

#63(L)

6/24/66

Memorandum 66-35

Subject: Study 63(L) - The Evidence Code (Revision of the Commercial Code)

Attached are two copies of a tentative recommendation on the revisions of the Commercial Code that are required to conform that code to the presumptions scheme of the Evidence Code. At the July meeting, we should approve this tentative recommendation for distribution for comment and the bill for preprinting. Accordingly, please mark your suggested revisions on one copy of the tentative recommendation and return it to the staff at the July meeting.

Section 1209

This section was approved at the second May meeting. However, we have added the exception at the beginning of the section because we propose to create burden of proof presumptions in the three sections referred to.

Sections 1202, 2719, 4103

We have revised these sections to create rebuttable presumptions and to classify the presumptions so that they will carry out what appears to have been the intent of the drafters of the Uniform Commercial Code.

We have written to a number of law professors who are experts in the commercial law field requesting their suggestions as to the classification of the presumptions under Sections 1202, 2719, and 4103. We have received one response -- a letter from Professor Harold Marsh, Jr., who served as the consultant to the Legislature on the California Commercial Code. We attach his letter as Exhibit I (pink sheet)

Respectfully submitted,

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Executive Secretary

UNIVERSITY OF WASHINGTON
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School of Law

June 22, 1966

John H. DeMouilly, Esq.
Executive Secretary
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Stanford, California 94305

Dear John:

Your letter of June 3, 1966, has been forwarded to me here at Seattle where I am teaching in the Summer School. However, nothing was lost by the delay, since I am afraid that I cannot be of any real assistance to you anyway. The question you raise never came up during our consideration of the Commercial Code, and I do not know of any discussion of the official text which deals with it.

My guess, for whatever it is worth, is that the intent in the sections which you mention was to change the burden of persuasion, or (perhaps more likely) that the phrase was used (as most lawyers use it) without any thought as to what it really meant. If the reports of the discussions of the various drafts of the UCC by the ALI and the Commissioners on Uniform State Laws are available, they might indicate whether this point was considered during the drafting of the Code. It was not by the California committees studying it.

Sincerely yours,


Harold Marsh, Jr.

#63(L)

TENTATIVE RECOMMENDATION
of the
CALIFORNIA LAW REVISION COMMISSION
relating to
THE EVIDENCE CODE

(REVISION OF THE COMMERCIAL CODE)

Upon recommendation of the California Law Revision Commission, the Legislature at the 1965 legislative session enacted the Evidence Code. At the same time, the Legislature directed the Commission to continue its study of the newly enacted code.

The legislation that enacted the Evidence Code also amended and repealed a substantial number of sections in other codes. One aspect of the continuing study of the Evidence Code is the determination of what additional changes are needed in other codes. Accordingly, the Commission has made a section by section study of the Commercial Code. As a result of this study, the Commission recommends:

1. Sections 3114(3), 3304(3)(c), 3307(1)(b), 3414(2), 3416(4), 3418(2), 3503(2), 3510,¹ and 8105(b) of the Commercial Code expressly create certain presumptions. These presumptions should be classified as presumptions affecting the burden of producing evidence. This classification will carry out the intent of the drafters of the Uniform Code and will harmonize the provisions of the California Commercial Code with the presumptions scheme of the Evidence Code. For further discussion, see the Comment to Section 1209 contained in the legislation herein recommended.

1. The text of these sections is set out in the Appendix to this recommendation.

2. Section 1202 of the Commercial Code provides that certain documents in due form purporting to be documents authorized or required by the contract to be issued by a third party shall be "prima facie evidence" of their own authenticity and genuineness and of the facts stated in the document by the third party. Under the Evidence Code, this section establishes a rebuttable presumption. EVIDENCE CODE § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.").

Insofar as Section 1202 establishes a presumption of the authenticity and genuineness of the document, the presumption should be classified as a presumption affecting the burden of producing evidence. This classification reflects the fact that the 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.

Insofar as Section 1202 establishes a presumption of the truth of the facts stated in the document by the third party, such presumption should arise only upon proof of the authenticity and genuineness of the document and should be a presumption affecting the burden of proof. This classification will give stability to commercial transactions and appears to effectuate the intent of the drafters of the Uniform Code.

For further discussion, see the Comment to Section 1202 contained in the legislation herein recommended.

3. Subdivision (3) of Section 2719 provides:

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

It is not clear whether this subdivision creates a presumption under Evidence

Code Section 602. Nevertheless, the subdivision should be clarified by revising it to expressly create a rebuttable presumption that affects the burden of proof. This appears to effectuate the intent of the drafters of the Uniform Code. For further discussion, see the Comment to Section 2719 contained in the legislation herein recommended.

4. Subdivision (3) of Section 4103 of the Commercial Code, relating to a bank's responsibility for its failure to exercise ordinary care, provides in part:

. . . in the absence of special instructions, action or non-action consistent with clearinghouse rules and the like or with a general banking usage not disapproved by this division, prima facie constitutes the exercise of ordinary care.

It is not clear whether this provision creates a presumption under Evidence Code Section 602. Nevertheless, this provision should be clarified by revising it to expressly create a rebuttable presumption that affects the burden of proof. This carries out the intent of the drafters of the Uniform Code. For further discussion, see the Comment to Section 4103 contained in the legislation herein recommended.

The Commission's recommendations would be effectuated by the enactment of the following legislation:

An Act to add Section 1209 to, and to amend Sections 1202, 2179,
and 4103 of, the Commercial Code, relating to presumptions.

• The people of the State of California do enact as follows:

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

1209. Except as otherwise provided in Sections 1202, 2179,
and 4103, the presumptions established by this code are presump-
tions 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 presump-
tions affecting the burden of producing evidence. UNIFORM COMMERCIAL
CODE § 1-201(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.")).
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.
It was thought that any revision of the law of presumptions should await
the recommendation of the Law Revision Commission. See CALIFORNIA SENATE
FACT FINDING COMMITTEE ON JUDICIARY, SIXTH PROGRESS REPORT, Part 1, the
Uniform Commercial Code at 439-441 (1961); California State Bar Committee on
the Commercial Code, A Special Report, The Uniform Commercial Code, 37 CAL.
S.B.J. 131-132 (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.

This section applies to the presumptions that are established by Commercial Code Sections 3114(3), 3304(3)(c), 3307(1)(b), 3414(2), 3416(4), 3419(2), 3503(2), 3510, and 8105(b).

SEC. 2. Section 1202 of the Commercial Code is amended to read:

1202. (1) 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 . The presumption established by this subdivision is a presumption affecting the burden of producing evidence.

(2) Unless the contract otherwise provides, proof of the authenticity and genuineness of the document referred to in subdivision (1) establishes a rebuttable presumption of the truth and of the facts stated in the document by the third party. This presumption is a presumption affecting the burden of proof.

Comment. Subdivision (1) of Section 1202 creates a hearsay exception and establishes a rebuttable presumption. See EVIDENCE CODE § 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 reflects the fact that the 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. Thus, if there is evidence upon which the trier of fact could find that the document is not genuine, the presumption is gone from the case. See Evidence Code Section 604 and the Comment to that section and the Comment to Commercial Code Section 1209.

§ 1202

Subdivision (2) of Section 1202 creates a rebuttable presumption affecting the burden of proof that arises upon proof of the genuineness of the document. This presumption has a limited scope. See Uniform Commercial Code Comment in CAL. COMM. CODE § 1202 (West 1964) ("This section is concerned only with documents which have been given a preferred status by the parties themselves who have required their procurement in the agreement and for this reason the applicability of the section is limited to actions arising out of the contract which authorized or required the document."). This presumption is classified as a presumption affecting the burden of proof in order to give stability to commercial transactions. See Uniform Commercial Code Comment in CAL. COMM. CODE § 1202 (West 1964) ("This section is designed to supply judicial recognition for documents which have traditionally been relied upon as trustworthy by commercial men.").

SEC. 3. Section 2719 of the Commercial Code is amended to read:

2719. (1) Subject to the provisions of subdivisions (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) The agreement may provide for remedies in addition to or in substitution for those provided in this division and may limit or alter the measure of damages recoverable under this division, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this code.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima-facie presumed to be unconscionable but limitation of damages where the loss is commercial is not. The presumption established by this subdivision is a presumption affecting the burden of proof.

Comment. Subdivision (3) of Section 2719 has been revised to make it clear that this subdivision establishes a rebuttable presumption affecting

the burden of proof. Although the official Uniform Code Comment does not indicate the effect of the "prima facie" clause contained in subdivision (3) of the comparable Uniform Code section, the revision of Section 2719 appears to carry out the intent of the drafters of the Uniform Code. See the portion of the official comment to Uniform Code Section 4-103 quoted in the Law Revision Commission's Comment to California Commercial Code Section 4103.

SEC. 4. Section 4103 of the Commercial Code is amended to read:

4103. (1) The effect of the provisions of this division may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

(2) Federal Reserve regulations and operating letters, clearinghouse rules, and the like, have the effect of agreements under subdivision (1), whether or not specifically assented to by all parties interested in items handled.

(3) Action or nonaction approved by this division or pursuant to Federal Reserve regulations or operating letters constitutes the exercise of ordinary care . and, In the absence of special instructions, proof of action or nonaction consistent with clearinghouse rules and the like or with a general banking usage not disapproved by this division , -prima-facie-constitutes establishes a rebuttable presumption of the exercise of ordinary care. This presumption is a presumption affecting the burden of proof.

(4) The specification or approval of certain procedures by this division does not constitute disapproval of other procedures which may be reasonable under the circumstances.

(5) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount which could not have been realized by the use of ordinary care, and where there is bad faith it includes other damages, if any, suffered by the party as a proximate consequence.

Comment. Subdivision (3) of Section 4103 has been revised to make it clear that this subdivision establishes a rebuttable presumption affecting the burden of proof. This carries out the intent of the drafters of the Uniform Code that the "prima facie" clause of the Uniform Code section impose the burden of proof on the party to show the failure to exercise ordinary care where, absent special instructions, the other party has proved action or nonaction consistent with clearinghouse rules and the like or with a general banking usage not disapproved by this division. Uniform Commercial Code Comment in CAL. CCM. CODE § 4103 (West 1964)("The prima facie rule does, however, impose on the party contesting the standards to establish that they are unreasonable, arbitrary or unfair.").

APPENDIX

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

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 accommodation 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.

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(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

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)..