#63 10/5/66

Memorandum 66-61

Subject: Study 63(L) - Evidence Code (Commercial Code Revisions)

Attached are two copies of the tentative recommendation on this subject. Please mark your suggested revisions on one copy to return to the staff at or before the October meeting.

This recommendation was distributed to members of the Advisory Committee on the Commercial Code (which advised the Senate Fact Finding Committee on Judiciary). It was printed in the Weekly Law Digest and in various legal newspapers.

Professor Degnan approves the tentative recommendation. His study (Exhibit III--green) supports proposed Section 1209. His letter (Exhibit II) supports Sections 1202, 2179, and 4103 as drafted.

The California Commission on Uniform State Laws (Exhibit I) requests that we withhold further action on this recommendation until the substance of the recommendation has been approved by the Permanent Editorial Board and further consideration may be given to an alternative approach to the drafting of legislation to effectuate those recommendations. It is apparent that the Commercial Code presumptions provisions will be classified in accordance with the scheme of the Evidence Code if the recommendation is not enacted. It is much more likely that the California decisions will not be in accord with the decisions in other states if the legislation is not enacted because the recommendation seeks to classify the presumptions in a manner that will effectuate the apparent intent of the drafters of the Uniform Commercial Code. The Evidence Code is a fact and the Evidence Code governs the classification of the presumptions provisions of the Commercial Code. The Legislature omitted the provision of the Uniform Commercial Code

classifying certain of the code's presumptions because we had undertaken to study this matter. The question seems to be whether we should publish a pamphlet on this subject for the 1967 legislative session or whether we should defer any recommendation on the Commercial Code until 1969. The staff believes that we should publish the recommendation for the 1967 session, but that we should withdraw the legislation if the Permanent Drafting Committee objects to it and such objections cannot be met by modest amendments after the proposed legislation is introduced. We suspect that it will be more likely that we will obtain a reaction from the Permanent Drafting Committee if we have a published recommendation than if we merely defer action until that Committee gets around to considering this matter.

It would be possible to defer action on this matter until the November meeting; but, if this course of action is taken, we probably will not have a printed report on this matter available when the session commences in January.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 66-61

EXHIBIT I

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September 19, 1966

John H. DeMoully, Esquire,
Executive Secretary,
California Law Revision Commission,
Room 30, Crothers Hall,
Stanford University,
Stanford, California 94305.

Dear Mr. DeMoully:

I regret very much that the pressures of time have prevented me from replying at an earlier date to your letter of July 29, 1966 enclosing the tentative recommendation to classify the presumptions of the California Commercial Code.

At this point the California Commission on Uniform State Laws is not in agreement with the proposed tentative recommendation of your commission with respect to classifying the presumptions in the Uniform Commercial Code. While we agree that in most cases the intent of the Commercial Code is relatively clear in how the respective presumptions therein would have been classified as either presumptions affecting the burden of producing evidence or presumptions affecting the burden of proof, there is sufficient doubt in some instances that we feel called upon to submit the questions to the Permanent Editorial Board of the sponsoring organizations for their views.

Secondly, we are very much concerned with the approach to drafting the solution of the problem. As you know, the Uniform Commercial Code has now been adopted in forty-seven states, the District of Columbia and two territories of the United States, and it is anticipated that it will be uniform in all states in the near future. One of the principal benefits of uniformity in the commercial field is certainly its desirability in interstate transactions. There are, however, a number of other benefits from uniformity, not the least of which is the benefit of decisions in other jurisdictions on identical language.

The approach to drafting set forth in your tentative recommendation is destructive of the uniformity in language between California and other states in a number of sections of the Uniform Commercial Code. While it is true that California departed from uniformity in language in a number of provisions of the Code when it was adopted in 1963, a major effort is under way to bring back as many of these sections as possible to conformity with the official text. Further departures from the official text are not desired and should not be made unless it is absolutely essential.

Under the circumstances we would request the California Law Revision Commission to withhold further action upon its recommendations as to amending the Uniform Commercial Code to classify presumptions therein to coincide with the Evidence Code until the substance of the recommendations has been approved by the Permanent Editorial Board and further consideration may be given to an alternative approach to the drafting of the legislation to effectuate those recommendations.

We appreciate very much the cooperation your commission has shown to us and hope that it may see fit to accede to our request.

Cordially yours,

George R. Richter, Jr.

George R. Richter, Jr.

GRR/lhb

CC - Richard H. Keatinge, Esq., Chairman
California Law Revision Commission
All Members of California Commission
on Uniform State Laws

memo 66-61 Exhibit II

UNIVERSITY OF CALIFORNIA, BERKELEY

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SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720

August 15, 1966

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
30 Crothers Hall
Stanford University
Stanford, California

Dear John:

I have been woefully delinquent in responding to some of your inquiries about proposed changes to be incorporated into the omnibus bill now being assembled. The only excuse I can offer is an unbearably busy spring and early summer. Now that I am in Salt Lake City and somewhat away from the day to day press of activity on the Berkeley campus, I take the time to give those inquiries the study and response they should have had some time ago. I hope that the answers will, even if some of them are late, be of assistance to you.

Presumptions in the Commercial Code. You refer to the minutes of the Commission meeting of May 27-28 and the contents thereof. Perhaps you will recall that in one of my early memoranda for the Commission, discussing the general subject of presumptions, prima facie evidence and the like, I adverted to the separate problems of presumptions in general, presumptions in criminal cases and presumptions under the Commercial Code. I am sorry that I am unable to supply you with a more definite citation, but I am far from my collection of materials.

In that memo, I pointed out that the Legislature had, in reliance on the Marsh-Warren study, postponed for Evidence Code consideration the problem of classification of presumptions. Your minutes refer to the fact that the U.C.C. adopts the Thayer-Wigmore theory that presumptions affect the burden of producing evidence. I think it is a mistake to assume, however, that this reflects in any precise way the "intent of the drafters" of the U.C.C. The present "official" definition was found in Proposed Final Draft No. 2, Spring 1951, at a time when this was the proposed single view of presumptions contained in the Model Code of

Evidence, and that the Model Code was the only such proposal then in existence. The U.C.C. was the product of the American Law Institute, as was the Model Code. Indeed, the U.C.C. proposal dates back at least to § 1-201(24) of the May, 1949, draft. Thus it has always seemed to me likely that little weight should be attached to the U.C.C. adoption of the Thayer view. The draftsmen were adopting what was then the only stated orthodox view, which happened also to be their own officially adopted view. They were not choosing between the Thayer view and the Morgan view; most of all, they were not trying to label some presumptions as being of one kind and some as being of another. This is essentially the California problem.

I don't mean by what is said to dispute the probability that "affecting the burden of producing evidence" is appropriate for most of the Com. Code presumptions. An example of one which probably would be intended by the U.C.C. draftsmen to fall into the category of "affecting the burden of proof" would be § 4-201; although the section does not use the word presumption, it begins "Unless a contrary intent clearly appears, ..." and the Official Comment says that it states "basic rules and presumptions of the bank collection process." Comment 1. Comment 2 describes this as "a rule of status in terms of a strong presumption." If it is a presumption at all, it must be one intended to affect the burden of proof. Probably it is not truly a presumption of any kind; arguably it does not shift the burden of proof from the one who otherwise would have it, but indeed allocates the burden of proof in the first instance. The latter argument is the more persuasive to me, but there does remain the fact that the comment to the section ascribes to it the status of presumption, and if it is one at all it is "strong." It is expressive of some "policy other than to facilitate the determination of the particular action," in the words of Evi. Code § 605.

This section also well illustrates the constant confusion of terms. Notice that Comment 3 goes on to refer to the same proposition as "the prima facie agency status of collecting banks." We have all the same words with all the same ambiguity that we had in the 1872 California Code of Civil Procedure.

These may be meandering remarks. They are meant to convey my idea, expressed in my earlier memorandum, that the Commercial Code is not tautly drawn on this subject. That, of course, is only to agree with you that a single statement of the operative effect of a presumption will not fully express the policies of the Commercial Code within the framework of presumptions established by the Evidence Code.

Section 1202. I agree with your view of this. Here the use of the words prima facie seem clearly intended to serve two purposes. One is to create the hearsay exception needed to let the document authenticate itself, just as acknowledged instruments do; another is to declare that evidence sufficient to support a finding of authenticity. To say that the evidence is merely sufficient, however, seems to be less than is intended by the section and accompanying comment. The object must be more--to say that the document must be accepted as genuine unless contrary evidence is produced.

The final clause, making the document "prima facie evidence . . . of the facts stated in the document by the third party" might also create merely a hearsay exception. But I incline to your view that it goes beyond and creates a presumption affecting the burden of proof. I deduce this from the limitation to documents "authorized or required by the contract," reasoning that where one chooses to dispute such things as weight or quantity or receipt or shipping date when they have been stated by a third person with his authorization, he should at least be required to convince the trier of fact that the statement is in error.

Section 2719. Here there is no problem of hearsay exception, for none is involved. The sole purpose is to tip the scale in favor of one result--full compensation for injury to person--in the absence of special justification. This seems clearly to be the explication of a policy "other than to facilitate" the trial, and by the definition contained in Evidence Code § 605 would be a presumption affecting the burden of proof.

Section 4103. This one seems clearest of all. Conformity to regulation or practice is the basic fact; once shown, according to Comment, the party contesting the standards must "establish that they are unreasonable, arbitrary or unfair." I suppose that it might be argued here as well that this allocation does not "affect" either of the burdens, but only operates to assign them initially. But that is less persuasive here than in § 1202. And you have to give some weight to the fact that the Commercial Code does its own labeling. Even if analytically wrong, there is far less harm in calling something a presumption than there used to be, for no longer will the jury be instructed that it is evidence and by them to be weighed as such.

Sincerely,

Ronan E. Degnan

RED:ma

EXHIBIT III

The Commercial Code. The Uniform Commercial Code is a child of the American Law Institute. It is thus not surprising that in the 1952 Official Draft the definition of presumption 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 switched to the Morgan theory, and U.C.C. § 1-201(31) 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 nonexistence.

The Official Comment is not enlightening; it says "New".

Although there was some controversy about the point, the definition of "presumption" in the Uniform Commercial Code was deleted from the California Code because the Law Revision Commission's study of evidence law was already in progress at the time. See Report of Professors Harold Marsh, Jr., and William D. Warren in Calif. Senate Fact Finding Comm. on Judiciary, Sixth Progress Report to the Legislature p. 441 (1961):

> 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 a 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.

The general pattern of the Commercial Code shows that the draftsmen adhered with substantial fidelity to their definition of presumption in employing that term in the Code itself. The sections are not intensively

examined here because a separate appendix listing and describing the presumptions of the Code is attached. Examination of them makes it apparent that presumptions are used primarily to serve convenience ends rather than policy objectives -- that is, to make production of evidence on a possible issue unnecessary until it is made to appear that the possible issue is also a real one. This is the principal role of Thayer-type presumptions.

This is not to say, however, that there are not instances in which the Code has a policy to effectuate by proof allocation. Section 1202 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.

It is evident that this section attempts to (1) make certain documents self-authenticating and (2) create a special hearsay exception. Whether it will do more depends on what definition (if any) the Commission finally recommends for the term prima facie.

In essence, the Code follows the Cleary approach, which would avoid employing presumptions when the intent is to allocate the burden of persuasion. Section 120(8) states 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 nonexistence.

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 it described is the one usually imposed in civil cases. There are several sections which expressly allocate burdens:

§ 2607(4). (burden is on the buyer to establish breach with respect to accepted goods.

§ 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).

§ 4202(2). (bank has burden of establishing that it acted seasonably when there is delay in collection).

§ 3307. (after defense to negotiable instrument is shown, the holder has burden of establishing that he is holder in due course).

§ 8105(2) (b and d) (same as § 33707, for investment securities).

§ 3115. (burden of establishing that completion of an instrument was unauthorized is on party so asserting).

§ 1208. (burden of establishing lack of good faith in an acceleration under a "deems insecure" clause is on the party whose obligation was accelerated).

The Code does not always, however, observe the distinction between burden of proof and presumption. Section 4201 provides in its first subsection:

> Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting for an item is or becomes final . . . the bank is an agent or subagent of the owner of the time and any settlement given for the credit is provisional.

The Comment calls this a "strong presumption." "A contrary intent can rebut the presumption but this must be clear."

This seems 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 more than that it

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 that term is defined in § 1201 of the Official Draft of the 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.

The question before the Law Revision Commission is whether it should do anything at all about the Commercial Code. The Legislature left the number slot, § 1201(31), vacant and invited, in the history note set out in the beginning of this topic, the Law Revision Commission to fill the slot when it completed its study and recommendation on presumptions. Some action seems called for. Since the presumptions created by the Code seem to adhere to the Thayer type, the action might be to make a reference from the Commercial Code to what is now denominated Rule 15.5 (Tentative Recommendation, Draft of March 13, 1964) -- Presumptions Affecting the Burden of Producing Evidence. It might, however, be more convenient to users of the Commercial Code to have the language there. The following adaptation of Proposed Rule 15.5 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 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.

The alternative method might be phrased as follows:

"Presumption" or "presumed" when used in this Code means a presumption affecting the burden of producing evidence as defined in § of the Evidence Code.

Appendix

Presumptions in the Commercial Code

§ 3114(3) - Where the instrument or any signature there on is dated, the date is presumed to be correct.

§ 3201(3) - Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner.

§ 3304(3)(c)-(A domestic check is presumed to be overdue after thirty days after date of issue.)

§ 3307 - (Signature is presumed genuine or authorized except when the alleged signer has died or become incompetent.)

§ 3414(2) - The order in which endorsers endorsed is presumed to the order in which their signatures appear on the instrument.

§ 3416(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 accomodation of the others.

§ 3419(2) - In an action for conversion, the measure of liability is presumed to be the face amount of the instrument.

§ 3503(2) - Creates certain presumptions about reasonable time for presentment.

§ 3510 - Creates certain presumptions about dishonor and notice of dishonor.

§ 8105 - Signature on investment security presumed to be genuine or authorized.

#63(L)

July 30, 1966

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

THE EVIDENCE CODE

Number 3 -- Commercial Code Revisions

July 30, 1966

California Law Revision Commission
School of Law
Stanford University
Stanford, California

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

#63(L)

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

THE EVIDENCE CODE

(COMMERCIAL CODE REVISIONS)

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 in order to harmonize those codes with the Evidence Code. One aspect of the continuing study of the Evidence Code is the determination of what additional changes, if any, are needed in other codes. The Commission has studied the Commercial Code for this purpose and has concluded that several changes should be made in that code to conform it to the Evidence Code.

Twelve sections of the Commercial Code create or appear to create rebuttable presumptions, but the Commercial Code does not specifically indicate the procedural effect of these provisions.

Evidence Code Section 601 provides that every rebuttable presumption is either a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof. Generally, presumptions affecting the burden of producing evidence are those created solely to forestall argument over the existence of a fact that is little likely to be untrue unless actually disputed by the production of contrary evidence. See EVIDENCE CODE § 603 and the Comment thereto. Presumptions affecting the burden of proof, however, are designed to implement some substantive policy of the law, such as the stability of titles to property. See EVIDENCE CODE § 605 and the Comment thereto. Sections 604, 606, and 607 specify the procedural effect of these two kinds of presumptions. The Evidence Code classifies only a few presumptions, leaving to the courts the task of classifying other statutory and decisional presumptions in light of the criteria stated in Evidence Code Sections 603 and 605.

The general standards provided in the Evidence Code do not permit ready classification of all of the presumptions in the Commercial Code. In the absence of legislative classification, it is possible that different courts would reach different conclusions as to the proper classification of some of the Commercial Code presumptions. In any event, the effect of any particular presumption could be determined with certainty only after the courts had had occasion to determine the classification of the presumption under the criteria of Evidence Code Sections 603 and 605.

In order to avoid uncertainty and to obviate the need for numerous judicial decisions to determine the effect of the presumptions provisions of the Commercial Code, the Commission recommends that the code be revised

as hereinafter indicated. In making these recommendations, the Commission has made no effort to reevaluate the policy decisions that were made when the Commercial Code was prepared and enacted. The policies underlying the Commercial Code were carefully studied by the Commissioners on Uniform State Laws and the Legislature. The revisions recommended by the Commission are designed merely to effectuate the intent of the drafters of the Commercial Code and the policies previously approved by the Legislature in the light of the subsequent enactment of the Evidence Code.

In most cases, the intent of the drafters of the Commission Code--i.e., how the draftsmen of that code would have classified its several presumptions had they been aware of and had been applying the Evidence Code distinction between presumptions affecting the burden of producing evidence and the presumptions affecting the burden of proof--is relatively clear. In a few cases, the question is a more doubtful one, and an educated guess must by made in light of what appears to be the legislative purpose sought to be accomplished by that part of the Commercial Code in which the particular section appears.

Sections 3114(3), 3304(3)(c), 3307(1)(b), 3414(2), 3416(4), 3419(2), 3503(2), 3510, and 8105(b). These sections of the Commercial Code expressly create certain rebuttable presumptions. In the official text of the Uniform Commercial Code as promulgated by the National Conference of Commissioners on Uniform State Laws, these presumptions were defined, in effect, as the equivalent of what the Evidence Code calls presumptions 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 code's definition of a presumption was deleted, however, because it was considered ambiguous and because the 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).

Therefore, 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, the Law Revision Commission recommends that these presumptions be classified as presumptions affecting the burden of producing evidence.

Section 1202. 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 Evidence Code Section 602, the legal effect of every statute which so provides is to establish a rebuttable presumption: "A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption." Section 602 does not, however, specify whether the presumption is one affecting the burden of proof or merely the burden of producing evidence.

Insofar as Section 1202 establishes a presumption of the authenticity and genuineness of the document, it would appear to have been intended by the draftsmen of the Uniform Code merely as a preliminary

assumption in the absence of contrary evidence, i.e., evidence sufficient to sustain a finding of the nonexistence of the presumed fact. This presumption, therefore, should be classified as a presumption affecting the burden of producing evidence.

On the other hand, insofar as Section 1202 establishes a presumption of the truth of the facts stated in the document by the third party, the presumption seems to have been established to permit reliance on the trustworthiness of such documents and, thus, to give stability to commercial transactions. See official comment to Uniform Commercial Code § 1-202 ("This section is designed to supply judicial recognition for documents which have traditionally been relied upon as trustworthy by commercial men."). Accordingly, the presumption should be classified as a presumption affecting the burden of proof.

Section 2719. 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 now creates a presumption under Evidence Code Section 602. To clarify its meaning, the subdivision should be revised to expressly create a rebuttable presumption. This presumption should be one that affects the burden of proof because this appears to effectuate the intent of the drafters of the Uniform Code. See the

official comment to Uniform Commercial Code Section 4-103 which indicates that similar language in that section was intended to affect the burden of proof rather than merely the burden of producing evidence.

Section 4103. 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 now creates a presumption under Evidence Code Section 602. To clarify its meaning, this provision should be revised to expressly create a rebuttable presumption. This presumption should be one that affects the burden of proof because this appears to carry out the intent of the drafters of the Uniform Code. See the official comment to Uniform Commercial Code Section 4-103 ("The prima facie rule does, however, impose on the party contesting the standards to establish that they are unreasonable, arbitrary or unfair.").

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 presumptions affecting the burden of producing evidence.

Comment. Section 1209 classifies as presumptions affecting the burden of producing evidence 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). The introductory "except clause" refers to presumptions which are classified as presumptions affecting the burden of proof. See Commercial Code Sections 1202, 2179, and 4103 and the Comments to those sections.

Section 1209 has the same substantive effect as subdivision (31) of Section 1-201 of the Uniform Commercial Code as promulgated by the National Conference of Commissioners on Uniform State Laws, but Section 1209 incorporates the comprehensive Evidence Code provisions relating to presumptions affecting the burden of producing evidence. 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 such contrary evidence is introduced, the presumption vanishes 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 the inferences arising therefrom and resolve the conflict. See Evidence Code Section 604 and the Comment to that section.

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~~ is admissible in any action arising out of the contract which authorized or required the document as evidence of the facts stated in the document by the third party and is presumed to be ~~of its own~~ authenticity and genuineness . This presumption 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 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) has been revised to make it clear that the documents referred to in Section 1202 are admissible notwithstanding the hearsay rule and to state the circumstances when the document is admissible. See the official comment to Uniform Commercial Code § 1-202 ("the applicability of the section is limited to actions arising out of the contract which authorized or required the document").

The revision of subdivision (1) also makes it clear that the presumption of authenticity and genuineness created by the section is a presumption affecting the burden of producing evidence. 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 non-existence, 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.

Subdivision (2) of Section 1202 classifies the presumption of the truth of the matters stated in a document authenticated under subdivision (1) as a presumption affecting the burden of proof. Under Evidence Code Section 606, the effect of this classification is to require the party against whom the presumption operates to prove by a preponderance of the evidence that the facts recited in the authenticated document are not true. See Evidence Code Section 606 and the Comment thereto.

The presumption stated in subdivision (2) has a limited scope. See the official comment to Uniform Commercial Code § 1-202 ("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.").

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. Under Evidence Code Section 606, the effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proving by a preponderance of the evidence that the presumed fact is not true. See Evidence Code Section 606 and the Comment thereto. Thus, under Commercial Code Section 2719, the party asserting that a provision limiting consequential damages for injury to the person in the case of consumer goods has the burden of proving that the limitation is not unconscionable.

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. Under Evidence Code Section 606, the effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proving by a preponderance of the evidence that the presumed fact is not true. See EVIDENCE CODE § 606 and the Comment thereto. Thus, under Commercial Code Section 4103, if a bank proves that it acted in accordance with clearinghouse rules or with a general banking usage not disapproved by the Commercial Code, the party asserting that the bank failed to exercise ordinary care has the burden of proving that fact.

Of course, if the party asserting that the bank acted without exercising ordinary care already has the burden of proof on that issue, the presumption can have no effect on the case and no instruction in regard to the presumption should be given. See the comment to Evidence Code Section 606. But even though the presumption can have no effect in such a case, evidence of the bank's compliance with clearinghouse rules or general banking usage may nevertheless be considered on the question whether the bank exercised due care.