a reasonable doubt. This presumption is conclusive in the absence of any evidence on the part of the defendant contravening it. If none is introduced by him the presumption prevails, and the burden on the prosecution of proving beyond a reasonable doubt the capacity of the defendant to commit the crime charged which the facts and circumstances otherwise show beyond such doubt was committed by him, is sustained. The rule prevailing in this state, and in the majority of jurisdictions elsewhere, requiring the defendant where insanity is interposed as a defense by him to prove it by a preponderance of the evidence does not affect the rule that the burden of proving sanity is on the prosecution. That burden is always on it and it is met in the first instance by the presumption which the law raises of sanity and which must prevail until it is overcome. The rule casting upon the defendant the burden of establishing his insanity by a preponderance of the evidence does not shift this burden of proof from the prosecution to him but only shifts the burden of introducing evidence and declares the amount or *quantum* of evidence which he must produce to overthrow the presumption and show his insanity.<sup>12</sup>

This hopeless contradiction in language is doubtless attributable in part to the unique California view that presumptions are evidence and are to be treated as such. However, it is manifestly impossible for the prosecution to have a burden of proving sanity beyond a reasonable doubt while at the same time the defendant must establish the fact of insanity by a preponderance of the evidence.<sup>13</sup>

In defense of at least part of the *Harris* rule, it may be said that most defendants are sane. It would be wasteful in the extreme to require the prosecution to establish sanity in every case merely because the issue might be contested in a few cases. In civil cases, this kind of problem is resolved by the pleadings. When the *Harris* case was decided, the only pleading of a criminal defendant was, in substance, "not guilty." The prosecution had to produce enough evidence to make a *prima facie* case. Since that time, the Legislature has added the plea of "not guilty by reason of insanity" to Section 1016 of the Penal Code. The last paragraph of that section incorporates some of the doctrine of the *Harris* case:

A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial.

<sup>12</sup> *Id.* at 68, 145 Pac. at 526.

<sup>13</sup> The *Harris* case is noticed as anomalous in Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CAL. L. REV. 805, 808 n.11 (1961), a study based upon one made at the request of the California Law Revision Commission.

This frees the prosecution of any obligation to produce evidence to prove the defendant sane unless the defendant pleads insanity. While this is adequate to take care of the waste problem, there must be other reasons for retaining the remainder of the *Harris* doctrine since the courts have continued to apply it. In *In re Dennis*,<sup>14</sup> the Supreme Court repeated, as it had in intervening cases, the formula that the rebuttable presumption of sanity fulfills the prosecution's burden of proving sanity until the defendant produces enough evidence to persuade by a preponderance of the evidence that he was insane. (The precise ruling of the *Dennis* case, however, was that Dennis had produced enough evidence to overcome the presumption as a matter of law.)

It seems clear that it would be entirely possible to put upon a criminal defendant the obligation of pleading insanity but thereafter require the prosecution both to produce evidence on this issue and to persuade the trier of fact beyond a reasonable doubt.<sup>15</sup> However, this has not been done.

If the rule that presumptions are evidence were to be abandoned, the contradictions of the present law would be even more serious. Thus, would the prosecution be able to meet its burden, whatever that might be, without the aid of the rule that the presumption of sanity is itself evidence sufficient to prove the case?

### Notice of Alibi

Another common example of adjusting the burden of pleading in criminal cases is the requirement that the defendant give notice of his intention to prove an alibi. A number of states, but not California, already have such statutes.<sup>16</sup> Even more clearly than in the case of a plea of insanity, an alibi is not a "defense" in the usual sense of the term. If the accused was not at the place where the criminal act was committed at the time it was committed, he did not commit it. Evidence that he was elsewhere at the time is logically receivable under a general denial. However, the pleading function of giving notice that a certain factual issue will be contradicted is performed by giving a notice in advance so that the prosecution may prepare to meet the evidence. Some statutes, such as the one previously recommended by the California Law Revision Commission, go further than a mere notice that an alibi will be proved; they also require disclosure of the names and addresses of the witnesses (other than the defendant himself) who will provide the evidence that the defendant was elsewhere. This couples a discovery function with a pleading function. But there is nothing in such statutes that would in any way affect the burden of producing evidence. The prosecution would fail to make a prima facie case if it failed to produce evidence that the defendant did the act charged; this necessarily includes a showing that he was at the place at the time of the offense charged. As in the case of the Law Revision Commission's previous recommendation on this subject, this does not

<sup>14</sup> 51 Cal.2d 666, 673, 335 P.2d 657, 661 (1959).

<sup>15</sup> SPECIAL COMMISSIONS ON INSANITY AND CRIMINAL OFFENDERS, SECOND REPORT, pp. 26-27 (Nov. 1962).

<sup>16</sup> The Law Revision Commission previously recommended adoption of such a statute for California. See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Notice of Alibi in Criminal Actions* at J-1 (1961).

suggest that the defendant bears any burden of persuasion about where he was when the offense was committed; presumably, the prosecution must still prove this beyond a reasonable doubt.

### **Summary**

The alibi situation and the plea of "not guilty by reason of insanity" have received special consideration because of their exceptional nature. As pointed out above, however, neither is a "defense" in the usual sense of the word.

The burdens of pleading, of producing evidence, and of persuasion are allocated at the outset in most cases. As the following discussion shows, the plaintiff bears all the burdens as to some questions, and the defendant bears all the burdens as to others. This presents two questions: How is the initial allocation made? When will subsequent developments in the case persuade the court that the initial allocation—*i.e.*, pleading—should be readjusted to thrust some aspects of the subsequent burdens upon the other party?

## MAKING THE INITIAL ALLOCATION

### Statutory Allocation of Burdens

The general statutory provisions which govern initial allocation are few and very general. They are found in Part II (Civil Actions) of Title 6 (Pleadings in Civil Actions) of the Code of Civil Procedure and in the Penal Code.

The principal provisions in the Code of Civil Procedure are Sections 426 and 437. Section 426 provides, in part:

The complaint must contain:

\* \* \* \* \*

2. A statement of the facts constituting the cause of action, in ordinary and concise language;

Section 437 provides, in part:

The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.

2. A statement of any new matter constituting a defense or counterclaim.

The pleading provisions of the Penal Code are even less precise. Section 950 provides, in part:

The accusatory pleading must contain:

\* \* \* \* \*

2. A statement of the public offense or offenses charged therein.

Penal Code Sections 951 and 952 elaborate on this slightly, permitting criminal pleadings to be stated in the most conclusionary of forms. The responsive pleadings in criminal cases raise even fewer possibilities for factual allegations. Section 1016 identifies three issues which may be raised in the criminal law counterpart of the answer: (1) former judgment of conviction or acquittal, (2) once in jeopardy, and (3) not guilty by reason of insanity.

Since substantive law—not procedural considerations—determines the elements that constitute a cause of action or a public offense, attempts to be more precise in allocating the various burdens to the parties have not been very effective. As shown above, legislatures are not alert to the problem and seldom refer to it. The Federal Rules of Civil Procedure make an attempt, in Rule 8(e), to provide a catalog of affirmative defenses, but this rule closes with the general phrase “and

any other matter constituting an avoidance or affirmative defense.”<sup>1</sup> On the whole, it is evident that judges make these decisions; the reasons for their decisions are varied. The grounds are sometimes simply logic —(e.g., an “essential” element of libel is falsity; hence, the plaintiff must allege it<sup>2</sup>). Sometimes, the judges purport to get guidance from the statutes even though the legislators put none there. Sections 1867, 1868, 1869, and 1981 of the Code of Civil Procedure<sup>3</sup> have been referred to for this purpose.

It is evident that language of the kind employed in these sections is simply a restatement of the question of allocation. Code of Civil Procedure Sections 426 and 437 and Penal Code Section 950 do not say where the burden of pleading will be; yet, Sections 1867-1869 and 1981 of the Code of Civil Procedure evidently assume that the pleading rules of this and other codes, especially the Penal Code, have somehow established the content of the pleadings and allocated between the parties the burden of proving allegations.<sup>4</sup> Thus, “each party must prove his own affirmative allegations”;<sup>5</sup> since the party holds the “affirmative of the issue,” he “must produce the evidence to prove it” and, “therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.”<sup>6</sup> “Burden of proof” in this context appears to relate to the burden of producing evidence, for the test is phrased in terms of total absence of evidence, not of the persuasive character of the evidence received.

The third sense in which the term “burden” is employed in this portion of the study, the burden of persuasion,<sup>7</sup> is regulated within the Code of Civil Procedure by Section 2061, which provides, in part:

The jury, subject to the control of the Court, in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

\* \* \* \* \*

5. That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made

<sup>1</sup> The full text of Rule 8(c) is as follows:

**Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

<sup>2</sup> See *Glenn v. Gibson*, 75 Cal. App.2d 649, 657, 171 P.2d 118, 123 (1946).

<sup>3</sup> For the text of these sections, see the text, *infra* at 1119, 1121, 1122, and 1124.

<sup>4</sup> It should be noted that pleadings can remove as well as create issues. An allegation not denied “must, for the purposes of the action, be taken as true.” CAL. CODE CIV. PROC. § 462. An allegation expressly admitted makes testimony inadmissible which would otherwise be proper for proof of the alleged fact. *Fuentes v. Tucker*, 31 Cal.2d 1, 187 P.2d 752 (1947).

<sup>5</sup> CAL. CODE CIV. PROC. § 1869, first sentence.

<sup>6</sup> CAL. CODE CIV. PROC. § 1981.

<sup>7</sup> “Burden of persuasion” is discussed in connection with presumptions and prima facie evidence, *infra* at 1131-1150.

according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt;

For some types of cases, case law provides a standard of persuasion which is higher than a preponderance of the evidence but is less than proof beyond a reasonable doubt. Professor McBaine provides a short list of the types of issues to which the clear and convincing standard applies as follows:

In an action to have a deed declared to be a mortgage the party who asserts that a deed was made, not to convey the property, but to secure a debt, must establish his claim by clear and convincing evidence.

In actions to declare a resulting trust in property the trust must be proved by clear and convincing evidence.

A litigant who alleges illegitimacy of a child, born to a married woman, not living with her husband when the child was conceived, has the burden of proving illegitimacy by clear and convincing evidence.

In actions to reform a written instrument, where parol evidence is relied upon, the litigant seeking reformation must prove his assertions by clear and convincing evidence.

Where property is transferred to a married woman, during marriage, by an instrument in writing, it has been held that the burden is upon the litigant, who asserts that the property was community property, to establish his contention by clear and convincing evidence. There seems to be some conflict in the decisions as to whether clear and convincing evidence is required in these actions.

The provisions of lost wills must be proved "clearly and distinctly by at least two credible witnesses."<sup>8</sup>

### Factors Determining the Allocation of Burdens

Thayer denied that we have a "right to look to the law of evidence for a solution of such questions" of allocation.<sup>9</sup> On the whole, however, it is only in the writings on evidence law that any guidance is offered. The authors agree that there is no single guide. It is clear, also, that neither logic nor grammar will provide the answer. Thus, the writers are substantially in accord as to three general considerations that seem to determine the allocation of burdens: (1) policy, (2) fairness and convenience, and (3) probabilities.<sup>10</sup> Each of these merits detailed discussion.

**Policy.** As an example of the influence of policy considerations on the allocation of burdens, Professor Cleary<sup>11</sup> points out that freedom of a plaintiff from contributory negligence is an "essential element" of the plaintiff's right to recover under the common law rule. Whether

<sup>8</sup> MCBAIN, CALIFORNIA EVIDENCE MANUAL § 1481 at 518-519 (2d ed. 1960). (Footnotes omitted.)

<sup>9</sup> THAYER, PRELIMINARY TREATISE ON EVIDENCE 371 (1898).

<sup>10</sup> See CLARK, CODE PLEADING 606-612 (2d ed. 1947); MCCORMICK § 318; WITKIN, CALIFORNIA EVIDENCE § 56 (1958). An excellent short treatment of this subject is found in Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 10-16 (1959).

<sup>11</sup> Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 11-12 (1959).

or not it is a "defense" which is allocated to the defendant for the purposes of pleading, producing evidence, and persuading depends on how the court views it. Modern courts are not friendly to the rule of complete bar to recovery because of contributory negligence, however slight; as a consequence, they have allotted the burdens of pleading, proving, and persuading to the defendant. In other words, unless affirmatively persuaded that contributory negligence exists, the courts prefer to act as though it did not because the consequences of its existence are so drastic.

**Fairness and Convenience.** In many cases, superior access to proof is also a reason for assigning the initial burden to the defendant. An example Cleary uses is the payment of a debt sued upon. As mentioned above,<sup>12</sup> California law is somewhat divided upon this issue at the pleading stage, some cases indicating that the plaintiff must plead non-payment to state a cause of action. However, it is clear enough that the burden of producing evidence and the burden of persuasion rest upon the defendant and that he must plead payment to produce such evidence.

Another example, also discussed by Professor Cleary, is a bailee's liability for nonreturn of bailed goods. *George v. Bekins Van & Storage Co.*<sup>13</sup> finally resolved for California a question which had been much discussed in California and elsewhere. Goods of the plaintiff in the possession of the defendant were destroyed by fire. It was at least as probable as not that the fire was caused by the negligence of defendant's employees; the evidence would have supported either finding. The question thus turned on which party had the burden of proof. With the aid of the Warehouse Receipts Act,<sup>14</sup> the court held that the burden of proof of freedom from negligence was upon defendant Bekins as bailee. It is significant that the court held that "the burden of proving that the goods were not lost because of negligence is on the defendant, *whether plaintiff frames his complaint on a negligence or a breach of contract theory.*"<sup>15</sup>

Analogous to the allocation of burden of proof because of greater access to evidence is one of the reasons underlying the doctrine of *res ipsa loquitur*. It functions more as a presumption, however, and is discussed later in that context.<sup>16</sup>

Much of the precedent on the burdens of pleading, of producing evidence, and of persuasion was crystallized before the inauguration of free discovery. Now that pretrial examination of witnesses and parties

<sup>12</sup> See the text, *supra* at 1109.

<sup>13</sup> 33 Cal.2d 834, 205 P.2d 1037 (1949).

<sup>14</sup> Cal. Stats. 1909, Ch. 290, p. 437 (CAL. GEN. LAWS ANN. Act 9059 (Deering 1954)), repealed and recodified as amended as CAL. CIV. CODE §§ 1858.01-1858.85 by Cal. Stats. 1953, Ch. 49, p. 683. It should be noted that the Warehouse Receipts Act was repealed effective January 1, 1965, by California's enactment of the Uniform Commercial Code. Cal. Stats. 1963, Ch. 819, p. 1849.

<sup>15</sup> *George v. Bekins Van & Storage Co.*, 33 Cal.2d 834, 841, 205 P.2d 1037, 1042 (1949) (emphasis added). The court has repeated the same formula in cases not subject to the Warehouse Receipts Act. See *Gardner v. Jonathan Club*, 35 Cal.2d 343, 348, 217 P.2d 961, 963 (1950):

If a bailor alleges and proves the deposit of property with the bailee, a demand therefor, and the failure of the bailee to redeliver, the burden of proof rests upon the bailee to explain his failure. If he fails to prove that the loss did not result from the aforementioned cause, he is liable for that loss . . . . [Citations omitted.]

<sup>16</sup> See the text, *infra* at 1133.

is permitted, and interrogatories to parties and the opportunity to inspect are readily available, the question of access to evidence may be less significant than it previously was. Discovery is not the entire answer, however; it may affect the reasons for allotting the burdens of pleading and of producing evidence, but it does little to serve the function achieved by transferring the burden of persuasion.

**Probability.** One reason for determining which party should have the respective burdens is that one result is, generally speaking, more likely than another. Thus, Cleary suggests<sup>17</sup> that one reason for having the defendant plead, prove, and persuade that a debt sued upon has been paid is that people are not prone to sue upon paid debts. Absent any evidence on the point of payment, the probabilities are that the debt, if one was owed, has not been paid. This justifies placing the burden of producing evidence on the defendant. Even when evidence is produced, it is best to resolve the issue against the defendant unless the trier of fact is persuaded that payment was made.

This is a purely statistical evaluation of the problem. Thus, if one assumes that 80 out of every 100 debts sued upon have not been paid, then the best overall justice will be achieved by acting as if none have been paid. All plaintiffs will prevail on the issue where there is no evidence or where the trier of fact is not persuaded by the evidence. However, it is better to have 100 win, although only 80 should have won, than to have 100 lose, where only 20 should have lost.

Again, the analogy to *res ipsa loquitur* should be noted. Flour barrels usually, although not always, do not roll out of lofts unless the person in possession has been negligent.

An aspect of probability which Professor Cleary does not mention is procedural economy. If, using the hypothesis above, 80 percent of all debts sued upon have not been paid, it is wasteful to the parties and to the courts to require all plaintiffs to prove nonpayment when in only 20 percent of the cases is there any question about the matter. One method of avoiding the waste is to put the burden of pleading payment upon the defendant. This helps identify those cases in which there is an issue about payment. It does not necessarily follow that the burden of producing evidence and the burden of persuasion should also be placed upon the defendant; this point is illustrated by the practice of requiring the defendant to specify that conditions precedent have not been performed before the plaintiff, suing on a contract, is required to produce evidence on the subject.<sup>18</sup>

### Revision of Existing Code Provisions

If it be accepted that allocation of the burdens of pleadings, producing evidence, and persuading is controlled by the considerations discussed above, it seems futile to try to incorporate any dependable guides into the pertinent sections of Part IV of the Code of Civil Procedure. Attempts to codify standards as vague as those mentioned are apt to result in misleading provisions rather than in useful ones. Repeal of the existing sections could be recommended on the ground that they are useless as guides to judicial rulings. An intermediate

<sup>17</sup> Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 13 (1959).

<sup>18</sup> See the text, *supra* at 1109 and 1117.



approach would be to preserve the existing sections, with such improvements as can be made, in a separate title relating to Burden of Proof, Burden of Producing Evidence, and the Weight and Effect of Evidence.

The pertinent sections of Part IV of the Code of Civil Procedure are considered in the following discussion. Each section is followed by a recommendation that it be retained, revised, or repealed.

**Section 1867** provides :

None but a material allegation need be proved.

At best, Section 1867 is but a truism. Very little attention has been paid by the courts to either this section or Section 463, which defines material allegations.<sup>1</sup> In *Hurley v. Ryan*,<sup>2</sup> the Supreme Court said that Section 1867 implies, "of course, that material allegations must be proved."<sup>3</sup> This was at a time when courts were seriously holding that there was a difference between necessary allegations and material allegations. In the *Hurley* case, the court relied upon *Melone v. Ruffino*,<sup>4</sup> which held that in a suit upon an obligation to pay money an averment of nonpayment:

. . . is necessary to make the complaint perfect upon its face. But it is a *non sequitur* to say that because such negative averment is necessary in the complaint therefore it is necessary for the plaintiff to prove it. The question is not one of pleading, but of evidence; not what must be alleged, but where the burden of proof lies. The general rule is that a party is not called upon to prove his negative averments, although they may be necessary to his pleading.<sup>5</sup>

This case did not cite the Code of Civil Procedure for its authority. It relied instead upon the opinion of Chief Justice Field in *Green v. Palmer*,<sup>6</sup> in which Field deplored the failure of the bar to understand the very simple rules of the Practice Act which, he said, had been taken in part from the New York code. He quoted extensively from a manual "written by one of the commissioners engaged in framing the New York code, some rules of pleading, with the observations of the writer thereon, as expressive of our views as to what should be stated in the pleadings under our Practice Act."<sup>7</sup> (The anonymous commissioner was his brother, David Dudley Field.) One of the rules mentioned is that certain negative allegations are necessary but are not to be proved by the pleader.<sup>8</sup>

In the light of this history, there seems to be a confusion of terms between the definition of material allegations in Section 463 and Section 1867. "Material" in the former section seems to include both what must be proved and what the brothers Field thought must only

<sup>1</sup> Section 463 provides :

A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

<sup>2</sup> 137 Cal. 461, 70 Pac. 292 (1902).

<sup>3</sup> *Id.* at 462, 70 Pac. at 292.

<sup>4</sup> 129 Cal. 514, 62 Pac. 93 (1900).

<sup>5</sup> *Id.* at 519, 62 Pac. at 95.

<sup>6</sup> 15 Cal. 411 (1860).

<sup>7</sup> *Id.* at 414.

<sup>8</sup> *Id.* at 415.

be pleaded but not proved by the pleader. Thus, David Dudley Field's test of what was material was as follows:

"The following question will determine, in every case, whether an allegation be material, 'Can it be made the subject of a material issue?' In other words, 'If it be denied, will the failure to prove it decide the case in whole or in part?' If it will not, then the fact alleged is not material; it is not one of those which constitute the cause of action, defense, or reply."<sup>9</sup>

The basic defect seems to be a failure to distinguish between what is a material fact and what is essential to a pleading. Other cases, without reference to the code, have made this distinction: "The matter alleged may be material in the case, but immaterial in the complaint, and a plaintiff cannot by pleading such matter at the outset call upon the defendant to answer it."<sup>10</sup>

The essential conflict seems to be that the code proceeds as if pleading governed proving, while the courts (as well as the writers) tend to assume today that allocation of the burden of pleading is governed, at least in most cases, by considerations of proof. Thus:

It was in the contract between the insurer and the insured, that the premises were insured while occupied as a dwelling-house. It was essential for plaintiff to prove that the fire occurred while the premises were occupied as such dwelling-house. If it was essential to prove such fact, it was essential to allege it. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged.<sup>11</sup>

Another strong indication of the judicial attitude is to be found in bailment cases. At one time, the courts held that whether the plaintiff had to prove that the bailed goods were destroyed through the bailee's negligence depended upon whether the plaintiff had pleaded negligence.<sup>12</sup>

There appears to be a marked line of distinction made by the decision between two classes of cases wherein this question has arisen. Where the plaintiff alleges that the goods stored were lost by fire due to negligence of the defendant, then the burden of proving these allegations is upon the plaintiff, but when the plaintiff's pleadings contain no such allegation, but the defendant, seeking to justify its refusal to return the goods, sets up their destruction by fire and alleges that the fire was not due to its fault or negligence, then the burden is upon the defendant to prove the allegation of its affirmative defense and show that it was free from negligence as to the cause of the fire.<sup>13</sup>

<sup>9</sup> *Id.* at 416.

<sup>10</sup> *Canfield v. Tobias*, 21 Cal. 349, 350 (1863), quoted with approval in *Hibernia Sav. & Loan Soc. v. Dickinson*, 167 Cal. 616, 619, 140 Pac. 265, 267 (1914) (plaintiff could not by anticipating a defense in the complaint require the defendant to respond to that point with a denial).

<sup>11</sup> *Allen v. Home Ins. Co.*, 133 Cal. 29, 30, 65 Pac. 138 (1901). (Citations omitted.) The thrust of the quoted statement was reiterated most recently in *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 233, 11 Cal. Rptr. 97, 101, 359 P.2d 465, 469 (1961): "As a general rule, the burden of pleading a particular matter and the burden of proving it correspond . . ."

<sup>12</sup> See *Wilson v. Crown Transfer & Storage Co.*, 201 Cal. 701, 258 Pac. 596 (1927).

<sup>13</sup> *Id.* at 706-707, 258 Pac. at 598-599.

This distinction was rejected in *George v. Bekins Van & Storage Co.*,<sup>14</sup> in which it was held that the burden was on the defendant without regard to the form of the complaint. The decision in *Gardner v. Jonathan Club*<sup>15</sup> indicates that a sufficient complaint in a bailment case would consist of allegations of bailment, demand for redelivery, and failure to redeliver.

In sum, Section 1867 should be repealed because the courts have changed the pleading rules. The rule today is, in fact, the converse of that stated in Section 1867.

**Section 1868** provides:

Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the Court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

The first sentence is consistent with the definition of "material allegations" in Section 463<sup>16</sup> and also is consistent with Uniform Rule 1(2), which defines "relevant evidence" as "evidence having any tendency in reason to prove any material fact." Therefore, it is recommended that this sentence be retained.

The remainder of Section 1868 should be repealed. The discretion of the court to permit inquiry into collateral issues is governed by Uniform Rule 45,<sup>17</sup> and URE Rules 20-22 govern inquiry into the credibility of witnesses.<sup>18</sup>

<sup>14</sup> 33 Cal.2d 834, 205 P.2d 1037 (1949).

<sup>15</sup> 35 Cal.2d 343, 217 P.2d 961 (1950).

<sup>16</sup> This section provides:

A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

<sup>17</sup> Rule 45 provides:

**RULE 45. Discretion of Judge to Exclude Admissible Evidence.** Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

See discussion of this rule in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 612, 639-644 (1964).

<sup>18</sup> Rules 20-22 provide:

**RULE 20. Evidence Generally Affecting Credibility.** Subject to Rules 21 and 22, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility.

**RULE 21. Limitations on Evidence of Conviction of Crime as Affecting Credibility.** Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

**RULE 22. Further Limitations on Admissibility of Evidence Affecting Credibility.** As affecting the credibility of a witness (a) in examining the

**Section 1869** provides:

Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

The second sentence of Section 1869 should be repealed. A classic example of the negative allegation referred to in Section 1869 is the nonpayment of a debt sued upon. To retain or to re-enact such language as appears in the second sentence of Section 1869 would result in preserving a pleading practice that the courts have condemned in recent years and in perpetuating the erroneous idea that there exists such a species of allegations as one that is necessary but is not material. Apart from this difficult concept of a necessary but immaterial allegation, there are at least two independent reasons for repealing this sentence. First, it is tautological because it purports to require proof of that which the law otherwise requires to be proved. Second, it is misleading, since most negative allegations must be proved (*e.g.*, want of probable cause in a malicious prosecution action<sup>19</sup>). However, to recast this sentence in language that would remove the existing difficulties would very likely result in an inflexible rule to the opposite extreme.<sup>20</sup> Hence, its repeal is recommended.

Disposition of the first sentence of Section 1869 presents a more difficult question. As in the case of Section 1868, the first sentence of this section might prove useful. Under present California law, as previously discussed,<sup>21</sup> a party must plead only that which he has to prove. Thus, it is merely inversion to say that a party must prove only that which he has properly alleged, and any surplusage of pleading on his part should be ignored. But even the inversion is useful, and it is the unstated assumption of URE Rule 1(5), which defines "burden of producing evidence" as follows:

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witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

See discussion of these rules in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701, 713-721, 743-771 (1964).

<sup>19</sup> *Griswold v. Griswold*, 143 Cal. 617, 77 Pac. 672 (1904).

<sup>20</sup> A statutory statement of any such rule would very likely preclude the courts from striking an equitable balance based upon the considerations of policy, fairness and convenience, and probability (discussed in the text, *supra* at 1116-1118). For example, it may be that if imposing the burden on one party would obligate him to prove a negative, there is good reason in this alone to put the burden of pleading and proving on the other party. See McCORMICK § 318 at 675.

<sup>21</sup> See the text, *supra* at 1119-1121.

“Burden of producing evidence” means the obligation of a party to introduce evidence when necessary to avoid the risk of a directed verdict or peremptory finding against him on a material issue of fact.<sup>22</sup>

Despite this definition in Rule 1(5), it should be noted that the Uniform Rules as such do not purport to govern the *allocation* of the burden of producing evidence. This is left to legislative action, or to judicial action based upon the considerations of policy, convenience, and probability discussed above.<sup>23</sup> Thus, the only visible purpose of URE Rule 1(5) is to define “burden of producing evidence” for the purpose of using the defined term in URE Rule 8, which permits the judge to allocate the burden of producing evidence (and the burden of persuasion as well) on preliminary questions of fact concerning admissibility.<sup>24</sup>

The case for retaining the first sentence of Section 1869 would be more clear were it not for possible ambiguities in meaning. For example, the requirement in the first sentence that a party must “prove” his own affirmative allegations might mean that the party must produce evidence or else suffer a directed verdict or nonsuit, thus bearing the “burden of proof” in that sense of the term. But this construction would overlap the precise language in Code of Civil Procedure Section 1981, which provides that:

The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

The first sentence of Section 1869 might also mean that the party holding the affirmative of an issue must “prove” his allegations in the second sense of “burden of proof,” that is, to persuade the trier of fact by a preponderance of evidence, by clear and convincing evidence, or beyond a reasonable doubt, as the case may be. But this is the precise subject covered by subdivision 5 of Code of Civil Procedure Section 2061, which provides that the jury must be instructed:

<sup>22</sup> Compare URE Rule 1(4), defining “burden of proof” as follows:

“Burden of Proof” means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with “burden of persuasion.”

<sup>23</sup> See the text, *supra* at 1116-1118.

<sup>24</sup> Rule 8 provides:

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

See discussion of this rule in *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1, 17-30, 71-74.

That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt;

It is apparent that the Code Commissioners did not use "prove" in either sense of "burden of proof," *i.e.*, as synonymous with either the burden of producing evidence or the burden of persuasion; rather, they used "prove" to comprehend both terms. There was little wrong with this use at the time; the law of presumptions had not yet been subjected to Professor Thayer's searching analysis. At that time, it was an almost invariable rule that the party who had the burden of producing evidence to support his allegations also had the obligation to persuade the trier of fact as to the truth of his allegations. However, this is no longer the case. Hence, the ambiguity should be removed by repealing the first sentence of Section 1869 along with the repeal of the second. In short, Section 1869 should be repealed without replacement.

**Sections 1981 and 2061(5).** The preceding discussion of Code of Civil Procedure Section 1869 raises questions concerning what should be done about Sections 1981 and 2061(5).

Section 1981 provides:

The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

Section 1981 might be retained on the ground that this section has never done any demonstrable harm. Indeed, the courts seldom mention it. If it were to be retained, however, it would have to be revised to avoid the confusion which might arise from the dual meaning of the term "burden of proof." This could be done by changing it to conform with the definition of "burden of producing evidence" in Uniform Rule 1(5). The section would then read:

The party holding the affirmative of the issue must produce evidence *sufficient to avoid a directed verdict or peremptory finding against him on a material issue of fact.*

As an alternative disposition for Section 1981, it might be feasible to codify those factors which the courts take into account in assigning the burden of producing evidence. The following general statement might be used as a statutory allocation of the burden of producing evidence:

The burden of producing evidence is on that party which by statute or rule of law will lose on the particular issue if no evidence is presented. In the absence of a statute, courts shall assign the burden of producing evidence to the parties, taking into account what is the most desirable result in the absence of evidence, considerations of fairness and convenience in access to evidence and in eliminating unnecessary proof, and the probabilities of particular results in issues of that nature.

A third possibility is to repeal Section 1981 entirely, trusting the courts to continue to do what they are doing now.

In all probability, the Code Commissioners believed that they were regulating both the burden of producing evidence and the burden of persuasion when they adopted Code of Civil Procedure Section 1869, discussed above. If this is true, they would have viewed Section 2061(5) not as an *allocation* of the burden of proof, but as a statement of what the jury is to be instructed upon. (Penal Code Section 1096 would have supplied the "reasonable doubt" standard for criminal cases.) Hence, retention of this section would do no harm. However, Section 2061(5), if retained, should be revised so that the jury is instructed (new matter in *italics*):

*That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt; That the burden of proof rests upon the party to whom it is assigned by statute or rule of law, informing the jury which party that is; and when the evidence is contradictory, or if not contradicted might nevertheless be disbelieved by them, that before they find in favor of the party who bears the burden of proof, they must be persuaded by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Unless a statute or rule of law specifically requires otherwise, the burden of proof requires proof by a preponderance of the evidence.*

## READJUSTMENT OF INITIAL ALLOCATIONS IN LIGHT OF SUBSEQUENT DEVELOPMENTS IN A CASE

### Generally

The essential thrust of Cleary's article<sup>1</sup> is that presumptions often play the role of "boys sent to do men's work." He points out that the very considerations of policy, fairness, and probability which are involved in making the initial allocation of the burden of proof are also the considerations which are advanced to justify the creation of presumptions *and* are the considerations which *should* control the assignment of pleading the ultimate or material facts. It follows, he argues, that much of what is presently accomplished by way of presumptions should be transferred to the stage of pleading; the allegations there assigned to the parties would control both the burden of producing evidence and the burden of persuasion. To achieve this, he argues for differentiation between the mere tactical use of presumptions (a phrase he employs to describe the use of presumptions as purely circumstantial evidence) and the use of presumptions as a means for allocating the burdens in regard to material facts (meaning thereby "an element in the case").

It may be that not all of what Cleary advocates can or should be accomplished. Thus, a wholesale reform of the California pleading practice is clearly beyond the scope of the present study. However, some clarification could be achieved if those sections which do not function as presumptions were removed from the present repository of general presumptions, Section 1963 of the Code of Civil Procedure.

In Section 1959 of the Code of Civil Procedure, a presumption is defined as "a deduction which the law expressly directs to be made from particular facts." The maxims stated, for example, in subdivisions 1, 2, and 4 of Section 1963<sup>2</sup> do not comply with this definition. Instead of being presumptions, as defined, they are formulations of the policy, convenience, and fairness criteria which the courts employ in making the initial allocation of burdens. Since they are statements of policy and the like, they have no proper place in a statute dealing with presumptions. However, if it be thought inadvisable to repeal them, consideration should be given to appending these sections to a general statutory provision that allocates the burden of producing evidence and the burden of persuasion, such as that recommended above.<sup>3</sup>

The confusion which has so often arisen from treating these broad propositions as presumptions is caused principally by the view that presumptions are evidence and are to be treated as such. This rule should be rejected. If it were to be revoked, calling such general statements as those mentioned above "presumptions" would create fewer

<sup>1</sup> Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959), discussed *supra* at 1116-1118.

<sup>2</sup> These subdivisions provide:

1. That a person is innocent of crime or wrong;
2. That an unlawful act was done with an unlawful intent;
4. That a person takes ordinary care of his own concerns.

<sup>3</sup> See the text, *supra* at 1124.



difficulties than has been the case in the past. For example, if the so-called presumption of due care in Section 1963(4) were treated simply as a device for making the initial allocation of the burden of producing evidence (and, perhaps, of pleading as well), it would mean only that a defendant who relies upon contributory negligence would have to plead and produce evidence upon the point. Since this is already the law, and doubtless is the law for the very reasons which underlie the so-called presumption, retaining the statement does no harm. If this particular statement were classified as a Morgan presumption, a plaintiff might be required to plead the fact (and even to prove the fact) that he is a person (*i.e.*, in the traditional statement of presumptions, the preliminary fact that must be established in order to give rise to the presumed fact) if the court declined to take judicial notice of that preliminary fact. From that time on, the defendant would have the burden of persuading the jury that the plaintiff had failed to exercise ordinary care. If the due care statement were classified as a Thayer presumption, it would enter into the case only when there was no credible evidence to the contrary instead of, as at present, whenever the person whose conduct is in question is dead or for other reasons is unable to supply testimony about the nature of his conduct at the time in question.

Rejection of the rule that presumptions are evidence will not automatically eliminate all problems. However, the problems that would remain would be considerably minimized and retention of the language of the more general presumptions of Section 1963 would not automatically perpetuate the difficulties of the past. Probably nothing can be done to prevent lawyers and judges from arguing at the appellate level that a jury verdict must be sustained because a person is presumed to exercise ordinary care and that, therefore, the jury must have found that he exercised ordinary care. This it not, however, an evidentiary use of presumptions; if the statement is not put in the form of an instruction to the jury, it will do very little harm. Indeed, this is the principal argument which can be advanced against repealing these generalities. Thus, some lawyers would heatedly argue and some judges may even decide that repealing these statements repudiates the policy which underlies them. It is recommended, therefore, that these existing statements be retained but placed in their proper perspective.

The function of other presumptions could depend on the context. In that case, it would be very difficult to formulate general rules. Suppose there were a presumption affecting the burden of proof "that an arrest without a warrant is unlawful." The rules about pleading the facts showing unlawfulness are truly bewildering.<sup>4</sup> The rules about producing evidence and persuading are somewhat more settled. In *Dragna v. White*,<sup>5</sup> Chief Justice Gibson said:

A cause of action for false imprisonment based on unlawful arrest is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendants to prove justification for the arrest.<sup>6</sup>

<sup>4</sup> See 2 CHADBOURN, GROSSMAN & VAN ALSTYNE, CALIFORNIA PLEADING § 1005 (1961).

<sup>5</sup> 45 Cal.2d 469, 289 P.2d 428 (1955).

<sup>6</sup> *Id.* at 471, 289 P.2d at 430.

Thus, so far as the burden of producing evidence is concerned, it is clear that the defendant must go forward with the evidence of justification. Is there, then, any point in having a presumption in the civil context? If the burden of proving justification in the first instance is upon the defendant, in what manner does the presumption "affect" the burden of proof? Actually, it leaves the burden where it was. The lawfulness of an arrest without process is an affirmative defense; like other affirmative defenses, it should be pleaded and must be proved by the defendant (at least in civil actions).

Criminal proceedings present a different problem, although not in every setting. Where objection is made that an arrest or search was unlawful, the same rule obtains as in civil cases:

When, however, the question of the legality of an arrest or of a search and seizure is raised either at the preliminary hearing or at the trial, the defendant makes a prima facie case when he establishes that an arrest was made without a warrant or that private premises were entered or a search made without a search warrant, and the burden then rests on the prosecution to show proper justification.<sup>7</sup>

However, in a criminal prosecution for false imprisonment, a different rule obtains. In *People v. Agnew*,<sup>8</sup> the court held that a common law presumption of unlawfulness applied and that it shifted to the defendant the obligation to come forward with some evidence. This was justified as an application of a rule of convenience or necessity, one of the factors affecting the allocation of burdens that was previously discussed.<sup>9</sup> The court held it to be error, however, to instruct the jury that Agnew's evidence of justification had to persuade the jurors by a preponderance of the evidence; the jury should have been informed "that the burden thus placed upon the defendant could be met by evidence which produced in their minds a reasonable doubt as to whether Mr. Prouty had in fact committed perjury."<sup>10</sup>

Thus it appears that, even as to any given issue of fact, there can be no single rule for allocation. In the first place, it makes a difference whether the case is a civil or criminal action.<sup>11</sup> Secondly, it makes some difference, as Cleary suggests,<sup>12</sup> whether the contested fact is material in the case or merely subsidiary. The California courts, as previously noted,<sup>13</sup> have shown a healthy tendency in recent years to allocate the burdens of pleading and proving according to those considerations of fairness, convenience, and policy mentioned above.<sup>14</sup> So long as the courts continue to do this, they obviate the need for talk about presumptions. In effect, they apply the Morgan theory of presumptions, i.e., that the defendant must establish his contention by persuading the jury by at least a preponderance of the evidence.

<sup>7</sup> *Badillo v. Superior Court*, 46 Cal.2d 269, 272, 294 P.2d 23, 25 (1956).

<sup>8</sup> 16 Cal.2d 655, 107 P.2d 601 (1940).

<sup>9</sup> See the text, *supra* at 1117-1118.

<sup>10</sup> *People v. Agnew*, 16 Cal.2d 655, 666, 107 P.2d 601, 606 (1940).

<sup>11</sup> Presumptions in criminal cases are discussed in the text, *infra* at 1134-1141.

<sup>12</sup> Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 26-27 (1959).

<sup>13</sup> See the text, *supra* at 1124-1125.

<sup>14</sup> See the text, *supra* at 1116-1118.

The dispute about the Thayer theory and the Morgan theory of presumptions thus tends to disappear.

It is, however, impossible to handle all presumptions in this way. An example of the difficulty is the presumption that a properly addressed and stamped envelope deposited in the mail was received at that address. As Professor Cleary observes, "normally this would be merely tactical . . ." <sup>15</sup> However, if an issue in the case is whether notice has been given, the presumed fact may also be a material fact.

It is impossible to classify by statute the variety of situations in which a particular fact may be established by a presumption so that there is a statutory answer in every case as to whether the burden is on the plaintiff or on the defendant. Greater use by the courts of the process of making the initial allocation by reference to the considerations of policy, convenience, and fairness would do much to minimize the problems of presumptions as they exist at present. The recent practices of the California courts give encouraging signs that they will do this when possible. The existence of a statute of the general purport of the one recommended above <sup>16</sup> would encourage the courts to solve the problem simply, without resorting to presumptions, when that is appropriate. Presumptions would still create difficult problems, but there would be fewer of them.

### **Express Legislative Allocation of Burdens**

The Legislature may, although it rarely does, expressly state upon which party the burdens of pleading, of producing evidence, and of persuasion are to be placed. It would appear to be useful to list and classify those sections of the various codes which deal with this problem of allocation. Some sections are contained in Part IV of the Code of Civil Procedure. The great majority are not. Yet, they are all affected in their practical operation by any revision of the law dealing with the burdens of producing evidence and of persuasion. There are also some sections which employ the term "prima facie." As is shown below, <sup>17</sup> the use of this term often has the same effect as a presumption and sometimes requires a shift in the burdens of producing evidence and of persuasion.

There is no guarantee, of course, that all sections which contain language relating to allocations, to presumptions, or to prima facie evidence have been located. Doubtless some have been missed, and doubtless more will be enacted in future years. However, the following discussion is an attempt to cover the pertinent sections.

One example of express legislative allocation is in the field of defamation, where Section 461 of the Code of Civil Procedure allocates these burdens. <sup>18</sup> There are only a few other instances of such specific allo-

<sup>15</sup> Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 26 (1959).

<sup>16</sup> See the text, *supra* at 1124.

<sup>17</sup> See the text, *infra* at 1143-1149.

<sup>18</sup> Section 461, cited in *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961) (discussed in the text, *supra* at 1109), provides:

In the actions mentioned in the last section the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

cation. Thus, Civil Code Section 1615 expressly places the burden of proving want of consideration to support a written instrument upon the party seeking to avoid it. Civil Code Section 2127, dealing with bills of lading, places the burden "to establish the existence of a lawful excuse" upon a carrier who refuses or fails to deliver goods upon demand. This and the similar provision of the Warehouse Receipts Act<sup>19</sup> will soon be superseded by Section 7403 of the Commercial Code,<sup>20</sup> which imposes liability upon the bailee (both warehousemen and carriers) "unless and to the extent that the bailee establishes any of the following [list of excuses]."

It is interesting to note that the enactment of the Commercial Code in California alters the existing law (although this is not noted in the comments to the code) by changing the result of *George v. Bekins Van & Storage Co.*<sup>21</sup> This case specifically held that when goods were damaged by fire the warehouseman had to show that the fire was not caused by his negligence. Subdivision (b) of Section 7403 of the Commercial Code lists as an excuse for failure to redeliver:

Damage to or delay, loss or destruction of the goods for which the bailee is not liable, but the burden of establishing negligence in case of damage or destruction by fire is on the person entitled under the document.

Penal Code Section 1096 refers to the presumption of innocence of one accused of a crime but declares that "the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt." Penal Code Section 496 deals with receiving stolen property; subdivision 3 of this section provides that when a dealer in used merchandise buys property under circumstances which should have caused the buyer to make inquiry about the seller's legal right to sell, "then the burden shall be upon the defendant to show that before so buying, receiving, or otherwise obtaining such property, he made such reasonable inquiry to ascertain that the person so selling or delivering the same to him had the legal right to so sell or deliver it."<sup>22</sup>

Other provisions that speak in terms of burden of proof are to be found in the Revenue and Taxation Code<sup>23</sup> and in the Labor Code.<sup>24</sup>

Although some of these sections (*e.g.*, Section 3708 of the Labor Code) use the term "presumption," there is little need to worry about its presence when the section also contains an express allocation of the burden of proof.

<sup>19</sup> CAL. CIV. CODE § 1858.17.

<sup>20</sup> Cal. Stats. 1963, Ch. 819, p. 1849, effective January 1, 1965.

<sup>21</sup> 33 Cal.2d 834, 205 P.2d 1037 (1949).

<sup>22</sup> This appears to be only a procedural elaboration of subdivision 2, which declares that purchasing by such persons under such circumstances creates a presumption that the buyer knew the property was stolen; but "this presumption may, however, be rebutted by proof." CAL. PENAL CODE § 496(2).

<sup>23</sup> Sections 6091 and 6241 provide that the seller of tangible personal property has the "burden of proving" that the sale was not at retail.

<sup>24</sup> Section 3708 provides that "the burden of proof is upon the employer [who has not secured compensation insurance], to rebut the presumption of negligence."

### Presumptions as a Device for Shifting Burdens

Included in the introductory portion of this part of the study is a general discussion of the operation of presumptions as affecting the allocation of burdens. It is apparent that no single rule can govern the operation of all presumptions because the purposes and the probabilities which call presumptions into existence are not always of the same intensity. Most efforts to blend these diverse elements into a single rule have proven to be failures.

There are three categories of presumptions to be dealt with in California: There are those found in the Code of Civil Procedure itself; there are a host of others sprinkled throughout other codes; finally, there are some common law, nonstatutory presumptions. (These latter are sometimes referred to as "inferences" because they are not created by statute, and they are sometimes called presumptions despite the fact that they are not created by statute.) Several presumptions in the Code of Civil Procedure have already been discussed. Some examples of the numerous presumptions contained in other codes are set out in the appended note.<sup>1</sup> Presumptions in the Penal Code and in the newly enacted Commercial Code are considered separately.<sup>2</sup> There remain to be considered, therefore, the uncodified, common law presumptions (or inferences).

Doubtless the most important example of an inference which operates as a presumption as applied in the California cases is the doctrine of *res ipsa loquitur*. It has its genesis in *Burr v. Sherwin Williams Co.*:<sup>3</sup>

It is settled, of course, that *res ipsa loquitur* raises an inference, not a presumption, and the general rule is that whether a particular inference shall be drawn is a question of fact for the jury, even in the absence of evidence to the contrary. . . . This, however, does not preclude the conclusion that *res ipsa loquitur* may give rise to a special kind of inference which the defendant must rebut, although the effect of the inference is somewhat akin to that of a presumption.

The rebuttal required differs from that commonly involved in presumptions of either the Thayer type or the Morgan type:

It is our conclusion that in all *res ipsa loquitur* situations the defendant must present evidence sufficient to meet or balance the inference of negligence, and that the jurors should be instructed

<sup>1</sup> See, e.g., CAL. AGRIC. CODE §§ 152, 1105; CAL. BUS. & PROF. CODE §§ 8752, 14431, 14486, 14495, 17071, 17071.5, 17073, 17074, 17077, 18405, 25607; CAL. CIV. CODE §§ 831, 853, 1055, 1105, 1150, 1431, 1477, 1654, 1659, 1660, 1838, 1914, 1943, 1944, 1945, 2137, 3336, 3356, 3387, 3400, 3440, 3522; CAL. GOVT. CODE §§ 11383, 11384; CAL. HARB. & NAV. CODE § 832; CAL. HEALTH & SAF. CODE §§ 8600, 12352; CAL. INS. CODE § 1964; CAL. LABOR CODE §§ 1200, 3003, 3357, 3708, 5302, 5704.5, 5707; CAL. PUB. RES. CODE § 4803; CAL. REV. & TAX. CODE §§ 6091, 6241, 6246, 6247, 7352, 9652, 14512, 17016; CAL. VEHICLE CODE §§ 41100, 41102, 41104; CAL. WATER CODE § 31028.

The preceding list includes only sections where explicit "presumption" language is used. Purposely excluded from the above list are numerous other sections that use equivalent terms, such as "deemed" (see, e.g., CAL. CIV. CODE §§ 129, 1059, 1946, 2806) or "prima facie evidence" (see, e.g., CAL. AGRIC. CODE §§ 18, 340.4, 772, 782, 841, 892.5, 893, 1040, 1272.5).

Because of their sheer number, no attempt is made to analyze any of these sections in detail.

<sup>2</sup> See the text, *infra* at 1134-1143.

<sup>3</sup> 42 Cal.2d 682, 688, 268 P.2d 1041, 1044 (1954). (Citations omitted.)

that, if the defendant fails to do so, they should find for the plaintiff. The trial court, therefore, did not err in giving instructions that it was incumbent upon Sherwin Williams to rebut the inference of negligence.<sup>4</sup>

Unlike a Thayer presumption, *res ipsa loquitur* does not vanish upon the production of some credible evidence. *Res ipsa loquitur* also differs from a Morgan presumption in that the jury is not told to find for the plaintiff unless the defendant persuades the jury that negligence did not exist; in effect, the jurors are told that, unless the defendant persuades them that the absence of his negligence is at least as probable as his negligence, they are to find that negligence existed. It is evident, therefore, that this "inference" (if such it be) is quite different from the general definition contained in Code of Civil Procedure Section 1958, which provides:

An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

In fact, the "inference" defined in the *Burr* case coincides with the formulation of presumption practice advocated by Justice Traynor in his dissent in *Speck v. Sarver*.<sup>5</sup> It may well be doubted, however, whether there is any practical difference in the end result between the Traynor-type instruction employed in the *Burr* decision and the conventional form of instruction. If the burden of persuasion still rests upon the plaintiff, as it does under either type of instruction, the jury must find for the plaintiff if the evidence is overbalanced in his favor as well as when the evidence is equally balanced.

The principal reason for originally designating these supplementary burden shifting devices as inferences rather than as presumptions was that presumptions were thought to be statutory; thus, only the legislature had the power to create them.<sup>6</sup> While this is no longer a *real* distinction, a practical consequence of the distinction between presumptions and inferences later came into existence. Under the Thayer view, a presumption may be rebutted; production of some credible contrary evidence dispels the presumption and it disappears entirely from the case. Under Section 1961 of the Code of Civil Procedure, the presumption may be "controverted" unless declared conclusive; the same term is employed in Section 1963.<sup>7</sup> Whether it was initially intended to distinguish the two terms may be doubted. In any event, "controvert" has come to mean something other than "rebut" in the Thayer sense because of the California rule that presumptions are evidence. The Supreme Court has held that a presumption wholly disappears from the case—*i.e.*, is rebutted in the Thayer sense—only when evidence produced by the party having the benefit of the presumption is wholly irreconcilable with the presumed fact. Testimony obtained from the defendant's witnesses or from the defendant himself by examination under Code of Civil Procedure Section 2055 will not suffice.<sup>8</sup> But in

<sup>4</sup> *Id.* at 691, 268 P.2d at 1046.

<sup>5</sup> 20 Cal.2d 585, 592-593, 128 P.2d 16, 20 (1942) (dissenting opinion).

<sup>6</sup> See WITKIN, CALIFORNIA EVIDENCE § 62 (1958).

<sup>7</sup> It should be noted, however, that many of the individual presumption statutes employ the term "rebutted."

<sup>8</sup> *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 552, 299 Pac. 529, 537 (1931).

*Leonard v. Watsonville Community Hospital*,<sup>9</sup> the Supreme Court held that this rule did not apply to the doctrine of *res ipsa loquitur* because it was only an "inference," not a presumption. Thus, where the testimony of the adverse party (although procured under Section 2055 so that plaintiff was not "bound" by it) was "clear, positive, uncontradicted and of such nature that it cannot rationally be disbelieved,"<sup>10</sup> the inference of *res ipsa loquitur* was dispelled from the case as a matter of law. Since there was no evidence of negligence other than *res ipsa loquitur*, the defendant was entitled to a nonsuit.

In this setting, *res ipsa loquitur* has some of the attributes under present California law of both an inference and a presumption. However, it is more like the latter than the former. The recommended revocation of the rule that presumptions are evidence would eliminate the difference between presumptions and inferences upon which the *Leonard* case turned. Would this change apply as well to *res ipsa loquitur*? The jury is currently instructed as follows:

From the happening of the accident involved in this case, an inference arises that a proximate cause of the occurrence was some negligent conduct on the part of the defendant. *That inference is a form of evidence and unless there is contrary evidence sufficient to meet or balance it, the jury should find in accordance with the inference.*<sup>11</sup>

Because this instruction requires evidence that will "meet or balance" the inference, *res ipsa loquitur* cannot be fitted into a scheme in which presumptions are grouped on the basis of whether or not they affect the burden of proof. It seems clear that *res ipsa loquitur* does affect the burden of producing evidence; it is also clear that it does not place the burden of persuasion on the defendant. However, this doctrine requires the production of something more than mere "evidence which would support a finding" of nonnegligence. It well may be that this *should* not be the California law, but it seems clear that it is.

In *People v. Agnew*,<sup>12</sup> the Supreme Court recognized that there are presumptions which exist apart from statutes:

We find nothing in the codes which purports to abolish those disputable presumptions known to the common law which are not repugnant to the presumptions which are found in our statutes. We are therefore of the opinion that the common law presumption of unlawfulness in unlawful imprisonment cases still exists in this state regardless of the fact that such presumption is not specifically enumerated among those found in said section 1963.<sup>13</sup>

<sup>9</sup> 47 Cal.2d 509, 305 P.2d 36 (1956).

<sup>10</sup> *Id.* at 515, 305 P.2d at 39.

<sup>11</sup> BAJI (4th ed. 1956) No. 206 (Rev.). (Emphasis added).

<sup>12</sup> 16 Cal.2d 655, 107 P.2d 601 (1940).

<sup>13</sup> *Id.* at 663, 107 P.2d at 605.

The following nonstatutory, judicially created presumptions have been recognized:<sup>14</sup>

That arrest without a warrant is unlawful.<sup>15</sup>

That family living expenses were paid from community earnings.<sup>16</sup>

That an attested will was duly executed, when the witnesses are unavailable or hostile.<sup>17</sup>

That the testator was sane.<sup>18</sup>

That a person adjudicated insane continues to be so.<sup>19</sup>

That a will last possessed by the deceased and which cannot be found has been destroyed by him with intention to revoke.<sup>20</sup>

That a recorded deed is genuine and was delivered by the grantor.<sup>21</sup>

That a deed in the possession of the grantee was duly delivered.<sup>22</sup>

That a death resulting from violent injury is not suicidal.<sup>23</sup>

The category of nonstatutory presumptions is, of course, not closed. New ones may be constructed as the need for them appears.

Still to be considered are presumptions in criminal cases and presumptions under the Commercial Code. Because of the special considerations involved, these two categories are discussed separately.

### Presumptions in the Penal and Commercial Codes

Although the foregoing discussion treated allocation of the burdens of pleading, producing evidence, and proving in connection with the Code of Civil Procedure and with other codes generally, presumptions in the Penal and Commercial Codes seem to require a separate discussion. This is necessary for the Penal Code because presumptions do not operate in the same way in criminal as in civil cases. It is desirable for the Commercial Code because it is new and because it contains some procedural regulations of its own.

**The Penal Code.** Although there are far fewer presumptions operative in criminal cases than in civil cases, the sources of those which do exist are quite as diverse. Some are found in the Penal Code itself. Thus, Section 250 provides:

An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.

<sup>14</sup> This is not an exhaustive list of possible common law presumptions, nor does this list make a distinction between those which are called presumptions and those which are called inferences when they have the same attributes.

<sup>15</sup> See the text, *supra* at 1127-1128.

<sup>16</sup> *Huber v. Huber*, 27 Cal.2d 784, 167 P.2d 708 (1946).

<sup>17</sup> *Estate of Pitcairn*, 6 Cal.2d 730, 59 P.2d 90 (1936); *Estate of Browne*, 159 Cal. App.2d 99, 323 P.2d 827 (1958).

<sup>18</sup> *Estate of Wright*, 7 Cal.2d 348, 60 P.2d 434 (1936).

<sup>19</sup> *In re Zanetti*, 34 Cal.2d 136, 208 P.2d 657 (1949).

<sup>20</sup> *Estate of Sweetman*, 185 Cal. 27, 28, 195 Pac. 918-919 (1921); *Estate of Le Sure*, 21 Cal. App.2d 73, 68 P.2d 313 (1937).

<sup>21</sup> *Thomas v. Peterson*, 213 Cal. 672, 3 P.2d 306 (1931).

<sup>22</sup> *Hennelly v. Bank of America*, 102 Cal. App.2d 754, 228 P.2d 79 (1951). *But cf.* *Miller v. Jansen*, 21 Cal.2d 473, 132 P.2d 801 (1943) (inference only).

<sup>23</sup> *Jenkin v. Pacific Mut. Life Ins. Co.*, 131 Cal. 121, 63 Pac. 180 (1900).



Section 270e provides, in part:

Proof of the abandonment and nonsupport of a wife, or of the omission to furnish necessary food, clothing, shelter, or of medical attendance for a child or children is prima facie evidence that such abandonment and nonsupport or omission to furnish necessary food, clothing, shelter or medical attendance is wilful.

Subdivision 2 of Section 496 provides that a dealer in used goods who purchases stolen property under circumstances which should have caused him to make inquiry about the seller's right to sell is presumed to have known that the property was stolen. Subdivision 3 elaborates on this by adding:

. . . then the burden shall be upon the defendant to show that before so buying, receiving, or otherwise obtaining such property, he made such reasonable inquiry . . . .

Section 1096 is the general "presumed to be innocent" provision, but it goes on to say that "the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt."

The Dangerous Weapons' Control Law<sup>1</sup> contains several presumptions. Thus, Penal Code Section 12023 provides that in a trial for a felony while armed with certain concealable weapons, without having a license or permit, "the fact that he was so armed shall be prima facie evidence of his intent to commit the felony if such weapon was used in the commission of the offense." Section 12091 provides:

Possession of any pistol or revolver upon which the name of the maker, model, manufacturer's number or other mark of identification has been changed, altered, removed, or obliterated, shall be presumptive evidence that the possessor has changed, altered, removed, or obliterated the same.

Section 1105 provides:

Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

The above listing doubtless is not complete. As is true in civil cases, some presumptions may be brought in from other codes. Chapter 4 of Division 17 of the Vehicle Code contains some presumptions applicable in cases of illegal parking, speed violations, and the like. Penal Code Section 1102 provides that "rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code." Presumptions are not "otherwise provided" for, and *People v. Hewlett*<sup>2</sup> held that the presumption of undue influence in dealings between a trustee and his charge applied in a criminal case.

<sup>1</sup> CAL. PENAL CODE §§ 12000-12551.

<sup>2</sup> 108 Cal. App.2d 358, 239 P.2d 150 (1951).

Finally, and again as in civil cases, common law presumptions may continue although not expressly adopted by statute.<sup>3</sup>

Criminal cases also involve a special constitutional problem. The Supreme Court of the United States has held that a presumption operating against a defendant in a criminal case must meet the test of a "rational connection" between the fact proved and the fact presumed.<sup>4</sup> The court rejected an alternative test which would justify the creation of a presumption where the fact to be presumed was peculiarly within the knowledge of the defendant. Since this was the very test relied upon in *People v. Agnew*,<sup>5</sup> California cases have since shown some embarrassment in trying to justify some of the presumptions.<sup>6</sup>

It is doubtful whether any classification scheme that classifies presumptions as those which are conclusive, those which affect the burden of persuasion, and those which affect the burden of going forward with the evidence can be applied in criminal cases, even when it is conceded that the presumption in question does not fail on constitutional grounds.

*Can there be a conclusive presumption in criminal cases?* In some cases, a legislature might reasonably dispense with intent or knowledge as an essential element of a crime. However, it is doubtful that this element could be retained only to have proof of it supplied by a conclusive presumption. The California Legislature has in one instance done something which resembles this. Penal Code Section 1016 provides, in part, that "a defendant who does not plead guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged . . . ." *People v. Walsh*<sup>7</sup> did hold that it was not error to instruct the jury accordingly. However, closer examination of this provision exposes it as a mere pleading rule. Thus, unless the defendant raises the issue of sanity by appropriate plea, there is no occasion to talk of presumptions because there is no issue of fact on which they could bear.

In *Freeman v. Superior Court*,<sup>8</sup> a finding that petitioner was guilty of contempt for failure to comply with a court order was challenged. The petitioner claimed that he was unaware of the order, although it had been served upon his counsel. The court held that this was evidence of petitioner's knowledge:

The rule rests on the premise that the agent has acquired knowledge which it was his duty to communicate to his principal, and the presumption is that he has performed that duty. While

<sup>3</sup> *People v. Agnew*, 16 Cal.2d 655, 107 P.2d 601 (1940).

<sup>4</sup> *Tot v. United States*, 319 U.S. 463 (1943).

<sup>5</sup> 16 Cal.2d 655, 663-664, 107 P.2d 601, 605 (1940).

<sup>6</sup> See *People v. Scott*, 24 Cal.2d 774, 778-783, 151 P.2d 517, 519-522 (1944), upholding Penal Code Section 12023 with the explanation that a rational connection may be founded in an assessment of probabilities of similar cases at large and need not be restricted to an inference justified by reference to the facts of the case at bar. And see *People v. Stevenson*, 58 Cal.2d 794, 26 Cal. Rptr. 297, 376 P.2d 297 (1962), holding invalid a since repealed presumption created by Penal Code Section 496 that a dealer in second hand goods who buys from one under the age of 18 is presumed to know that the goods were stolen. The court could find no "sinister significance" or "warning signal" derived from experience with cases of that kind which would warrant the suspicion which must exist to support a presumption under the *Tot* test. See the text at notecall 4, *supra*.

<sup>7</sup> 50 Cal. App.2d 164, 122 P.2d 671 (1942).

<sup>8</sup> 44 Cal.2d 533, 282 P.2d 857 (1955).

under our law the presumption is deemed conclusive for the purposes of civil actions, . . . we do not believe that it should be given that effect for the purpose of a proceeding of a criminal nature, such as a contempt proceeding. On the other hand, there appears to be no valid objection to treating the presumption as a disputable presumption for the purpose of a contempt proceeding.<sup>9</sup>

Since it seems doubtful that the courts would apply a conclusive presumption in criminal cases, and since it seems unlikely that any of the present "conclusive" presumptions would be applicable in criminal cases, there should be little concern with this problem.

*Can there be a presumption affecting the burden of proof?* That there is no constitutional barrier to creation of such presumptions (assuming the *Tot* test to be satisfied<sup>10</sup>) seems established by *Leland v. Oregon*,<sup>11</sup> which held that due process of law was not violated by a requirement that the accused prove his insanity beyond a reasonable doubt to justify an acquittal. The case may be an insecure precedent because the Oregon instructions are contradictory (*i.e.*, the prosecution must prove all elements of the crime, presumably including mental capacity, beyond a reasonable doubt, while the defendant must prove the absence of one of them) and because the case involves the issue of sanity, which has generally received special treatment.

California purports to follow a similar rule in insanity defenses, although the burden on the accused is to prove insanity by a preponderance of the evidence rather than beyond a reasonable doubt.<sup>12</sup> This facet of the problem is not discussed here because the Special Commissions on Insanity and Criminal Offenders have made an elaborate study and report of recommendations which would change the existing practice as to the presumption of sanity.<sup>13</sup>

Penal Code Sections 496 and 1105 allocate certain burdens to the defendant.<sup>14</sup> Section 496 does not seem to have been judicially interpreted. However, Section 1105 has been extensively construed and strongly criticized. The substance of the present law seems to be that a jury should never be instructed in the language of that section alone. Even where the trial judge qualified the language by explaining that "such proof need not be by a preponderance of the evidence, but only to an extent sufficient to raise a reasonable doubt," the court was critical:

[T]he jury should have been expressly told in connection with the instruction on section 1105, that the prosecution has the burden throughout the trial to prove every element of the crime beyond a reasonable doubt and that the burden of persuasion never shifts to the defendant.<sup>15</sup>

<sup>9</sup> *Id.* at 538, 282 P.2d at 860. (Citations omitted.)

<sup>10</sup> *Tot v. United States*, 319 U.S. 463 (1943) (necessity for "rational connection" between the fact proved and the fact presumed).

<sup>11</sup> 343 U.S. 790 (1952).

<sup>12</sup> *People v. Harris*, 169 Cal. 53, 68, 145 Pac. 520, 526 (1914).

<sup>13</sup> See SPECIAL COMMISSIONS ON INSANITY AND CRIMINAL OFFENDERS, SECOND REPORT, pp. 26-27 (Nov. 1962).

<sup>14</sup> See the text, *supra* at 1135.

<sup>15</sup> *People v. Deloney*, 41 Cal.2d 832, 842, 264 P.2d 532, 537-538 (1953). And see WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 342 (1963).

The substance of the matter seems to be that, even if it would be constitutional to shift the burden of persuasion in criminal cases, the California courts are very little disposed to do so. In fact, their attitude quite resembles that shown in the comments to the American Law Institute's Model Penal Code—that affirmative defenses in criminal cases are rare and require singular justification.<sup>16</sup>

*Can there be a presumption which affects the burden of producing evidence?* In one sense of the word, there can be. However, it does not appear that such a presumption can be the same as the one defined in URE Rule 13:

A presumption is an assumption of fact resulting from a rule of law which *requires* such fact to be assumed from another fact or group of facts found or otherwise established in the action. [Emphasis added.]

This is a partial directed verdict. Can the court, for example, instruct the jury that from the proved fact that defendant possessed a weapon on which marks had been altered, where he produced no evidence that he had not altered the weapon, the jurors *must* find that he altered it? This seems unlikely.<sup>17</sup>

It may well be that if the matter is put as an affirmative defense (as with justification for homicide or a warrant to justify an arrest), this result may be reached by the simple device of refusing to give any instruction on the point in the absence of some evidence in the record to support the claim. However, when the element is one which the prosecution is required to establish, it is doubtful whether the existing provisions of the Code of Civil Procedure relating to presumptions, Model Code (or Thayer) presumptions, Uniform Rule (or Morgan) presumptions, or a combination of the latter two could be applied.

This view is advanced with some hesitation. There seems to be no California authority on what happens to a presumption when there is no controverting evidence, although there is much authority on what the controverting evidence must achieve in order to rebut the presumption. However, there is some support for this view in the formulation proposed in Section 1.13(5) of the Model Penal Code (Tentative Draft No. 4):

When the Code establishes a presumption with respect to any fact which is an element of an offense, it has the following consequences:

(a) when there is evidence of the facts which give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the Court is satisfied that the evidence as a whole clearly negatives the presumed fact; and

(b) when the issue of the existence of the presumed fact is submitted to the jury, the Court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts

<sup>16</sup> A.L.I., MODEL PENAL CODE, TENTATIVE DRAFT No. 4, at 112 (April 1955).

<sup>17</sup> Cf. CALJIC (2d ed. 1958) No. 40 ("... but unless so controverted, the jury is bound to find in accordance with the presumption"). However, the only authority offered for this instruction are Sections 1959 and 1961 of the Code of Civil Procedure, which obviously do not support such a proposition for criminal cases.

giving rise to the presumption as sufficient evidence of the presumed fact.

A stronger view was favored by the Council and the Reporter :

The alternative gives greater weight to the presumption. In the absence of evidence to the contrary of the presumed fact, it requires that fact to be treated as established by the proof beyond a reasonable doubt of the facts which give rise to the presumption.<sup>18</sup>

If these views were to be accepted, it would seem to follow that the declaration that a presumption is not evidence, wise in civil cases, is not wholly true in criminal cases. A presumption can be no more than a permissible (although strong) inference, for it cannot compel a finding. And if this be true, it cannot truly "shift the burden of producing evidence" in the literal sense, for the civil consequence of failure to produce some credible contrary evidence cannot follow. To say that from the basic facts (if found to exist) the jury *may* find the presumed fact is scarcely more than to tell the jury that an inference is justified. Such an instruction may be very useful to the prosecution when the inference is not strong as a matter of logic. It is, nevertheless, quite different from the traditional definition of presumptions and how they operate.

One result of special criminal considerations, then, is that the jury cannot be instructed that, in the absence of contrary evidence, the jurors must find that the presumed fact exists. Another difference between Thayer presumptions and presumptions in criminal cases lies in what the jurors should be told about the contrary evidence which the defendant does produce. In a civil setting, URE Rule 14 provides that the party against whom the presumption operates must introduce evidence "which would support a finding of the nonexistence" of the presumed fact. If he does, the jury will never hear of the presumption—*i.e.*, whether or not the defendant has met the burden of producing evidence is solely a question for the judge. In a criminal case, the defendant must (at the risk, although not the certainty, of losing on that point) both produce enough evidence to create a reasonable doubt *and* persuade the jury that the doubt does exist.<sup>19</sup> Especially instructive is *People v. Hewlett*,<sup>20</sup> in which the court applied the presumption of undue influence in a fiduciary relationship created by Civil Code Section 2235, but approved an instruction concerning it which said :

"It is—that is, the presumption is, as I have said, a mere disputable presumption which may be controverted and overcome by other evidence and it is controverted and overcome whenever other evidence in the case, including other presumptions such as the presumption of innocence, creates or leaves in the minds of the jurors a reasonable doubt as to whether the fact was as so presumed." <sup>21</sup>

<sup>18</sup> A.L.I., MODEL PENAL CODE, TENTATIVE DRAFT No. 4, at 116 (April 1955).

<sup>19</sup> *People v. Scott*, 24 Cal.2d 774, 151 P.2d 517 (1944); *People v. Agnew*, 16 Cal.2d 655, 107 P.2d 601 (1940).

<sup>20</sup> 108 Cal. App.2d 358, 239 P.2d 150 (1951).

<sup>21</sup> *Id.* at 371, 239 P.2d at 158.

If it be assumed that the foregoing is both a correct analysis and the statement of a desirable policy, what should be done? Four alternative solutions present themselves:

(1) The problem could be ignored altogether. The Legislature has authorized a major study of the Penal Code. Definitive recommendations for a major revision of that code should come from that study.

(2) The position could be taken that the Code of Civil Procedure has not to date distinguished between criminal and civil cases and no demonstrable harm has followed from that failure. The courts have overwhelmingly handled the Penal Code presumptions substantially as it has been suggested above that they should be handled—by placing upon the accused the small duty to persuade the jury that a reasonable doubt exists. This is more than a Thayer presumption because the evidence must be more than merely sufficient to persuade, it must in fact persuade. This is less than a Morgan presumption because the amount of conviction it must induce is mere doubt that the fact exists rather than any affirmative belief, however slight, that it does exist.

(3) If it were deemed desirable to leave the criminal practice undisturbed without wholly ignoring the problem, it could be stated that any proposed provisions relating to presumptions do not apply in criminal proceedings. This is the approach that was taken by the New Jersey Supreme Court Committee on Evidence.<sup>22</sup> This is an easier approach for New Jersey than for California, however, since New Jersey has no existing statutory definition of presumptions nor statutory statements as to how they operate. New Jersey simply made no change in its present criminal presumption practice. A similar disclaimer in California presumably would change the existing law, since it is assumed that the Code of Civil Procedure provisions on presumptions apply in criminal cases as well as civil cases.

(4) A fourth possibility would be to spell out explicitly how presumptions operate in criminal cases. The following is an attempt to state the existing law on the subject, leaving to the comprehensive study of criminal law any proposals for modification of present practice:

When by statute or rule of law a presumption is available to the prosecution to prove an element of crime in a criminal proceeding, the jury shall be told that, if they believe that the basic facts of the presumption are proved beyond a reasonable doubt, the law permits them to find that the presumed fact has also been proved beyond a reasonable doubt, unless there is contrary evidence which raises in their minds a reasonable doubt of the existence of the presumed fact.

The objects of this statement are several: (a) to limit the rule to the use of presumptions by the prosecution; (b) to show that it is a jury question rather than, as is presently the case in civil actions, a judicial manipulation; (c) to eliminate the implication of Uniform Rule 13 that a verdict could be directed in a criminal case; (d) to avoid any need to distinguish between conclusive, Morgan, and Thayer presumptions, all of which are the same in the context of a criminal

<sup>22</sup> REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE at 52-53 (March 1963).

case; and (e) to avoid any implication of "burden" on the defendant, for evidence which raises a reasonable doubt is sufficient for acquittal without regard to which side presents it. The general form seems compatible with the standard stated in *People v. Marrone*:<sup>23</sup>

It has been held that presumptions are evidence and are applicable to criminal actions when the facts warrant it, and where application of the presumption does not arbitrarily determine the case or prevent the jury from making an independent investigation of the issues.

**The Commercial Code.**<sup>24</sup> The Uniform Commercial Code is a product of the American Law Institute. Thus, it is not surprising that the definition of "presumption" in Section 1-201(31) of the 1962 official text is simply a paraphrase of the definition in Rule 704 of the Institute's Model Code of Evidence. No change was made when the Uniform Rules of Evidence adopted the Morgan theory. Thus Section 1-201(31) of the Uniform Commercial Code still reads:

"Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence.

The official Comment is not enlightening; it simply says "New."

Although there was some controversy about the point, the definition of "presumption" in the Uniform Commercial Code was deleted from the California version of the Commercial Code for the following reason:

It is very difficult to defend the present California law of presumptions, and, so far as we know, no one has ever tried to do so. The question is, however, whether the Uniform Commercial Code is the place to reform this law; and, if so, whether a completely ambiguous provision which answers none of the basic problems accomplishes such reform. At the direction of the Legislature, the California Law Revision Commission has for several years been conducting an extensive study of the Uniform Rules of Evidence, which include the subject of presumptions, with a view to a statutory reform of the California law of evidence. A treatment of this subject in connection with the bill which will result from that study would give California a uniform law of presumptions within the State, which is more important than having the California law of presumptions in a particular area uniform with that of some other state.<sup>25</sup>

The draftsmen of the Uniform Commercial Code adhered to their definition of presumption in employing that term in the code itself. The pertinent sections are listed in the appended note.<sup>26</sup> These presumptions primarily serve the objective of convenience rather than policy, *i.e.*, they make the production of evidence on a possible issue unnecessary until it is shown that the issue is a real one. This is the principal role of Thayer presumptions.

<sup>23</sup> 210 Cal. App.2d 299, 312, 26 Cal. Rptr. 721, 729 (1962).

<sup>24</sup> The Uniform Commercial Code will replace Sections 7401 *et seq.* of the Civil Code on January 1, 1965. Cal. Stats. 1963, Ch. 819, p. 1849.

<sup>25</sup> Report of Professors Harold Marsh, Jr., and William D. Warren in CALIFORNIA SENATE FACT FINDING COMMITTEE ON JUDICIARY, SIXTH PROGRESS REPORT, p. 441 (1961).

<sup>26</sup> UNIFORM COMMERCIAL CODE § 3-114(3) ("Where the instrument or any signature thereon is dated, the date is presumed to be correct."); § 3-201(3) ("Negotia-

However, there are some instances in which the Uniform Commercial Code attempts to effectuate policy by allocation of the burden of proof. For example, Section 1-202 provides:

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.<sup>27</sup>

This section attempts to make certain documents self-authenticating and to create a special hearsay exception. Whether it does more than this will depend upon the interpretive effect given the term "prima facie evidence."

In essence, the Commercial Code follows the Cleary approach of not employing presumptions when the intent is to allocate the burden of persuasion. Thus, Section 1-201(8) contains the following definition:

"Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.<sup>28</sup>

This is a laudable attempt to state the conventional preponderance-of-the-evidence standard of persuasion in terms of what it really means. Scholars have urged this improvement for years, although to little avail. No attempt should be made to change this wording; it is readily evident that the burden described is the one usually imposed in civil cases. However, the distinction between burden of proof and presumptions is not always observed. Section 4-201 provides, in part:

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tion takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner."); § 3-304(3) (c) (a domestic check is presumed to be overdue after thirty days after date of issue); § 3-307(1) (b) (signature is presumed genuine or authorized except when the alleged signer has died or become incompetent); § 3-414(2) (the order in which indorsers indorsed is presumed to be the order in which their signatures appear on the instrument); § 3-416(4) (words of guaranty added to the signature of one of two or more makers or acceptors create a presumption that the signature is for the accommodation of the others); § 3-419(2) (in an action for conversion of an instrument, the measure of liability is presumed to be the face amount of the instrument); § 3-503(2) (creates certain presumptions about reasonable time for presentment); § 3-510 (creates certain presumptions about dishonor and notice of dishonor); § 8-105(2) (b) (signature on investment security presumed to be genuine or authorized).

<sup>27</sup> This section is the same as Section 1202 of the California Commercial Code. Cal. Stats. 1963, Ch. 819, p. 1849.

<sup>28</sup> This section is the same as Section 1201(8) of the California Commercial Code. Cal. Stats. 1963, Ch. 819, p. 1849. Examples of such allocation in the Uniform Commercial Code as approved in California are as follows:

§ 1208 (burden of establishing lack of good faith in an acceleration under a "deems insecure" clause is on the party whose obligation was accelerated); § 2607(4) (burden is on the buyer to establish breach with respect to accepted goods); § 3115(2) (burden of establishing that completion of an instrument was unauthorized is on party so asserting); § 3307(3) (after defense to negotiable instrument is shown, the holder has burden of establishing that he is holder in due course); § 4202(2) (bank has burden of establishing that it acted seasonably when there is delay in collection); § 4403(3) (burden is on bank customer to establish loss resulting from failure to honor stop payment order); § 4406(4) (burden of establishing that signature was unauthorized is on customer); § 8105(2) (b) and (d) (same as § 3307, for investment securities).



Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is or becomes final . . . the bank is an agent or sub-agent of the owner of the item and any settlement given for the item is provisional.<sup>29</sup>

The Comment calls this a "strong presumption." <sup>30</sup> "A contrary intent can rebut the presumption but this must be clear." <sup>31</sup>

This is an instance in which the code should have expressly allocated the burden by providing that the person asserting that the bank was owner rather than agent should have the burden of establishing that fact. It is possible, however, that the draftsmen intended to require a higher standard of proof than that it simply appear more probable than not that the bank was an owner; perhaps "clearly appears" is designed to require proof by something resembling clear and convincing evidence. In any event, it seems that this is not a presumption as defined in Section 1-201(31) of the official text of the Uniform Commercial Code. It may be unfortunate that the Comment refers to it as such, but little harm is likely to come of that. The same is true of the reference to "prima facie agency status" in the same Comment.

In enacting the Commercial Code, the Legislature left Section 1201(31) vacant and invited, in the history note set out in the beginning of this topic, *supra*, the Law Revision Commission to fill this slot when it completed its study and recommendation on presumptions. Some action seems called for. Since the presumptions created by the Commercial Code seem to adhere to the Thayer type, the following language is recommended:

"Presumption" or "presumed" as used in this Code means that the trier of fact must find the existence of the presumed fact unless and until evidence it introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.

### **Prima Facie Evidence as a Device for Shifting Burdens**

**Background.** Section 1833 of the Code of Civil Procedure defines prima facie evidence as follows:

Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: the certificate of a recording officer is prima facie evidence of a record, but it may afterwards be rejected upon proof that there is no such record.<sup>1</sup>

<sup>29</sup> This section is the same as Section 4201 of the California Commercial Code. Cal. Stats. 1963, Ch. 819, p. 1849.

<sup>30</sup> UNIFORM COMMERCIAL CODE § 4-201 Comment at 381 (1962).

<sup>31</sup> *Ibid.*

<sup>1</sup> The Code Commissioners originally employed the word "primary" instead of the term "prima facie," but their Note states that "this definition corresponds with what has heretofore been known as prima facie evidence." Code Commissioners' Notes in CAL. CODE CIV. PROC. § 1833 (West 1955). The word "primary" was substituted for "original" in Sections 1828 and 1829 by the amendments of 1873-74. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1, 49-51 (1964). At the same time, references

This is the most elusive of all the definitions contained in Part IV of the Code of Civil Procedure. The Code Commissioners' Notes explain what "prima facie evidence" meant to them:

... such evidence as in judgment of law is sufficient to establish the fact, and if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light. No Judge would hesitate to set aside their verdict and grant a new trial if, under such circumstances, without any rebutting evidence, they disregard it. It would be error on their part which would require the remedial interposition of the Court. In a legal sense, then, such primary evidence, in the absence of all controlling evidence or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact.<sup>2</sup>

There are several objections to this construction of the term. One is that this interpretation is inconsistent with the commonly used expression, "prima facie case." A "prima facie case" normally means no more than that the party who has the burden of proof has produced enough evidence on every matter on which he bears that burden to survive a motion for nonsuit or directed verdict—*i.e.*, his evidence, if believed, is sufficient to warrant a finding in his favor on those points. However, that term can be distinguished; the statute refers to proof "of a particular" fact, while the prima facie case normally involves more than one fact.

A more important objection to the interpretation of the Code Commissioners is that the statute on its face does not require such a result. It says merely that prima facie evidence "suffices," not that it compels the acceptance of the fact as true. If construed as the Commissioners' Note indicates, the statute would conform to the conception of the prima facie case; the trier of fact may, but need not, accept the fact as true, and the judge cannot nonsuit on the point.

The most serious objection to accepting the interpretation of the Commissioners, however, is that it becomes very difficult to reconcile their "prima facie evidence" as defined in Section 1833 with their definition of "presumption" in Section 1959:

A presumption is a deduction which the law expressly directs to be made from particular facts.

The possible difference between evidence which only "suffices" for proof and evidence which "requires" a deduction is somewhat canceled by Section 1961:

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to "primary" evidence were changed to "prima facie" evidence in Sections 1828, 1833, 1920, 1926, 1936, 1946, and 1948.

Understandably, the revisers did not catch all the instances in which "primary" was used in the Code of Civil Procedure. Section 1925 still says that a certificate of purchase or location issued under federal or state law "is primary evidence that the holder or assignee of such certificate is the owner of the land described therein." Nor did they make all the changes in sections in other codes using the word "primary." See *Boyer v. Gelhaus*, 19 Cal. App. 320, 323, 125 Pac. 916, 918 (1912) (recital in tax deed that property tax was delinquent was primary evidence, which "manifestly" means prima facie evidence, of the fact).

<sup>2</sup> Code Commissioners' Notes in CAL. CODE CIV. PROC. § 1833 (West 1955).

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.

Under the Commissioners' interpretation of Section 1833, the only difference that remains is that a new trial will be granted if the jury fails to find in accord with uncontroverted *prima facie* evidence, whereas the jury will be directed to find in accord with uncontroverted presumptions. (All theories of presumptions—Thayer, Morgan, and Traynor—agree that uncontroverted presumptions require the directed deduction to be made if the jury believes that the basic facts exist.) However, a judge without a jury would have some difficulty in trying to observe the Commissioners' interpretation of this section. Thus, he need not accept the fact because it is not a presumption; but, unlike a jury, he would not be able to refuse to find in accord with it in the absence of contrary evidence. Should he order himself to grant a new trial?

The small difference between granting a new trial and directing a verdict may not be as pointless as it now appears, however. In those days, there was little discovery in civil actions, no machinery for the demanding of admissions, and no interrogatories to parties such as are available today.

**Current Judicial Usage.** Current usage does not provide any single meaning for the term "*prima facie*." Courts use it to refer to presumptions.<sup>3</sup> The Supreme Court in *Miller & Lux, Inc. v. Secara*,<sup>4</sup> its only direct pronouncement on the meaning of the statute, seemed to make it at least as strong as a presumption:

It is to be noted that the code does not say "until contradicted or overcome by other evidence," but "until contradicted *and* overcome by other evidence." Therefore, when *prima facie* evidence of a given fact has been introduced, its effect is not destroyed by the introduction of contradictory evidence. It stands as *proof* of that particular fact unless and until it is *both contradicted and overcome* by such other evidence. "Proof" is something more than merely "evidence." It is "the establishment of a fact by evidence." (Code Civ. Proc., sec. 1824).<sup>5</sup>

The quoted language has been frequently cited; it is an explicit interpretation of Section 1833. What does it mean? Unless this case was erroneously decided or can somehow be distinguished, it seems clearly to stand for the proposition that *prima facie* evidence is even stronger than all but Morgan presumptions. Is it possible that this decision should have only restricted application?

Some language in *People v. Mahoney*<sup>6</sup> might justify restricting *Miller & Lux* to the specific facts involved in that case, *i.e.*, restricting to assessment cases the *Miller & Lux* interpretation of Section 1833 as

<sup>3</sup> *E.g.*, Estate of Hampton, 55 Cal. App.2d 543, 565, 131 P.2d 565, 577 (1942) ("Appellants offered no other instruction setting forth the correct rule as to the burden of meeting the *prima facie* case where the presumption of undue influence had been established.").

<sup>4</sup> 193 Cal. 755, 227 Pac. 171 (1924).

<sup>5</sup> *Id.* at 770-771, 227 Pac. at 176. (Emphasis in original.)

<sup>6</sup> 13 Cal.2d 729, 734-735, 91 P.2d 1029, 1031-1032 (1939).

a device for shifting to the defendant the burden of showing "the extent of any claimed non-liability."<sup>7</sup> Thus, the evidence involved in *Miller & Lux* consisted of the assessment book of an irrigation district; in essence, the parties were attempting to make a collateral attack upon the assessment after failing to resort to the statutory procedure. In the *Mahoney* case, Mahoney's argument was that, since he had paid some of the sales tax represented by the assessment, the State had the obligation of showing how much he still owed by evidence other than the certificate of delinquency. Section 30 of the Retail Sales Tax Act provided that "a certificate by the board showing the delinquency shall be *prima facie* evidence of the levy of the tax, of the delinquency and of compliance by the board with all the provisions of this act in relation to the computation and levy of the tax."<sup>8</sup> The court said in the *Mahoney* case:

Section 1833 of the Code of Civil Procedure provides: "*Prima facie* evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence . . .", and section 1824 of the same code provides: "Proof is the effect of evidence, the establishment of a fact by evidence". (See *Moore v. Hopkins*, 83 Cal. 270 [23 Pac. 318, 17 Am. St. Rep. 247].) Proof is something more than evidence. When, therefore, the certificate of delinquency is made *prima facie* evidence of the facts it purports to establish under section 30 of the act, it is proof of those facts and as such is sufficient to prove the case for the plaintiff "until contradicted and overcome by other evidence".<sup>9</sup>

The reasons the court reached the conclusions it did in the *Mahoney* and *Miller & Lux* cases are not found in the definition of "prima facie" but rather in the context in which the term was employed. Thus, the court said in *Mahoney*:

Similar provisions of other taxing statutes might be referred to but sufficient examination has been made to indicate beyond question that it has been the intention of the legislature from the early history of the state to make the copy of the assessment-book or delinquent list, duly certified, *prima facie* evidence of the right to enforce payment of the tax or assessment involved, and that when such showing has been made the burden is placed on the defendant to show the extent of any claimed non-liability.<sup>10</sup>

In short, the reason for this ruling was found in tax collection considerations. The same thing is found to be true on examination of the *Miller & Lux* case.

**Effect of Prima Facie Evidence.** The term "prima facie" is evidently used for many purposes quite different from that of Section 1833. Some of the problems which can arise are listed below.

*Is the evidence admissible at all?* In many instances, the particular item made "prima facie evidence" would not be admissible at all

<sup>7</sup> *Id.* at 735, 91 P.2d at 1032.

<sup>8</sup> Cal. Stats. 1933, Ch. 1020, § 30, p. 2610 (now CAL. REV. & TAX. CODE §§ 6711-6715). (Emphasis added.)

<sup>9</sup> *People v. Mahoney*, 13 Cal.2d 729, 732, 91 P.2d 1029, 1030-1031 (1939).

<sup>10</sup> *Id.* at 735, 91 P.2d at 1032.

without a statute to that effect. Section 10577 of the Health and Safety Code makes admissible certain records of "birth, fetal death, death, or marriage" (if properly registered and certified) as "prima facie evidence in all courts and places of the facts stated therein." Absent this section, these records could be excluded as hearsay under present law.

*Is the evidence sufficient to support a finding?* It is in this sense that the term is used when it is asked whether a plaintiff has made a "prima facie case" and can survive a motion for nonsuit.

*Does the evidence compel a finding in the absence of any controverting evidence?* In this sense, "prima facie evidence" resembles a Thayer presumption. The treatment of the death certificate in *Pacific Freight Lines v. Industrial Acc. Comm'n*<sup>11</sup> is consistent with this view, if it does not directly support it. It seems also to be the view of the Code Commissioners who drafted the language.

*Does the evidence compel a finding until contradicted and overcome?* This is the construction given in *Miller & Lux*.<sup>12</sup> The amount of evidence needed to "overcome" prima facie evidence has not been discussed in quantitative terms; it would seem that nothing less than a preponderance could suffice for this purpose. *Pacific Freight Lines v. Industrial Acc. Comm'n*,<sup>13</sup> which was a proceeding to review a compensation award for the death of a truck driver, is a case in point. The claim, supported by some evidence, was that the driver's death was caused by his own intoxication. An Arizona death certificate was received in evidence; under Arizona law, it was "prima facie evidence of the facts therein stated."<sup>14</sup> The certificate recited that "evidence shows that right rear wheel locked due to some mechanical defect."<sup>15</sup> The majority called this an opinion or conclusion of the coroner's jury and found that it had "no foundation in fact when correlated with the transcript of the evidence produced at the coroner's inquest";<sup>16</sup> accordingly, it could be disregarded. Justice Carter dissented, citing the *Miller & Lux* case<sup>17</sup> and *Smellie v. Southern Pac. Co.*<sup>18</sup> The majority ignored the point.

*How does prima facie evidence affect the burdens of proof and of persuasion?* Production of prima facie evidence on a point may have the effect of shifting the burden of producing evidence; it may also have the effect of shifting the burden of persuasion. In *Overton v. Harband*,<sup>19</sup> the issue was whether a certain grantee was named in the deed when it was executed. The trial court found it was; on appeal, the claim was made that this finding was not supported by the evidence. A certified copy of the deed was in evidence. The court said:

And sections 1920 and 1948 of the [Code of Civil Procedure] make such proof *prima facie* evidence of the execution of the writ-

<sup>11</sup> 26 Cal.2d 234, 157 P.2d 634 (1945).

<sup>12</sup> 193 Cal. 755, 227 Pac. 171 (1924), discussed in the text, *supra* at 1145-1146.

<sup>13</sup> 26 Cal.2d 234, 157 P.2d 634 (1945).

<sup>14</sup> *Id.* at 238, 157 P.2d at 636, citing ARIZ. REV. CODE § 2740. The same would be true of a California death certificate under CAL. HEALTH & SAF. CODE § 10577.

<sup>15</sup> *Pacific Freight Lines v. Industrial Acc. Comm'n*, 26 Cal.2d 234, 238, 157 P.2d 634, 636 (1945). (Original in italics.)

<sup>16</sup> *Id.* at 239, 157 P.2d at 636.

<sup>17</sup> 193 Cal. 755, 227 Pac. 171 (1924).

<sup>18</sup> 212 Cal. 540, 299 Pac. 529 (1931).

<sup>19</sup> 6 Cal. App.2d 455, 44 P.2d 484 (1935).

ing and of the facts stated therein. The deed is sufficient in the absence of evidence to the contrary.

The burden of proving that at the time respondents signed and acknowledged the deed the name of the grantee was not written therein, was upon respondents.<sup>20</sup>

**Conclusion and Recommendation.** It seems quite apparent that the term "prima facie" has no single, set meaning.<sup>21</sup> The value of Section 1833 as a definition is somewhat dubious. Although some sections of the Code of Civil Procedure make certain documents prima facie evidence of the facts recorded in them,<sup>22</sup> most "prima facie" standards come from other codes. There is no indication whatever in the other codes that the Legislature thereby intended to adopt the definition in Section 1833; there is even less indication as to which possible construction of this definition might be intended. In such instances, it is better to examine the context of the particular legislation to determine which of the several possible meanings set out above was intended. Finally, the definition serves no purpose in connection with the URE, which is concerned only with admissibility and not with the weight which may subsequently be given to evidence nor with the amount necessary to overcome contrary evidence.

The section should be repealed. Even if it were possible to come up with a single, precise definition, it would be impossible to get everyone, particularly the Legislature, to agree to consistent use of the term.

No instance in which the term "prima facie" is used other than in connection with writings and records has been discovered. This in itself suggests that much of the time the Legislature is concerned with creating a hearsay exception. But there are enough demonstrated instances to believe that more often than not there is an additional desire to make such proof final unless contradicted. Usually this is attributable to considerations of convenience of proof rather than of policy. When the policy becomes strong, as in the tax assessment cases, the courts are quick to discern its presence. They then use the policy considerations

<sup>20</sup> *Id.* at 460, 44 P.2d at 486. (Citation omitted.)

<sup>21</sup> *Cf.* *People v. Carmona*, 80 Cal. App. 159, 166, 251 Pac. 315, 318 (1926) ("The words 'prima facie' have, by long usage, become a part of the English language, and their meaning is readily understood by a person of common understanding.")

<sup>22</sup> The pertinent sections are CAL. CODE CIV. PROC. § 1920 ("Entries in public or other official books or records, made in the performance of his duty by a public officer of this State, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein."); § 1926 ("An entry made by an officer, or Board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry."); § 1927 (patent for mineral lands is prima facie evidence of the date of location); § 1927.5 (duplicates and translations of Spanish title papers are receivable as prima facie evidence); § 1928 (deed executed by official pursuant to legal process and properly recorded is prima facie evidence that the property interest described was conveyed to the grantee); § 1936 ("Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest."); § 1946 ("The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases: One—When the entry was made against the interest of the person making it. Two—When it was made in a professional capacity and in the ordinary course of professional conduct. Three—When it was made in the performance of a duty specially enjoined by law."); § 1948 (certificate of acknowledgment is prima facie evidence of execution of the instrument).

to impose upon the taxpayer the burden of producing and of persuading. It would be better not to enable the courts to place this result even in part upon the definition of the term *prima facie*, for in the great majority of cases it is quite clear that the Legislature intended no such radical reallocation of burdens merely because something was recorded in writing.

Since many of the various uses of "*prima facie*" in the codes seem to evidence a desire to simplify proof by permitting use of a record, perhaps the wisest solution is to give the record in question the status of evidence that is conclusive on the point unless contrary evidence is adduced. This result could be accomplished by a provision such as the following:

Unless the context otherwise indicates, a statute providing that a record or writing is *prima facie* evidence of any of the facts recorded or recited therein shall suffice for proof of those facts unless contrary evidence is produced.

Assuming that the use of "*prima facie* evidence" usually indicates more than a mere desire to make hearsay or secondary evidence admissible, the object of this recommendation is to give that desire full effect without confusing the subject with presumptions. The operation of the two devices is different. URE Rule 13 defines presumptions as resulting "from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action." In other words, a presumption creates a mandatory inference that if fact *A* exists, fact *B* also exists. There is no inference involved in the operation of *prima facie* evidence—fact *B* exists if someone has written that it does. The question is one of credibility rather than of logical connection.

### Quantum of Persuasion

The preceding discussion regarding legislative allocation of burdens, and presumptions and *prima facie* evidence as vehicles for allocating burdens would not be complete without a brief discussion of the quantum of persuasion required to discharge a party's burden.

Code of Civil Procedure Section 1826 provides:

The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

This section once had a companion, Section 1835, which read:

That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence.

In *People v. Miller*,<sup>28</sup> the Supreme Court criticized both sections as "rather carelessly drawn provisions . . . enacted in an attempt to satisfactorily define or declare the degree of proof essential to the

<sup>28</sup> 171 Cal. 649, 154 Pac. 468 (1916).

establishment of a fact by evidence. . . . Manifestly these provisions are not in accord with other provisions of law in all respects, even on the subject to which they relate."<sup>24</sup> Elaboration of this was directed primarily at Section 1835, which (probably as a consequence) was repealed in 1923.<sup>25</sup> Section 1826 should have been dealt the same fate. The second sentence is wrong and it would surely be error to instruct in its terms, at least in a civil case.<sup>26</sup> Indeed, the best that can be said of its use in a criminal case is that stating it to the jury may not be prejudicial if made clear that it means the same thing as "reasonable doubt."<sup>27</sup> But the reasonable doubt standard is adequately covered by Penal Code Sections 1096, 1096a, and 1097. Since the second sentence serves no useful purpose, it should be repealed.

The first sentence is not so much wrong as it is unnecessary. The underlying predicates are the measures of persuasion needed to justify findings. Other statutes adequately cover persuasion by a preponderance of the evidence<sup>28</sup> and beyond a reasonable doubt.<sup>29</sup> Persuasion by clear and convincing (sometimes including "cogent," to be alliterative) evidence seems not to have a statutory origin. In general, it is applied to the kind of issues—fraud, reformation of instruments, and the like—which the present courts inherited from their equity ancestors.<sup>30</sup>

The first sentence is really an argument addressed to an old and now forgotten dispute over whether verdicts could rest upon probabilities rather than certainty or satisfaction. At one time, it was useful as the basis for an instruction in civil cases.<sup>31</sup> Perhaps some judges still use it. However, modern instructions depart from the formula of Section 1826, concentrating on what the evidence must be—a preponderance—rather than upon what it need not be.<sup>32</sup> If this shift in emphasis is generally accepted, and it appears desirable that it should be, what little justification that ever existed for Section 1826 disappears. Hence, it should be repealed.

<sup>24</sup> *Id.* at 654-655, 154 Pac. at 470-471 (citation omitted).

<sup>25</sup> Cal. Stats. 1923, Ch. 110, § 1, p. 237.

<sup>26</sup> See *Mella v. Hooper*, 200 Cal. 628, 254 Pac. 256 (1927); BAJI (4th ed. 1956) No. 21-B, Note.

<sup>27</sup> *People v. Hatch*, 163 Cal. 368, 383, 125 Pac. 907, 913 (1912).

<sup>28</sup> CAL. CODE CIV. PROC. § 2061(5).

<sup>29</sup> CAL. PENAL CODE §§ 1096, 1096a, and 1097.

<sup>30</sup> MCCORMICK § 320 at 679.

<sup>31</sup> See BAJI (4th ed. 1956) No. 21-B.

<sup>32</sup> See BAJI (4th ed. 1956) Nos. 21, 22 (Rev.).

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