

#63

4/26/66

Third Supplement to Memorandum 66-21

Subject: Study 63(L) - Evidence Code

In this supplement, we discuss the presumptions provisions contained in the Commercial Code.

As originally proposed by the Commissioners on Uniform State Laws, the Commercial Code contained a definition of presumption:

"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 nonexistence;

The Commercial Code was drafted in light of this definition of a presumption. When the Commercial Code was adopted in California, the definition of a presumption was deleted for three reasons:

(1) The proposed definition was thought to be ambiguous because it did not state explicitly that the Commercial Code presumptions no longer exist when contrary evidence is introduced, thus leaving unclear whether such presumptions affect the burden of proof.

(2) The Commercial Code definition was inconsistent with existing California law and the proponents of the Commercial Code did not wish to introduce additional confusion and complexity into existing California law.

(3) The California Law Revision Commission was studying the law of evidence and the proponents of the Commercial Code believed that any revision of the law of presumptions should await the recommendation of the Law Revision Commission.

See Exhibits I (pink) and II (yellow) attached.

The Commercial Code adopted the view that a presumption requires the trier of fact to find the presumed fact until evidence is introduced which

would support a finding of its nonexistence. Under the Commercial Code, it seems fairly clear that a presumption did not place the burden of persuasion on the party against whom the presumption operates. See, e.g., Commercial Code Section 3307 (Exhibit III--green). Thus, the definition of a presumption proposed in the original Uniform Commercial Code was, in substance, the description of the manner in which a presumption affecting the burden of producing evidence operates under the provisions of Evidence Code Section 604:

604. 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. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.

This provision should be compared with subdivision (31) of Section 1-201 of the Uniform Commercial Code (this subdivision omitted in California Commercial Code):

(31) "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 nonexistence.

The provisions of the Commercial Code that contain presumptions are set out in Exhibit III (green pages). These are included for your information, but no change is needed in these sections. The necessary adjustment of the Commercial Code can be accomplished in one of two ways. First, Section 1201 (Uniform Act Section 1-201) could be amended to include subdivision (31). See Exhibit V (blue pages). This amendment would retain the language of the Uniform Act, but the amendment would not be as precise as one that would recognize the Evidence Code scheme. Accordingly, we recommend that a new section be added to the California Commercial Code to carry out the intent of

its original drafters and to harmonize the provisions of the California Commercial Code with the presumptions scheme of the Evidence Code. The new section, Section 1209, is set out as Exhibit IV (buff pages).

One additional adjustment is needed in the California Commercial Code. Section 1202 of the California Commercial Code provides that certain evidence is "prima facie evidence." See Exhibit VI (gold page). This section obviously is intended to provide a hearsay exception and to create a presumption affecting the burden of producing evidence. Hence, we recommend that Section 1202 be amended as set out in Exhibit VI (gold page).

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

Extract - Sixth Progress Report to
the Legislature by Senate Fact-
Finding Committee on Judiciary (1959-
1961) Part 1, The Uniform Commercial
Code, pp. 439-441.

SECTION 11201(31)

This subsection provides: "'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 nonexistence."

Proposed Amendment. The State Bar Committee questions whether this subsection is consistent with CCP § 1961 but does not propose any specific amendment.

Recommendation. It is recommended that this subsection be deleted.

Discussion. The definition of "presumption" in this subsection is applicable wherever that word is used in the Code, which is largely in Chapter 3 (see Sections 18114(3), 18307(1), 18414(2), 18416(4), 18419(2), 18508(2) and 18510).

In order to determine whether this definition changes present California law, it is necessary to consider briefly the two leading theories about presumptions: the Thayer-Wigmore theory and the Morgan-McCormick theory. According to Thayer and Wigmore, a presumption merely changes the burden of going forward with the evidence, and once substantial controverting evidence has been introduced, the presumption disappears from the case. According to Morgan and McCormick, a presumption changes not merely the burden of going forward, but also the burden of persuasion and, therefore, continues in the case and is an element in formulating the charge to the jury. California follows neither of these theories. By an interpretation of the California statutes (principally CCP § 1967, 1959 and 1961), the California courts have reached the conclusion that a presumption is "evidence" which must be weighed by the jury along with the evidence contradicting it. Witkin, California Evidence, § 61, § 102 (1958). The principal elements of the peculiar California law have been stated by Professor James H. Chadbourn in an unpublished manuscript as follows:

"... a presumption is evidence, weighable as such.

"... 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.

"... a presumption is rebuttable as a matter of law only by conclusive evidence from the rebutter or by evidence from his adversary."

The Model Code of Evidence promulgated by the American Law Institute adopted in Rule 704 the Thayer-Wigmore theory. The Uniform Rules of Evidence promulgated by the Commissioners on Uniform State Laws adopted in substance the Morgan-McCormick theory. This definition in the Uniform Commercial Code is substantially copied from paragraph (1) of Rule 704 of the Model Code of Evidence. Nevertheless, it does not expressly adopt the Thayer-Wigmore theory because paragraph (2) of that Rule, which says that once substantial controverting evidence is introduced "the existence or nonexistence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action", is omitted in the Uniform Commercial Code. Nevertheless, it has a definite Thayer-Wigmore flavor in view of its derivation, and one expects it to go on and say that once substantial controverting evidence is introduced, the presumption disappears, because that is what the original text did go on to say. It is conceivable that a court would read into it the latter statement.

Therefore, whether this definition changes California law depends upon how it will be interpreted, and this is very difficult to predict.

If this subsection is ultimately interpreted in harmony with those sections of the Code of Civil Procedure defining presumptions and their effect, its presence in the Code would be harmless, but, at the same time, entirely useless. On the other hand, if it is interpreted differently from those sections, the result would be that there would be one law of presumptions in lawsuits arising under the Code and another law of presumptions in all other lawsuits. This would be a very undesirable result, regardless of which law is "better."

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.

EXHIBIT II

Extract - California State Bar
Committee on the Commercial Code,
A Special Report, The Uniform
Commercial Code, 37 Calif. State
Bar J. (March-April, 1962) pp. 131-
132.

DEFINITION OF "PRESUMPTION"

Section 11201(31) of the Official Text says a presumption means "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 nonexistence."

Section 11201(31) is not in S.B. 1093 for two reasons: (1) It is ambiguous, and (2) it would establish a law of presumptions in lawsuits arising under the Code different from that applicable in other California litigation.

Section 11201(31) is ambiguous because it borrows only the first paragraph of Rule 704 of the Model Code of Evidence.²⁰ The second paragraph of Rule 704 provides that once substantial controverting evidence had been introduced, the presumption disappears from the case, adopting the "Thayer-Wigmore theory" of presumptions. The Uniform Rules of Evidence,²¹ on the other hand, adopt the "Morgan-McCormick theory": A presumption remains in the case and changes not merely the burden of going forward with evidence but also in some cases the burden of persuasion. Half of the Model Code of Evidence definition fails to indicate which of these rival theories was intended.

California law is already confused and follows neither of the leading theories. The California courts have stated that a presumption is "evidence" to be weighed by the trier of fact along with other evidence in the case.²² While California law needs clarification and probably reform, the inconclusive Code provision would accomplish neither. Further, it would be unwise for one law of presumptions to apply generally and another to apply in actions under the Code, especially when Code and non-Code issues might often be intermingled in a single lawsuit.

The California Law Revision Commission has been making a study of the Uniform Rules of Evidence with a view toward a general statutory reform of the law of evidence. Any revision of the law of presumptions should await the results of that study.

²⁰ The Model Code of Evidence was adopted by the American Law Institute in 1942.

²¹ The Uniform Rules of Evidence were developed by the National Conference of Commissioners on Uniform State Laws and were approved by that group in 1953.

²² *Scott v. Burke*, 39 C.2d 388, 398, 247 P.2d 313 (1952); *Palos v. Palos*, 140 C.A.2d 913, 916, 295 P.2d 907 (1956).

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EXHIBIT III

Commercial Code

3114. Date, Antedating, Postdating. (1) The negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated.

(2) Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.

(3) Where the instrument or any signature thereon is dated, the date is presumed to be correct.

Commercial Code

3201. Transfer: Right to Indorsement. (1) Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

(2) A transfer of a security interest in an instrument vests the foregoing rights in the transferee to the extent of the interest transferred.

(3) Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner.

Commercial Code

3304. Notice to Purchaser.

* * *

(3) The purchaser has notice that an instrument is overdue if he has reason to know

* * *

(c) That he is taking a demand instrument after demand has been made or more than a reasonable length of time after its issue. A reasonable time for a check drawn and payable within the states and territories of the United States and the District of Columbia is presumed to be 30 days.

* * *

Commercial Code

3307. Burden of Establishing Signatures, Defenses and Due Course.

(1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue

(a) The burden of establishing it is on the party claiming under the signature; but

(b) The signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

(2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.

(3) After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

Commercial Code

3414. Contract of Indorser; Order of Liability. (1) Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

(2) Unless they otherwise agree indorsers are liable to one another in the order in which they indorse, which is presumed to be the order in which their signatures appear on the instrument.

Commercial Code

3416. Contract of Guarantor. (1) "Payment guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party.

(2) "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.

(3) Words of guaranty which do not otherwise specify guarantee payment.

(4) No words of guaranty added to the signature of a sole maker or acceptor affect his liability on the instrument. Such words added to the signature of one of two or more makers or acceptors create a presumption that the signature is for the accomodation of the others.

(5) When words of guaranty are used presentment, notice of dishonor and protest are not necessary to charge the user.

(6) Any guaranty written on the instrument is enforceable notwithstanding any statute of frauds.

Commercial Code

3419. Conversion of Instrument; Innocent Representative. (1) An instrument is converted when

(a) A drawee to whom it is delivered for acceptance refuses to return it on demand; or

(b) Any person to whom it is delivered for payment refuses on demand either to pay or to return it; or

(c) It is paid on a forged indorsement.

(2) In any action under subdivision (1), the measure of liability is presumed to be the face amount of the instrument.

(3) Subject to the provisions of this code concerning restrictive indorsements a representative, including a depository or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

(4) An intermediary bank or payor bank which is not a depository bank is not liable in conversion solely by reason of the fact that proceeds of an item indorsed restrictively (Sections 3205 and 3206) are not paid or applied consistently with the restrictive indorsement of an indorser other than its immediate transferor.

Commercial Code

3503. Time of Presentment.

* * *

(2) A reasonable time for presentment is determined by the nature of the instrument, any usage of banking or trade and the facts of the particular case. In the case of an uncertified check which is drawn and payable within the United States and which is not a draft drawn by a bank the following are presumed to be reasonable periods within which to present for payment or to initiate bank collection:

(a) With respect to the liability of the drawer, 30 days after date or issue whichever is later; and

(b) With respect to the liability of an indorser, seven days after his indorsement.

(3) Where any presentment is due on a day which is not a full business day for either the person making presentment or the party to pay or accept, presentment is due on the next following day which is a full business day for both parties.

(4) Presentment to be sufficient must be made at a reasonable hour, and if at a bank during its banking day.

Commercial Code

3510. Evidence of Dishonor and Notice of Dishonor. The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:

(a) A document regular in form as provided in the preceding section which purports to be a protest;

(b) The purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor;

(c) Any book or record of the drawee, payor bank, or any collecting bank kept in the usual course of business which shows dishonor, even though there is no evidence of who made the entry.

Commercial Code

4201. Presumption and Duration of Agency Status of Collecting Banks and Provisional Status of Credits; Applicability of Article; Item Indorsed "Pay Any Bank". (1) 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 (subdivision (3) of Section 4211 and Sections 4212 and 4213) the bank is an agent or subagent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of indorsement or lack of indorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn; but the continuance of ownership of an item by its owner and any rights of the owner to proceeds of the item are subject to rights of a collecting bank such as those resulting from outstanding advances on the item and valid rights of setoff. When an item is handled by banks for purposes of presentment, payment and collection, the relevant provisions of this division apply even though action of parties clearly establishes that a particular bank has purchased the item and is the owner of it.

(2) After an item has been indorsed with the words "pay any bank" or the like, only a bank may acquire the rights of a holder

(a) Until the item has been returned to the customer initiating collection; or

(b) Until the item has been specially endorsed by a bank to a person who is not a bank.

Commercial Code

8105. Securities Negotiable; Presumptions. [(1) Reserved.]

(2) In any action on a security.

(a) Unless specifically denied in the pleadings, each signature on the security or in a necessary indorsement is admitted;

(b) When the effectiveness of a signature is put in issue the burden of establishing it is on the party claiming under the signature but the signature is presumed to be genuine or authorized;

(c) When signatures are admitted or established production of the instrument entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security; and

(d) After it is shown that a defense or defect exists the plaintiff has the burden of establishing that he or some person under whom he claims is a person against whom the defense or defect is ineffective (Section 8202).

EXHIBIT IV

SECTION 1. Section 1209 is added to the Commercial Code
to read:

1209. The presumptions in this code are presumptions affecting
the burden of producing evidence.

COMMENT

The official text of the Uniform Commercial Code adopted the view
that the presumptions in the Commercial Code should be presumptions affecting
the burden of producing evidence. See Uniform Commercial Code Section 1-201(3)
("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 nonexistence"). When the Commercial Code
was enacted in California, the definition of a presumption was deleted because
it was considered ambiguous and because the California Law Revision Commission
was studying the law of evidence and it was thought that any revision of the
law of presumptions should await the recommendation of the Law Revision
Commission. See Sixth Progress Report to the Legislature by Senate Fact-
Finding Committee on Judiciary (1959-1961), Part 1, the Uniform Commercial
Code at 439-441; California State Bar Committee on the Commercial Code, A
Special Report, The Uniform Commercial Code, 37 Calif. State Bar J. 131-132
(March-April, 1962).

Section 1209 is added to the California Commercial Code to carry out
the intent of the drafters of the Uniform Commercial Code and to harmonize
the provisions of the California Commercial Code with the presumptions

scheme of the Evidence Code. Section 1209 has the same substantive effect as subdivision (31) of Section 1-201 of the Uniform Commercial Code, but Section 1209 picks up the comprehensive Evidence Code scheme on presumptions. See Evidence Code Sections 600-607. Under Evidence Code Section 604, 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. If contrary evidence is introduced, the presumption is gone from the case and the trier of fact must weigh the inferences arising from the facts that gave rise to the presumption against the contrary evidence and resolve the conflict. See Evidence Code Section 604 and the Comment to that section.

Presumptions are established by Commercial Code Sections 1202, 3114(c), 3304(3)(c), 3307(1)(b), 3414(2), 3416(4), 3419(2), 3503(2), 3510, and 8105(b). See also Sections 3201(3) and 4201.

EXHIBIT V

SEC. . Section 1201 of the Commercial Code is amended to read:

1201.

General Definitions. Subject to additional definitions contained in the subsequent divisions of this code which are applicable to specific divisions or chapters thereof, and unless the context otherwise requires, in this code:

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity and any other proceedings in which rights are determined.

(2) "Aggrieved party" means a party entitled to resort to a remedy.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this code (Sections 1205 and 2208). Whether an agreement has legal consequences is determined by the provisions of this code, if applicable; otherwise by the law of contracts (Section 1103). (Compare "contract.")

(4) "Bank" means any person engaged in the business of banking.

(5) "Bearer" means the person in possession of an instrument, document of title, or security payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and which, by its terms, evidences the intention of the issuer that the person entitled under the document (Section 7403(4)) has the right to receive, hold and dispose of the document and the goods it covers. Designation of a document by the issuer as a "bill of lading" is conclusive evidence of such intention. "Bill of lading" includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "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 nonexistence.

(9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured

credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(10) "Conspicuous." A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this code and any other applicable rules of law. (Compare "agreement.")

(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

(13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel paper or securities means voluntary transfer of possession.

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt, gin ticket, compress receipt, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person entitled under the document (Section 7403(4)) has the right to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission or breach.

(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

(20) "Holder" means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank.

(21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

(22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

(23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.

(25) A person has "notice" of a fact when

(a) He has actual knowledge of it; or

(b) He has received a notice or notification of it; or

(c) From all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this code.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when

(a) It comes to his attention; or

(b) It is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to

know of the transaction and that the transaction would be materially affected by the information.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(29) "Party," as distinct from "third party," means a person who has engaged in a transaction or made an agreement within this division.

(30) "Person" includes an individual or an organization. (See Section 1102.)

(31) "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.

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property.

(33) "Purchaser" means a person who takes by purchase.

(34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

(36) "Rights" includes remedies.

(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2401) is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of accounts, chattel paper, or contract rights which is subject to Division 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2501 is not a "security interest," but a buyer may also acquire a "security interest" by complying with Division 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (Section 2326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(40) "Surety" includes guarantor.

(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

(42) "Term" means that portion of an agreement which relates to a particular matter.

(43) "Unauthorized" signature or indorsement means one made without actual, implied or apparent authority and includes a forgery.

(44) "Value." Except as otherwise provided with respect to negotiable instruments and bank collections (Sections 3303, 4208 and 4209) a person gives "value" for rights if he acquires them

(a) In return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a chargeback is provided for in the event of difficulties in collection; or

(b) As security for or in total or partial satisfaction of a pre-existing claim; or

(c) By accepting delivery pursuant to a pre-existing contract for purchase; or

(d) Generally, in return for any consideration sufficient to support a simple contract.

(45) "Warehouse receipt" means a document evidencing the receipt of goods for storage issued by a warehouseman (Section 7102), and which, by its terms, evidences the intention of the issuer that the person entitled under the document (Section 7403(4)) has the right to receive, hold and dispose of the document and the goods it covers. Designation of a document by the issuer as a "warehouse receipt" is conclusive evidence of such intention.

(46) "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form. (Stats.1963, c. 819, § 1201.)

EXHIBIT VI

SEC. . Section 1202 of the Commercial Code is amended
to read;

1202. 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. The presumption established by this section is a presumption affecting the burden of producing evidence.

COMMENT

Section 1202 creates a hearsay exception and establishes a rebuttable presumption. See Evidence Code Section 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption") This presumption is classified as a presumption affecting the burden of producing evidence. This carries out the intent of the drafters of the Uniform Commercial Code. See Uniform Commercial Code Section 1-201(31)(defining "presumption" or "presumed"). See also the Uniform Commercial Code Comment to Section 1-202 (Section 1202 of California Commercial Code)("The provisions of this section go no further than establishing the documents in question as prima facie evidence and leave to the court the ultimate determination of the facts where the accuracy or authenticity of the documents is questioned. In this connection the section calls for a commercially reasonable interpretation.")