

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

*relating to*

The Evidence Code  
Number 3—Commercial Code Revisions

October 1966

CALIFORNIA LAW REVISION COMMISSION  
SCHOOL OF LAW  
STANFORD UNIVERSITY  
STANFORD, CALIFORNIA

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This 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.

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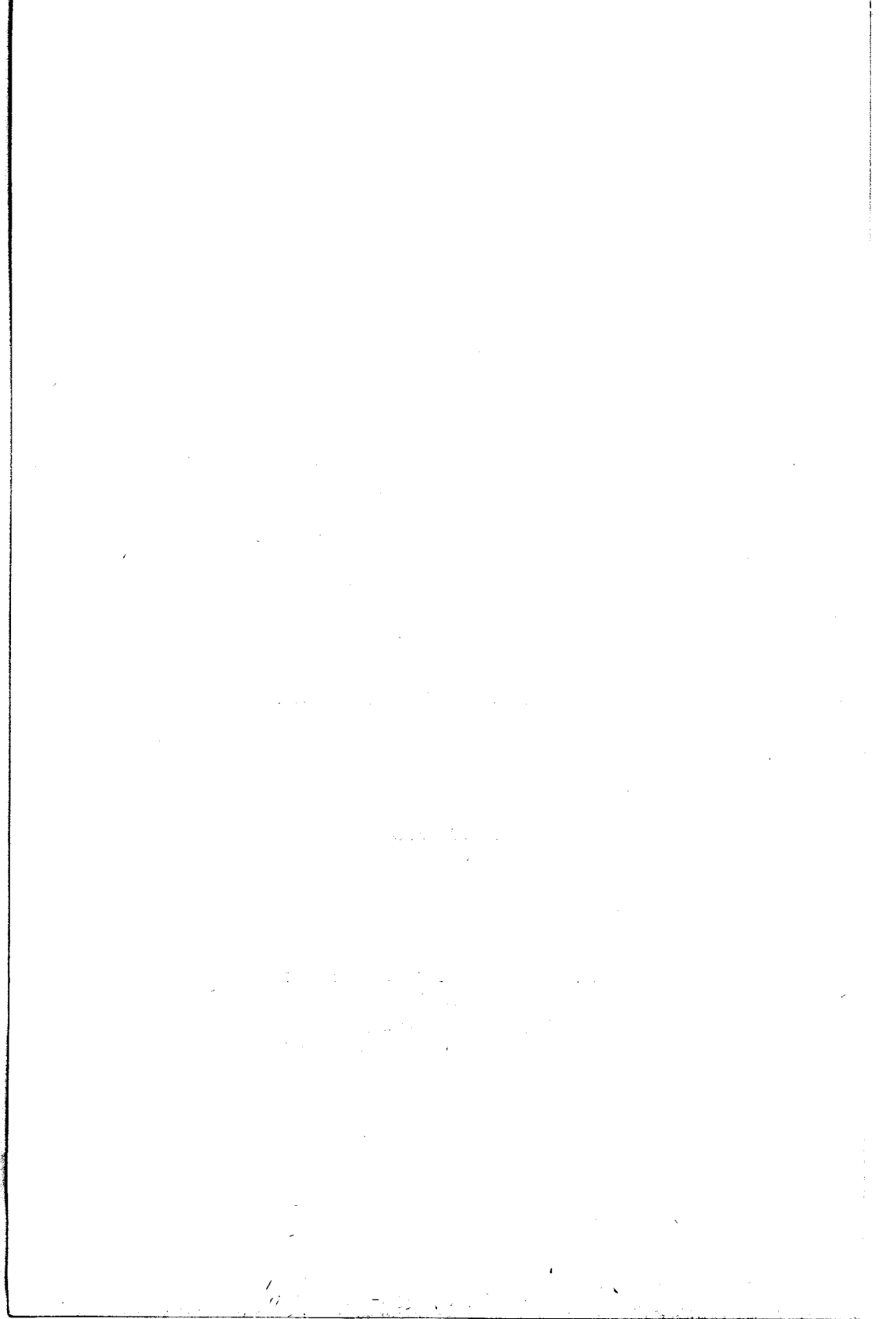
RECOMMENDATION

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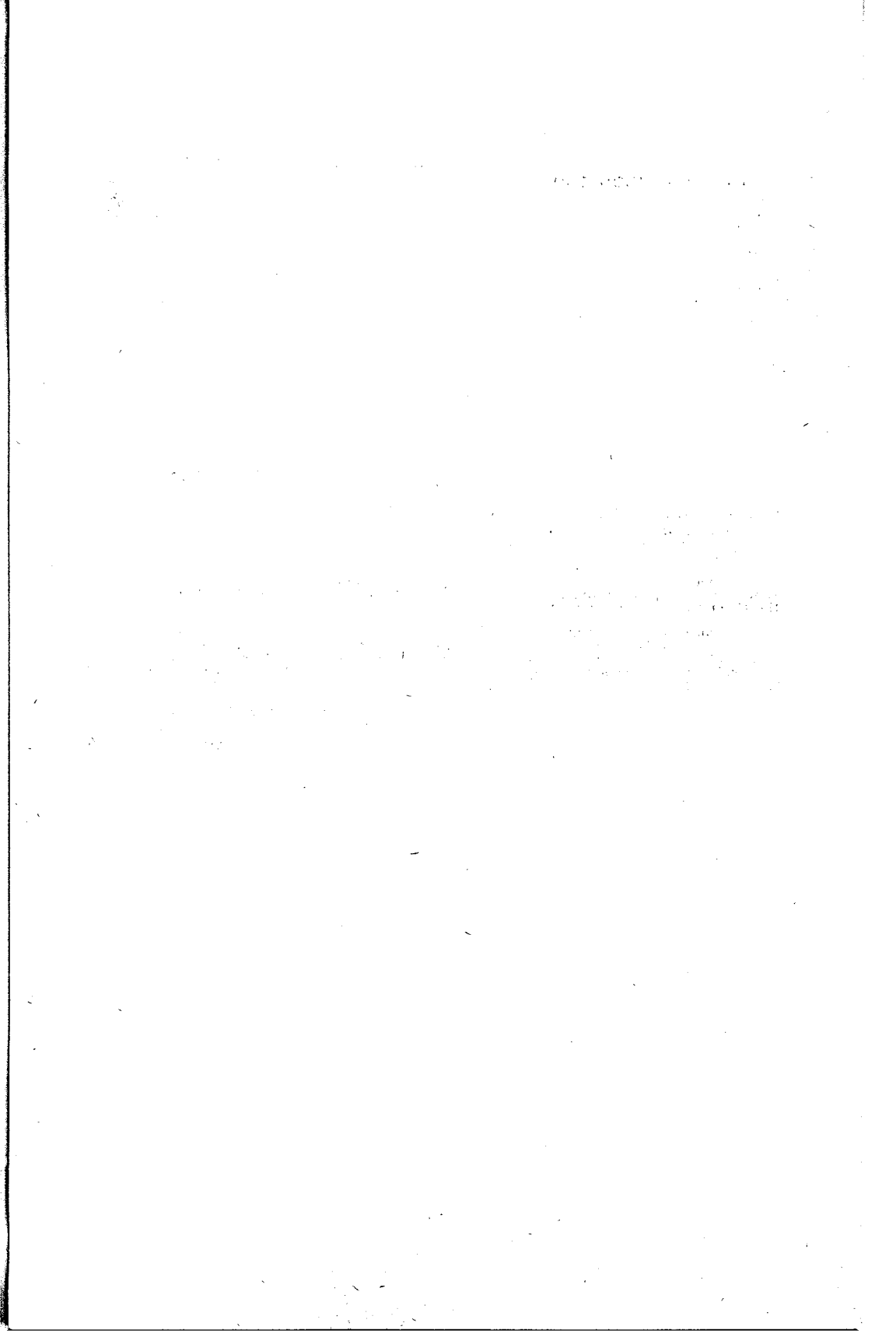
**The Evidence Code**  
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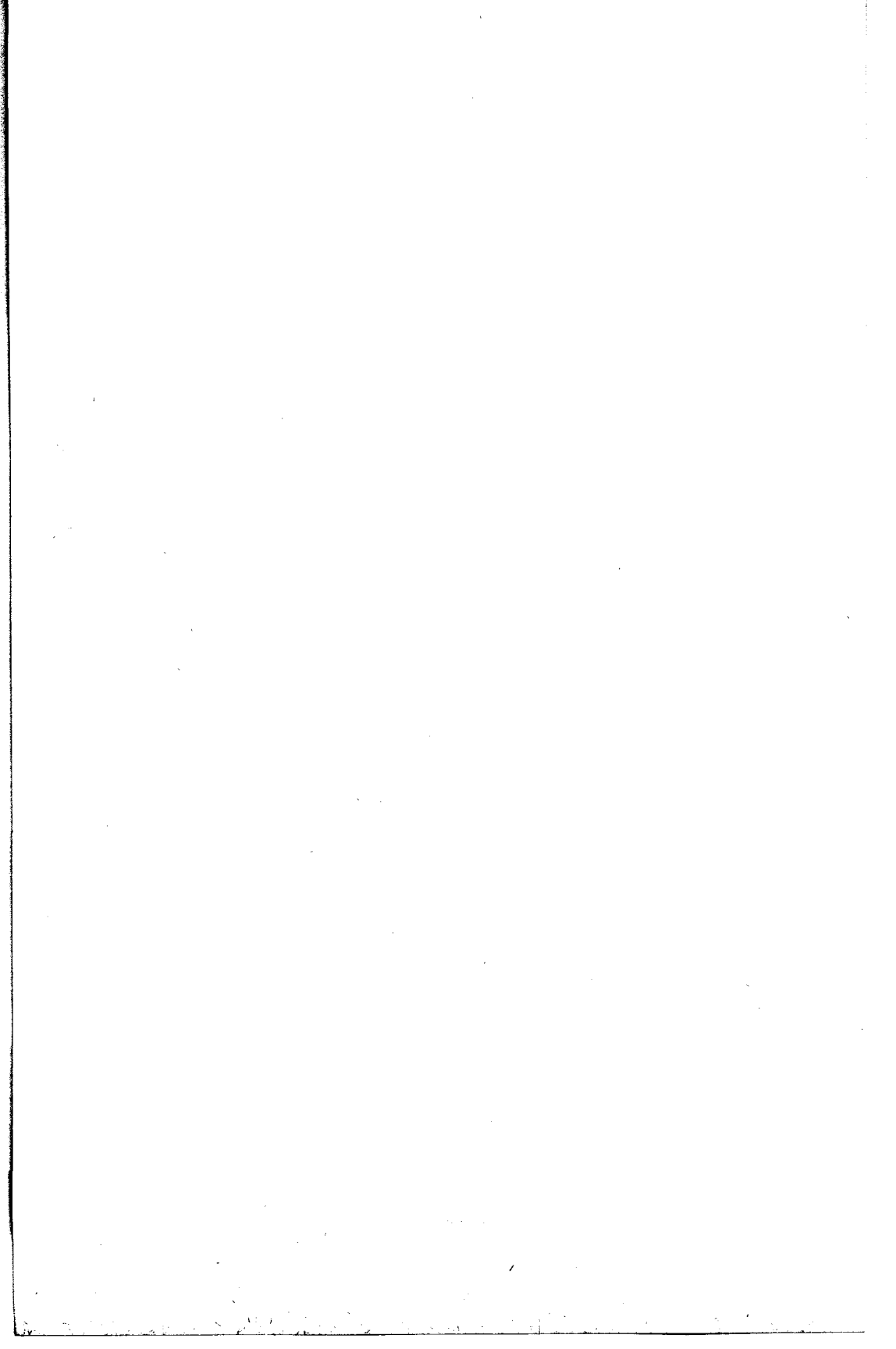






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# RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

## THE EVIDENCE CODE

### Number 3—Commercial Code Revisions

#### BACKGROUND

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The same legislation that enacted the Evidence Code also amended and repealed a substantial number of sections in other codes in order to harmonize those codes with the Evidence Code.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 involves 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 the Commercial Code to conform it to the provisions of 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 not 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 of the Evidence Code specify the procedural effect of these two kinds of presumptions. However, the Evidence Code classifies only a few of the more common 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 can be determined

with certainty only after the courts have 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 in 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 Law Revision 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.<sup>1</sup>

### RECOMMENDATIONS

**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 provides that a fact or group of facts is prima facie evidence of another fact is to establish 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. UNIFORM COMMERCIAL CODE § 1-202 Comment 1 ("This section is designed to supply judicial recognition for documents which have traditionally been relied upon as trustworthy by commercial men."). Accordingly, this presumption should be classified as a presumption affecting the burden of proof.

<sup>1</sup> In most cases, the intent of the drafters of the Commercial Code—i.e., how they would have classified the Commercial Code presumptions had they been aware of and 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 answer is more doubtful, and an educated guess must be made in light of what appears to be the legislative purpose of the 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(2)(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* 439-441 (1961); California State Bar Committee on the Commercial Code, *The Uniform Commercial Code*, 37 CAL. S.B.J. 119, 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 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.

This subdivision should be revised to make it clear that (1) in the case of consumer goods, the person claiming that a limitation of consequential damages for injury to the person is valid has the burden of proving that the limitation is not unconscionable and (2) where the loss is commercial, the person claiming that the limitation of damages is invalid has the burden of proving that the limitation is unconscionable. The rephrasing of this subdivision in terms of burden of proof 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 nonaction 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. UNIFORM COMMERCIAL CODE § 4-103 Comment 4 ("The *prima facie* rule does, however, impose on the party contesting the standards to establish that they are unreasonable, arbitrary or unfair.").

### PROPOSED LEGISLATION

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

*An act to amend Sections 1202, 2719, and 4103 of, and to add Section 1209 to, the Commercial Code, relating to evidence.*

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

#### Section 1202 (amended)

SECTION 1. 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 is admissible as evidence of the facts stated in the document by the third party in any action arising out of the contract which authorized or required the document.~~

(2) *In any action arising out of the contract which authorized or required the document referred to in subdivision (1):*

(a) ~~of its own authenticity and genuineness~~ *The document is presumed to be authentic and genuine. This presumption is a presumption affecting the burden of producing evidence.*

(b) *Unless the contract otherwise provides, if the document is found to be authentic and genuine, and of the facts stated in the document by the third party are presumed to be true. This presumption is a presumption affecting the burden of proof.*

**Comment.** Section 1202 has been revised to indicate that it applies only in an action arising out of the contract which authorized or required the document referred to in the section. This revision is consistent with the intent of the drafters of the Uniform Commercial Code. UNIFORM COMMERCIAL CODE § 1-202 Comment 2 ("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.").

Paragraph (a) of subdivision (2) classifies the presumption of authenticity and genuineness as a presumption affecting the burden of producing evidence. Under Evidence Code Section 604, a presumption affecting the burden of producing evidence requires 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.

Paragraph (b) of subdivision (2) classifies the presumption as to the truth of the matters stated in the document by the third party 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.

#### Section 1209 (new)

SEC. 2. Section 1209 is added to the Commercial Code, to read:

1209. Except as otherwise provided in Sections 1202 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(2)(b). The introductory "except clause" refers to presumptions which are classified as presumptions affecting the burden of proof. See Commercial Code Sections 1202 and 4103 and the Law Revision Commission's 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, a presumption affecting the burden of producing evidence requires 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 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.

## Section 2719 (amended)

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 invalid unless it is proved that the limitation is not unconscionable but limitation*. *Limitation of consequential damages where the loss is commercial is not valid unless it is proved that the limitation is unconscionable.*

*Comment.* Subdivision (3) of Section 2719 has been revised to make it clear that this subdivision allocates the burden of proof as to the validity of provisions limiting consequential damages.

## Section 4103 (amended)

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~~ *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 con-*

~~stitutes~~ 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, a presumption affecting the burden of proof imposes 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.

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