

6/26/68

Memorandum 68-62

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

You will recall that legislation was enacted upon recommendation of the Law Revision Commission in 1967 to conform the Commercial Code to the Evidence Code. However, Section 4103 of the Commercial Code was not conformed at that time because the Commission concluded that this section needed further study.

A tentative recommendation relating to Section 4103 was prepared and distributed for comment early this year. A copy of the tentative recommendation is attached.

After distribution of the tentative recommendation, a law review article on the problem of presumptions and burden of proof under the Commercial Code came to our attention. We provided persons reviewing our tentative recommendation with a copy of this law review article and we attach a copy for your study.

Without exception, the comments we received on the tentative recommendation are opposed to any amendment of the California Commercial Code. The comments take the position that any efforts to clarify the Commercial Code should be undertaken by the Permanent Drafting Committee and recommended for adoption in all the states. Other commentators take the view that the tentative recommendation would either merely restate what the courts would otherwise hold or would increase rather than reduce the confusion in the existing law.

The staff believes that the tentative recommendation is sound. A study of the attached law review article will demonstrate this. However, in view of the unanimous opposition to any attempt to clarify the

California Commercial Code, we suggest that the Commission not submit a recommendation on this subject to the 1969 session and that any further consideration of the problem of conforming the Commercial Code to the Evidence Code be deferred until all the other California codes have been considered with a view to conforming them to the Evidence Code.

Respectfully submitted,

John H. DeMouly
Executive Secretary

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488 SOUTH SPRING STREET
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California Commission on Uniform State Laws

June 21, 1968

Professor John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Dear Professor DeMouilly:

The California Commission on Uniform State Laws has considered the tentative recommendation of the Law Revision Commission relating to an amendment to Section 4103 of the Uniform Commercial Code.

The members of the California Commission on Uniform State Laws believe that the proposed amendment to Section 4103(3) is wholly unnecessary and should not be approved because it will create one more wholly pointless variation from uniformity. The study prepared for the Law Revision Commission does not remotely suggest that the courts will interpret the section in any other manner as it stands than they would under the revised language. If we are going to approve the efforts of people who want to tinker with the language of the Uniform Commercial Code merely to make it more clearly say what it already clearly says then I think we must abandon all hope of achieving uniformity.

Some of our members feel that the proposed amendment, in fact, by removing the words prima facie tends toward lack of clarity rather than toward clarity.

I assume that by this time you have already heard from Kenneth G. McGilvray, Esquire, Chairman of the Advisory Committee on the Uniform Commercial Code to the Senate Judiciary Committee

Professor John H. DeMouilly

- 2 -

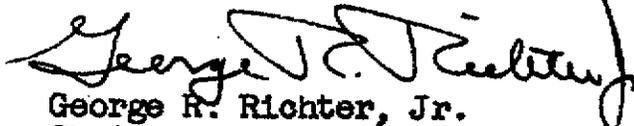
June 21, 1968

that the members of that Advisory Committee unanimously disapproved of the proposed recommendation of the Law Revision Commission.

While the members of the Permanent Editorial Board have not met with respect to any matters since the submission of your proposal, it was circulated to the members of the Board by Paul A. Wolkin, Esquire, the Secretary, and I have seen written comments of six of the ten members of that Board. All six disapprove of the proposed amendment to Section 4103 as being unnecessary.

Thank you for submitting the matter to us.

Very truly yours,



George R. Richter, Jr.
Chairman

GRR:miw

cc: To All Members of the California Commission
on Uniform State Laws
Kenneth G. McGilvray, Esquire
Paul A. Wolkin, Esquire

McGILVRAY

1968 APR 19 AM 10:30

ATT'N. _____

DIARY _____

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STANDARD OIL BUILDING
225 BUSH STREET
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE 421-6133
AREA CODE 415

April 18, 1968

Uniform Commercial Code
Section 4103

Kenneth G. McGilvray, Esq.
Messrs. McGilvray and McGilvray
Forum Building - Suite 714
1107 Ninth Street
Sacramento, California 95814

Dear Kenneth:

I have your letter of April 15, and the enclosed copy of Mr. DeMouilly's letter of April 4, and the Law Revision Commission's tentative recommendation concerning a proposed amendment to Section 4103.

It seems to me that if this proposed change does nothing to the Code, it shouldn't be adopted, and if it does, it shifts a burden of proof contrary to the plan of Uniform Code. If uniformity is to be continued and California is to have the benefit of decisions elsewhere under this section, I think that we should oppose the change.

Very truly yours,


Maurice D. L. Fuller, Sr.

cc: Robert L. Hunt, Esq.
John G. Eliot, Esq.
Harold Marsh, Jr., Esq.
William D. Warren, Esq.
George R. Richter, Esq.
James M. Conners, Esq.
Kenneth Johnson, Esq.
Almon B. McCallum, Esq.
Arlo D. Poe, Esq.
Paul L. Davies, Jr., Esq.

MCGILVRAY

Bank of America

NATIONAL TRUST AND SAVINGS ASSOCIATION

SAN FRANCISCO HEADQUARTERS

ATT'N. _____

SAN FRANCISCO, CALIFORNIA 94120

KENNETH M. JOHNSON
VICE PRESIDENT AND COUNSEL

April 19, 1968

Kenneth G. McGilvray, Esq.
Messrs. McGilvray and McGilvray
Forum Building - Suite 714
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Sacramento, California 95814

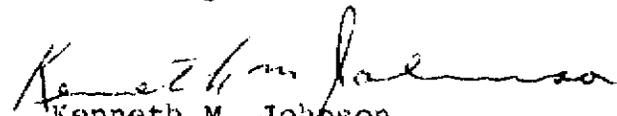
Re: Uniform Commercial Code §4103

Dear Kenneth:

This is in reply to your letter of April 15 in relation to the above section and the proposal made by the Law Revision Commission.

I do not favor this change. It seems to me that the expression, "not manifestly unreasonable", is just as uncertain, if not more so, that the term "prima facie". This seems to be a situation where change is being made for the sake of change. I therefore concur in the point of view taken by Mr. Maurice D. L. Fuller in his letter to you dated April 18.

Sincerely,


Kenneth M. Johnson

KMJ/akr

- ccs: Robert L. Hunt, Esq.
- John G. Eliot, Esq.
- Harold Marsh, Jr., Esq.
- William D. Warren, Esq.
- George R. Richter, Esq.
- James M. Connors, Esq.
- Almon B. McCallum, Esq. (4)
- Arlo D. Poe, Esq.
- Paul L. Davies, Jr., Esq.
- Maurice D. L. Fuller, Esq.



1968 APR 23 PM 2:23

SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

ATT'N. _____

April 22, 1968

DIARY _____

Kenneth G. McGilvray, Esquire
McGilvray and McGilvray
Suite 714, Forum Building
1107 Ninth Street
Sacramento, California 95814

Dear Ken:

I have your letter of April 15, 1968 enclosing the copy of the Law Revision Commission proposal relating to Section 4103 of the Uniform Commercial Code.

I have no objection to the substance of the proposal of the Law Revision Commission, but I think that it is wholly unnecessary and should not be approved because it will create one more wholly pointless variation from uniformity. The study does not remotely suggest that the courts will interpret the section in any other manner as it stands than they would under the revised language. If we are going to approve the efforts of people who want to tinker with the language of the UCC merely to make it more clearly say what it already clearly says, then I think we must abandon all hope of achieving uniformity.

Sincerely yours,

Harold Marsh, Jr.
Harold Marsh, Jr.
Professor of Law

msl

- cc: Robert L. Hunt, Esquire
- John G. Eliot, Esquire
- William D. Warren, Esquire
- George R. Richter, Esquire
- James M. Connors, Esquire
- Maurice D. L. Fuller, Esquire
- Kenneth Johnson, Esquire

5

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781-6181

1968 APR 26 AM 9:46

ATTN. _____

DIARY _____

April 25, 1968

Kenneth G. McGilvray, Esq.
714 Forum Building
Sacramento 14, California

Dear Ken:

After studying the suggestions of the Law Revision Commission, with reference to Section 4103 of the Commercial Code, and reading the comments that have already come to my attention, I am of the opinion that at the least the registered language is no improvement and at the most it might very well conflict with the basic theory of the code as to burden of proof. In any event it would be a needless departure from uniformity. For these reasons I am opposed to it.

Sincerely,



John G. Eliot

JGE:mjr

cc: Members of Editorial Board

(6)

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1968 APR 30 PM 2:30

ATTORNEY

TELEPHONE 421-8133
AREA CODE 415

DIARY

April 29, 1968

Section 4103

Kenneth G. McGilvray
Messrs. McGilvray and McGilvray
Forum Building - Suite 714
1107 Ninth Street
Sacramento, California 95814

Dear Ken:

I have your letter of April 26, and the enclosed material from John H. DeMouilly. This material does not change my mind insofar as California is concerned. I still prefer uniformity and if anything is to be done, Professor Bigham should persuade the Uniform Commercial Code Commission to make the changes.

Very truly yours,



Maurice D. L. Fuller, Sr.

cc: Robert L. Hunt, Esq.
John G. Eliot, Esq.
Harold Marsh, Jr., Esq.
William D. Warren, Esq.
George R. Richter, Esq.
James M. Conners, Esq.
Kenneth Johnson, Esq.
Almon B. McCallum, Esq.
Arlo D. Poe, Esq.
Paul L. Davies, Jr., Esq.

(7)

J. STANLEY MULLIN
GORDON F. HAMPTON
FRANK SIMPSON, III
WESLEY L. NUTTEN, III
MERRILL R. FRANCIS
JOHN D. MUSSEY
JOHN A. STURGEON
DON T. HIBNER, JR.
PIERCE T. BELWOOD
RICHARD L. LOTT
JOSEPH G. GORMAN, JR.
WILLIAM M. BURKE
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GEORGE R. RICHTER, JR.
MYRL R. SCOTT
WILLIAM A. HASTENSON
DAVID A. MADDOX
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THOMAS R. SHEPARD
WILLIAM A. HOGUE
PAUL M. REITLER
THOMAS C. WATERMAN
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ATTORNEYS AT LAW
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TELEPHONE
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"SHEPLAW"

IN REPLY REFER TO

No. 5158-J

April 30, 1968

Kenneth G. McGilvray, Esquire
McGilvray and McGilvray
Suite 714 Forum Building
1107 Ninth Street
Sacramento, California 95814

Dear Ken:

I have received your communication of April 26, 1968, enclosing Mr. DeMouilly's letter and copy of the article in the Vanderbilt Law Review. Nothing in that article is persuasive to me that we should favor the Law Revision Commission's recommendation.

One of the greatest values of the UCC is uniformity of law applicable to commercial transactions. Uniformity is achieved by both the wording of the statute and the decisions of courts thereunder. One way of getting that value in one state is to have available the decisions of the courts of other states on the same statutory language. The decisions of courts of other states lose most, if not all, of their value in the event that they are on language different from that in the state whose law is to be applied to the transaction.

The function of the Permanent Editorial Board is to keep a watchful eye on the Code, to watch the trend of judicial decisions and to attempt, by means of amicus curiae briefs or other means, to prevent erroneous decisions. Where the need for amendment to the Code has been demonstrated, either by changing conditions or by the course of judicial decisions then the Permanent Editorial Board recommends amendments to the states. With a watch dog of this type, it seems to me that we should be as conservative as possible in tinkering with the language of the Code. Where, as here, the language is already clear there seems no excuse whatever for amending the language of the Code to attempt to make

SHEPPARD, MULLIN, RICHTER & HAMPTON

Kenneth G. McGilvray, Esquire

- 2 -

April 30, 1968

clear in the minds of few people what is already clear in the minds of most. I will stand on Harold Marsh's comments in his letter to you of April 22, 1968.

Cordially yours,



for SHEPPARD, MULLIN, RICHTER & HAMPTON

GRR:miw

cc: Robert L. Hunt, Esquire
John G. Eliot, Esquire
Professor Harold Marsh, Jr.
Professor William D. Warren
James M. Conners, Esquire
Maurice D. L. Fuller, Sr., Esquire
Kenneth M. Johnson, Esquire

All Members of the California Commission on Uniform State Laws

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May 2, 1968

Uniform Commercial Code
Section 4103

John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

I appreciate your courtesy in sending me your letter of April 26 and the enclosed copy of a law review article by Professor Bigham which I have read with considerable interest.

I have no real quarrel with his thesis but I am still of the opinion that the change in question together with any other changes suggested by Professor Bigham ought to be the result of action by the National Editorial Board for the Uniform Commercial Code. I think that California would lose something by deviating from uniformity in this particular situation.

Very truly yours,



Maurice D. L. Fuller, Sr.

cc: All Members of the Advisory Committee
of the Uniform Commercial Code

(10)

VANDERBILT UNIVERSITY



NASHVILLE, TENNESSEE 37203

TELEPHONE 254-5411 AREA 615

May 3, 1968

School of Law

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

Your letter of April 25, 1968, regarding my article in the Vanderbilt Law Review on the Burden of Proof and Presumption Problems under the Uniform Commercial Code was very much appreciated.

What the Permanent Editorial Board fails to realize is that defects in the Code text need not "be so wide as a door nor so deep as a well" cause a great deal of difficulty. In my judgement, the California revisions are good ones, and I commend your Commission and the legislature for making them.

Again let me thank you for your letter. You were very kind to write and to enclose the materials.

Yours very truly,

W. Harold Bigham
Associate Professor of Law

WHB:lam

(11)

KENNETH G. MCGILVRAY
E. L. MCGILVRAY

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MCGILVRAY AND MCGILVRAY
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AREA CODE 916
443-7417

May 3, 1968

Mr. John H. DeMouly, Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Dear Mr. DeMouly:

Enclosed are copies of communications received from
Maurice D. L. Fuller, Sr. and George Richter, in response
to my distribution of the Vanderbilt Law Review article
which you sent me.

As you can see, the committee is opposed to the proposed
amendment to Section 4103 of the Commercial Code at this
time.

I shall continue to keep you advised in this matter.

Very truly yours,

K. G. McGilvray
Kenneth G. McGilvray

KGM:mmm
Enclosures

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781-6161

May 6, 1968

John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMouilly:

I appreciate your having sent me a copy of the law review article by Professor Bigham which I have read with interest. However, it does not change my viewpoint of the proposed amendment to Section 4103 of the California Commercial Code.

I agree with Del Fuller, we should not move in this area until the National Editorial Board has made a recommendation.

Very truly yours,


John G. Eliot

JGE:mjr

CLASSIFIED BY: 60300
DATE: 11/11/01

Bank of America

NATIONAL TRUST AND SAVINGS ASSOCIATION

SAN FRANCISCO HEADQUARTERS

SAN FRANCISCO, CALIFORNIA 94120

KENNETH M. JOHNSON
VICE PRESIDENT AND COUNSEL

May 6, 1968

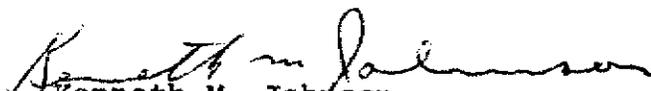
Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Uniform Commercial Code Section 4103

Dear Mr. DeMouilly:

Thank you very much for your letter of April 26 enclosing the Vanderbilt Law Review article by Professor Bigham. I am reading this with a great deal of interest and will let you have my conclusions within a short period of time.

Sincerely,


Kenneth M. Johnson

KMJ/akr

(14)



SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

May 7, 1968

Professor John H. DeMouilly
School of Law
Stanford University
Stanford, California 94305

Re: Uniform Commercial Code Section 4103

Dear John:

I have read the article by Professor Bigam which you enclosed with your letter of April 26 and I am in accord with the statements made by Del Fuller in his letter to you of May 2 regarding this matter.

Sincerely yours,

A handwritten signature in cursive script that reads "Harold Marsh, Jr.".

Harold Marsh, Jr.
Professor of Law

msl

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

COMMERCIAL CODE SECTION 4103

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

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.

NOTE

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.

TENTATIVE RECOMMENDATION OF THE CALIFORNIA
LAW REVISION COMMISSION

relating to

COMMERCIAL CODE SECTION 4103

The Evidence Code was enacted in 1965 upon recommendation of the Law Revision Commission. Resolution Chapter 130 of the Statutes of 1965 directs 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.¹ In 1967, the Commission submitted a recommendation relating to the changes needed in the Commercial Code² and, upon Commission recommendation, several changes were made at the 1967 session of the Legislature to conform the Commercial Code to the provisions of the Evidence Code.³ The 1967 recommendation proposed an amendment to Commercial Code Section 4103, but this section was not amended in the legislation enacted in 1967 because the Commission concluded that the section needed further study.

-
1. For a description of this project, see 8 Cal. Law Revision Comm'n Reports 1314 (1967).
 2. See Recommendation Relating to the Evidence Code: Number 3-- Commercial Code Revisions, 8 Cal. Law Revision Comm'n Reports 301 (1967).
 3. See Cal. Stats. 1967, Ch. 703.

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.

The phrase "prima facie constitutes" is of uncertain meaning and does not indicate the nature of the proof that must be produced by the party contesting the standards established by clearinghouse rules and the like or by general banking usage. The comments of the drafters of the Uniform Commercial Code, however, clearly indicate that the standards so established constitute the exercise of ordinary care unless the party contesting those standards establishes that the standards manifestly are unreasonable. Subdivision (3) should be revised to make this clear.

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

An act to amend Section 4103 of the Commercial Code, relating to bank deposits and collections.

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

Section 1. 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, 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 if the standards established by the clearinghouse rules and the like or by the general banking usage are not manifestly unreasonable .

(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 is amended to delete "prima facie" and to add "if the standards established by the clearinghouse rules and the like or by the general banking usage are not manifestly unreasonable." The added language is substantially the same as that used in the last clause of subdivision (1) of Section 4103 and in subdivision (3) of Commercial Code Section 1102.

Under Commercial Code Section 4103, if a bank proves that it has acted in accordance with standards established by clearinghouse rules and the like or by 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 the standards so established manifestly are unreasonable. The added language makes this clear and is consistent with the intent of the drafters of the Uniform Commercial Code. See Uniform Commercial Code Section 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."). See also the Comment to Uniform Commercial Code Section 1-102, construing similar language in subdivision (3) of that section: "However, the section also recognizes the prevailing practice of having agreements set forth standards by which due diligence is measured and explicitly provides that, in the absence of a showing that the standards manifestly are unreasonable, the agreement controls."

VANDERBILT LAW REVIEW

VOLUME 21

MARCH, 1968

NUMBER 2

Presumptions, Burden of Proof and the Uniform Commercial Code

W. Harold Bigham*

The Uniform Commercial Code uses the terms "prima facie" and "presumption" in different contexts and frequently without clearly indicating whether the terms are intended to affect the risk of non-persuasion or the burden of producing evidence. Professor Bigham discusses the ambiguous use of these terms and calls for clarification by amendment to the Code. He also suggests the probable intention of the drafters with respect to particular sections.

I. INTRODUCTION

The Uniform Commercial Code¹ represents an attempt to codify, to clarify and to improve the substantive law of commercial transactions.² Even a summary examination of the Code impresses one with the magnitude of this ambitious undertaking to reform so huge a body of substantive law. Inevitably, such a project must shade over into areas of adjective law and problems of proof. Whether through inadvertence or failure of the draftsmen to solicit the aid of persons whose expertise is outside the substantive law of commercial transactions, it is precisely at the points where substantive and procedural law meet in the Uniform Commercial Code that the most infelicitous results may very well have occurred.

The confluence of substantive law and procedural law is most turbulent in the area of presumptions and burden of proof.³ It is almost axiomatic that the burden of proof problem represents a

* Associate Professor of Law, Vanderbilt University School of Law.

1. Unless otherwise indicated, references to the UNIFORM COMMERCIAL CODE are to the 1962 Official Text with Comments.

2. Perhaps the best source of material regarding the background of the UNIFORM COMMERCIAL CODE is contained in Braucher, *The Legislative History of the Uniform Commercial Code*, 58 *COLUM. L. REV.* 798 (1958). See also Schnader, *The New Commercial Code: Modernizing Our Uniform Commercial Acts*, 36 *A.B.A.J.* 179 (1950).

3. There has, of course, been a plethora of legal writing dealing with the presumption and burden of proof problem. Some of the better works include: Causewitz, *Presumptions in a One-Rule World*, 5 *VAND. L. REV.* 324 (1952); McBaine, *Burden of Proof: Presumptions*, 2 *U.C.L.A.L. REV.* 13 (1954); Morgan, *Some Observations Concerning Presumptions*, 44 *HARV. L. REV.* 906 (1931); Roberts, *An Introduction to the Study of Presumptions*, 4 *VILL. L. REV.* 1 (1958).

"lamentable ambiguity of phrase and confusion of terminology;"⁴ furthermore, it has been said of both presumption and burden of proof that "presumption is the slipperiest of the family of legal terms, except its first cousin, 'burden of proof'."⁵ It is the thesis of this paper that in the area of commercial law the draftsmen of the Uniform Commercial Code have not only done very little to alleviate the ambiguous and slippery nature of the burden of proof and presumption problems; but, unhappily, new ambiguities and uncertainties have been injected as a result of a lack of proper attention to these procedural spectres which haunt the law.

The author disavows, *in limine*, any contention that the draftsmen of the Uniform Commercial Code were not cognizant of procedural problems, or that they did not in several areas attempt to deal specifically with the grant or deprivation of procedural advantage in pursuance of policy objectives. In like fashion, the author makes no claim for himself of any particular inspiration, divine or otherwise, concerning a new theory or technique for handling burden of proof and presumption problems. The author's presumptuous sally into this area is motivated by a feeling that the knowledge of substantive law is essential to a meaningful discussion of presumptions and burden of proof in the Code, and that, without doubt, the draftsmen could have done better in this area.

Although it is certainly true that the thesis of this paper, to the extent that it reflects a lack of satisfaction with the treatment of presumptions and burden of proof in the Code, is not a universally shared view,⁶ the results of a study by the California Law Revision Commission⁷ necessitated by the almost concurrent enactment of the California Evidence Code and the Uniform Commercial Code, demonstrated rather forcefully the ambiguities, interstices and lack of appreciation for the nature of the problem reflected in the Uniform Commercial Code. Indeed, California early found—as would most states—that the treatment of presumptions and burden of proof in the Code was not consonant with the pre-Code treatment of this problem, and that it would be a mistake to have one set of rules applying to commercial transactions and another to all other substantive law.⁸ Subsequently, after adoption of the California Evi-

4. 9 J. WIGMORE, EVIDENCE § 2485 (3d ed. 1940).

5. McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C.L. REV. 291, 295 (1927).

6. See, e.g., Note, *The Law of Evidence in the Uniform Commercial Code*, 1 GA. L. REV. 44 (1966).

7. See 6 CALIFORNIA LAW REVISION COMMISSION, REPORTS, RECOMMENDATIONS AND STUDIES 1009 (1964); 8 CALIFORNIA LAW REVISION COMMISSION, REPORTS, RECOMMENDATIONS AND STUDIES 303-13 (1966). See also California State Bar Committee, *The Uniform Commercial Code*, 37 CALIF. ST. B.J. 117 (1962).

8. "While California Law needs clarification and probably reform, the inconclusive

dence Code,⁹ which constituted essentially a reworking of the Uniform Rules of Evidence, several very material amendments were recommended for the Uniform Commercial Code for the purpose of clarifying the presumption and burden of proof rules and conforming the Commercial Code's treatment to that of the California Evidence Code.¹⁰

Only a few specific examples of the general problem introduced above will suffice to describe its dimensions. In the first place, the term "prima facie" is used in several instances in the Code, but not always in the same sense.¹¹ For example, it was the clear intent of the draftsmen, by the utilization of "prima facie" in at least one section (2-719(3)), to affect the burden of proof (risk of non-persuasion). A concomitant of the "prima facie" difficulty is the fact that in several instances¹² the Official Comments of the Code suggest the creation of a rebuttable presumption where it is at least questionable that the statute itself creates one. Furthermore, to exacerbate the problem, the Comments quite frequently suggest that the presumption created has a different procedural effect from that which results from essentially similar language in another section or Official Comment. In many instances where it is intended to create rebuttable presumptions, it is impossible to tell whether the presumption affects the risk of non-persuasion ("burden of proof") or the burden of going forward with the evidence ("burden of pro-

Code provision would accomplish neither. Further, it would be unwise for one law of presumptions to apply generally and another to apply under the Code, especially when Code and non-Code issues might often be intermingled in a single lawsuit." California State Bar Committee, *The Uniform Commercial Code*, 37 CALIF. ST. B.J. 117, 131-32 (1962).

9. CAL. EVID. CODE § 101 (1967).

10. The amendments represent primarily a classification of presumptions according to whether they affect the risk of non-persuasion or the burden of producing evidence. For example, § 1-201(31) defines the term "presumption," but a new section, 1-209, has been recommended by the California Law Revision Commission clarifying the effect of presumptions: "except as otherwise provided in sections 1-202 and 4-103, the presumptions established by this code are presumptions affecting the burden of producing evidence." The other amendments are similarly designed to make clear that certain presumptions created by the Commercial Code either affect the burden of proof in the sense of risk of non-persuasion or in the sense of the burden of producing evidence. The text of the suggested amendments are contained in 8 CALIFORNIA LAW REVISION COMMISSION, REPORTS, RECOMMENDATIONS AND STUDIES 307-13 (1966).

11. See text accompanying notes 35 & 36 *infra*.

12. See, e.g., UNIFORM COMMERCIAL CODE § 2-313, Comment 6. "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 distinction in the Uniform Rules of Evidence 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." 8 CALIFORNIA LAW REVISION COMMISSION, REPORTS, RECOMMENDATIONS AND STUDIES 308 n.1 (1966).

ducing evidence").¹³ This is at least in part attributable to the ambiguous and incomplete definition of the term "presumption" given in section 1-201(31) of the Uniform Commercial Code.

II. PRESUMPTIONS AND BURDEN OF PROOF--THE CONTEXT OF THE PROBLEM

At least since the publication of Professor Thayer's treatise¹⁴ in 1898 there has been almost continuous turmoil regarding the purpose and function of presumptions and burdens of proof. It is perhaps more accurate to state that the real dissension is about the effect of a rebuttable presumption, for, after all, an irrebuttable presumption, or conclusive presumption, is a rule of substantive law, presenting no particular problem.

At the risk of oversimplification, the positions on the issues involved may be stated briefly as follows.¹⁵ The first view is that a presumption is a preliminary assumption of fact that disappears from the case upon the introduction of evidence sufficient to sustain the finding of the nonexistence of the presumed fact. This is the view espoused by Professors Thayer and Wigmore,¹⁶ by the American Law Institute's Model Code,¹⁷ and accepted by what is in all likelihood a majority of courts. Professor Thayer expressed it thus:

Many facts and groups of facts often recur, and when a body of men with a continuous tradition has carried on for some length of time, this process of reasoning upon facts that often repeat themselves, they cut short the process and lay down a rule. To such facts they affix, by a general declara-

13. Throughout this paper, unless otherwise indicated, "burden of proof" means the risk of non-persuasion.

14. J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE* (1898). Also a landmark in the dispute regarding the effect of presumptions in the burden of proof is Abbott, *Two Burdens of Proof*, 6 HARV. L. REV. 125 (1892).

15. For a very lucid and succinct exposition of the problems, see C. McCORMICK, *EVIDENCE* §§ 306-22 (1954).

16. 9 J. WIGMORE, *EVIDENCE* § 2490 (3d ed. 1940).

17. MODEL CODE OF EVIDENCE rule 704(2) (1942). The introductory note to the chapter on presumptions in the MODEL CODE OF EVIDENCE suggests that there have been at least 8 views as to the procedural effect of presumptions. The American Law Institute concludes that: "Presumptions must be classified, and each class must be given an effect commensurate with the strength of the reasons which induced its creation. This calls for an almost impossible performance. Each of the . . . presumptions heretofore recognized by the courts would have to be carefully studied and assigned its proper class; and provision would have to be made for an arbitrary assignment of presumptions created hereafter and not judicially or legislatively classified when created. The cure would probably be as bad as, if not worse than, the disease. A simple solution must be sought even though it may not be as rational as a complicated one." *Id.* at 312. It is, of course, the contention of the author that the presumptions contained in the UNIFORM COMMERCIAL CODE are not so numerous as to make the task of classification impossible. Already the California Law Revision Commission has, it seems, shown the way.

tion, the character and operation which common experience has assigned to them.¹⁸

Arrayed on the other side are Professors Morgan¹⁹ and McCormick,²⁰ as well as others less distinguished. It is their position that a presumption should shift the burden of proof to the adverse party, since presumptions are created for reasons of policy. They reason that if the policy underlying a presumption is of sufficient weight to require a finding of the presumed fact when there is no contrary evidence, it should be of sufficient weight to require a finding when the mind of the trier of fact is in equilibrium, and, a fortiori, it should be of sufficient weight to require a finding if the trier of fact does not believe the contrary evidence. Of course, the "burden of proof," of which the Morgan-McCormick disciples speak is the "risk of non-persuasion," or as the Model Code of Evidence defines it, "the burden which is discharged when the tribunal which is to determine the existence or non-existence of a fact is persuaded by sufficient evidence to find that the fact exists."²¹ It should be noted at this point that the Uniform Rules of Evidence use the term "burden of proof" rather than the burden of persuasion.²² Both the Model Code and the Uniform Rules²³ use the term "burden of producing evidence" to describe the obligation of one party to adduce sufficient evidence to avoid a directed verdict in a jury case, i.e., what is traditionally thought of as a "prima facie" case.

Professor Bohlen²⁴ suggested that there is a third view to the question of the effect of rebuttable presumptions on the burden of proof. His position is that both the Thayer view and the Morgan view are correct in some instances, and that the vice of the positions is the polarity and intractability of them. As Professor Morgan has very aptly pointed out,²⁵ and as Bohlen confirmed, the fact is that presumptions are created for a variety of reasons, and no single theory or rationale of presumptions can deal adequately with all of them. An acceptance of this view would result in the classification of rebuttable presumptions as (1) affecting the burden of producing evidence, or (2) presumptions affecting the burden of proof. The

18. THAYER, *supra* note 14, at 326.

19. E. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 33 (1957).

20. C. MCCORMICK, *EVIDENCE* §§ 306-11 (1954).

21. MODEL CODE OF EVIDENCE rule 1(3) (1942).

22. UNIFORM RULES OF EVIDENCE 1(4).

23. MODEL CODE OF EVIDENCE rule 1(2) (1942); UNIFORM RULES OF EVIDENCE 1(5).

24. Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920).

25. See, e.g., E. MORGAN, J. MAGUIRE & J. WEINSTEIN, *CASES AND MATERIALS ON EVIDENCE* 440 (4th ed. 1957).

categorization would have to abide analysis of the policy reasons for the creation of the presumption in the first instance.

Along the lines of the Bohlen suggestion, the Uniform Rules of Evidence classify presumptions based on whether there is an underlying inference supporting the presumption.²⁶ Under the Uniform Rules, presumptions based on an underlying inference affect the burden of proof—the risk of non-persuasion; presumptions not so based affect the burden of producing evidence. The soundness of this view has been not only questioned, but also rejected in California.²⁷ It is argued that the Uniform Rules of Evidence were moving in the right direction in attempting a classification of presumptions according to their effect, but that it is wrong to base the classification on whether there is an underlying inference supporting it. The California Law Revision Commission has pointed out:

Thus, a presumption affecting the burden of proof is most needed when the logical inference supporting the presumption is weak or nonexistent but the public policy underlying the presumption is strong. Because the URE fails to provide for presumptions affecting the burden of proof at precisely the point where they are most needed, the Commission has disapproved URE Rules 14-16 and has substituted for them proposed statutes classifying presumptions according to the nature of the policy considerations upon which the presumptions appeared to be based.²⁸

As Professor Morgan has pointed out, "[t]here are myriads of situations in which the courts declare that the establishment of the basic fact requires the assumption of the existence of the presumed fact and unless and until certain conditions are fulfilled."²⁹ Hence, it may be that in view of the varying circumstances which call for the existence or creation of a presumption, that the preceding sentence represents about as good a definition as one can devise. However that may be, it is true that commercial law represents a body of substantive law where untold situations call for policy decisions concerning which party to the commercial contract will bear the burden of producing evidence of a fact. More often than not goods and/or instruments move under circumstances which are beyond the control and knowledge of either party to subsequent litigation. Again, in many instances, the permissibility of the conduct of one party to a commercial transaction may rest largely upon a subjective state of mind with which he has made a decision or which motivated certain acts on his part. Although the presumption itself is designed to alleviate

26. See UNIFORM RULE OF EVIDENCE 14-16; cf. F. BOHLEN, *STUDIES IN THE LAW OF TORTS* 651 (1926).

27. 6 CALIFORNIA LAW REVISION COMMISSION, *REPORTS, RECOMMENDATIONS AND STUDIES* 1017 (1964).

28. *Id.* at 1017-18.

29. MORGAN, MACUIRE & WEINSTEIN, *supra* note 25, at 441.

the exquisitely difficult problem of production of evidence in such cases, a perfect scheme is entirely too much to hope for; nevertheless, the Code treatment of the problem could be improved.³⁰

III. THE CODE'S TREATMENT OF PRESUMPTIONS AND BURDEN OF PROOF

A. Code Definitions

The Uniform Commercial Code definition of presumption in section 1-201(31) is both incomplete and ambiguous. A comparison with Rule 13 of the Uniform Rules of Evidence and with Rule 704(1) of the Model Code of Evidence will demonstrate the origin of the Code definition:

A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.³¹

(1) . . . [W]hen the basic fact of a presumption has been established in an action, the existence of the presumed fact must be assumed unless and until evidence has been introduced which would support a finding of its non-existence. . . . (Emphasis added).³²

(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. (Emphasis added).³³

The Code definition is incomplete because it fails to give any instruction as to how it is to be dealt with once it is "rebutted," i.e., its effect. Having served its purpose of evoking the requisite contrary evidence, should the presumption be disregarded and not mentioned in the instructions to the jury?³⁴ The Thayer-Wigmore followers would answer this question in the affirmative; but surely there are instances where the underlying policy of the Uniform Commercial Code calls for the use of presumptions to shift the "risk of non-persuasion," rather than merely to shift the burden of producing evidence. Just as surely the draftsmen of the Code did not intend to create an area of discretion in which those construing the Code are free to divine

30. See generally Kinyon, *Actions on Commercial Paper: Holder's Procedural Advantages Under Article Three*, 65 MICH. L. REV. 1441 (1967); Note, *The Law of Evidence in the Uniform Commercial Code*, 1 GA. L. REV. 44 (1966).

31. UNIFORM RULE OF EVIDENCE 13.

32. MODEL CODE OF EVIDENCE rule 704 (1942).

33. UNIFORM COMMERCIAL CODE § 1-201(31).

34. On the question of whether the jury is to be told about presumptions, see *New York Life Ins. Co. v. Satcher*, 152 Fla. 411, 12 So. 2d 108 (1943); *Bryan v. Aetna Life Ins. Co.*, 174 Tenn. 602, 130 S.W.2d 85 (1939); *Hutton v. Martin*, 41 Wash. 2d 780, 252 P.2d 561 (1953). See also Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71 (1940); McBaine, *Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519 (1938).

the legislative purpose of the section according to their own preconceived notions of the law of evidence. Such is not likely to result in view of the underlying policy in favor of uniform interpretation of Code sections where in fact underlying policy may well be paramount.

Although "prima facie" is used in several places in the Code, it is not defined in the definition section, 1-201, or elsewhere in the statute. Section 1-202 provides that certain documents in due form purporting to be those 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. Apparently, insofar as section 1-202 establishes a presumption of the authenticity and genuineness of the document, it was intended as a preliminary assumption sufficient to support a finding in the absence of contrary evidence.

Such a decision as to the meaning of "prima facie" here is complicated, however, by the Code definition of "presumption" and the lack of guidance as to its effect. It is at least arguable that "presumption" would have been used in section 1-202 if the intent had been to create a rebuttable presumption affecting only the burden of producing evidence and that, therefore, the risk of non-persuasion was intended to be affected. This theory is in turn supported by language in the Comments suggesting that the "section is designed to supply judicial recognition for documents which have traditionally been relied upon as trustworthy by commercial men."³⁵

Equally unsatisfactory and confusing is the treatment accorded "prima facie" in sections 4-103 and 4-201. Subdivision (3) of section 4-103, 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 clearing house rules and the like or with a general banking usage not disapproved by this Article, prima facie constitutes the exercise of ordinary care.

That a rebuttable presumption of some kind is intended seems obvious. Whether the presumption is strong enough to affect the risk of non-persuasion is much less clear. The Comments, however, suggest, at least, that the intent of the drafters was to create a presumption affecting the burden of proof:

The prima facie rule does, however, impose on the party contesting the

35. UNIFORM COMMERCIAL CODE § 1-202, Comment 1. In addition, §§ 1-102(1) & (2)(c) state: "(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies. (2) Underlying purposes and policies of this act are . . . (c) to make uniform the law among the various jurisdictions."

standards to establish that they are unreasonable, arbitrary or unfair.³⁶

Militating against the conclusion that section 4-103 creates a presumption shifting the risk of non-persuasion to one challenging the fairness of clearinghouse rules or general banking usage, is the apparently variant treatment of "prima facie" in section 1-202 considered above.

Discussion of another Code section which does not even mention the term will further demonstrate how difficult is the task of untying the Gordian knot which is the Code treatment of "prima facie." Section 4-201 provides that, "unless a contrary intent clearly appears," a bank is an agent of the owner of any item, and any settlement given is provisional. A rebuttable presumption affecting burden of proof must be intended. The Comments confirm this unequivocally, but it is repeatedly there referred to as a "prima facie rule of agency."³⁷

Finally, lest one hasten to the conclusion from examining the above mentioned sections that a rebuttable presumption affecting the risk of non-persuasion was intended to be the result of using the expression "prima facie," section 3-115 should be considered. This section is concerned with the filling in of incomplete negotiable instruments in general and with the question of unauthorized completion in particular. The draftsmen make it clear that, consistent with the definition of "burden of establishing"³⁸ in section 1-201(8), the pre-

36. UNIFORM COMMERCIAL CODE § 4-103, Comment 4. This should be contrasted however with the preceding sentence which states: "However, the phrase in the absence of special instructions affords owners of items an opportunity to prescribe other standards and where there may be no direct supervision or control of clearinghouses or banking usages by official supervisory authorities, the confirmation of ordinary care by compliance with these standards is *prima facie* only, thus conferring on the courts the ultimate power to determine ordinary care in any case where it should appear desirable to do so."

37. UNIFORM COMMERCIAL CODE § 4-201, Comment 2, states that "[w]ithin this general rule of broad coverage, the first two sentences of subsection (1) state a rule of status in terms of a strong presumption. 'Unless a contrary intent clearly appears' the status of a collecting bank is that of an agent or sub-agent for the owner of the item." The following paragraph of this Comment states that "a contrary intent can rebut the presumption but this must be clear." Both Comments 3 and 4, however, speak of the agency status as being a *prima facie* one. For a recent case discussing this presumption, see *Pazol v. Citizens Nat'l Bank of Sandy Springs*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

38. Apparently "burden of establishing" was deliberately used in order to avoid the use of the term "burden of proof," since the latter might have a tendency to confuse the question of who has the burden of first producing evidence of a fact with the question of who has the burden of ultimate persuasion. The confusion exists regardless of the term used, and the use of euphemisms or synonyms is hardly a panacea. The extremes to which this kind of thinking can be extended are demonstrated by the fact that in § 3-307(3), the term "shown" is used in lieu of "burden of proof" or "burden of establishing." Thus one is forced to dig through layers of meaning to divine the intention of the draftsmen, only to be disappointed, of course, by finding

sumption of authorized completion affects the burden of proof (risk of non-persuasion). The contrast made by the Comment to section 3-115 between what was intended in the Code and the N.I.L. treatment of the same question is startling, to put it mildly:

The language on burden of establishing unauthorized completion is substituted for the "prima facie authority" of the original section 14. It follows the generally accepted rule that the full burden of proof by a preponderance of the evidence is upon the party attacking the completed instrument.³⁹

B. Analysis According to Underlying Policy

Despite what has been said, in most cases the intent of the drafters of the Commercial Code is not too difficult to discern, *provided* that attention is given to the substantive policy obviously sought to be subserved. Unhappily, the still prevalent unfamiliarity with the Code on the part of the bench and bar, and the difficulties presented by the Code treatment of presumptions and burdens of proof may produce an unenviable record of judicial interpretation with results which are neither uniform nor in accord with legislative purpose.

Some organization of the subject of presumptions and burden of proof in the Code must be suggested and some analysis must be made concerning the proper effect of the Code's rebuttable presumptions. Such an analysis should consider the policy to be served by the Code generally and by the particular provision, the degree of probability of the existence of the presumed fact, the accessibility of evidence, and any other evidence which may reveal the reason for the presumption. We begin first with those sections creating presumptions⁴⁰ where the drafters clearly intended to affect the burden of proof or where, although unclear, judicious construction of the Code calls for treating the presumption as being one affecting the risk of non-persuasion.

C. Presumptions Affecting Burden of Risk of Non-Persuasion

Acceleration clauses in security agreements, promissory notes and even sales contracts are common devices used by a party obligee as: (1) an *in terrorem* clause to motivate performance, (2) a method to proceed against the obligor before his situation deteriorates further,

that what was meant was in fact "burden of proof," but still without a guide as to whether the risk of non-persuasion or the mere burden of going forward with the evidence is involved.

39. UNIFORM COMMERCIAL CODE § 3-115, Comment 6.

40. Unless otherwise indicated, all presumptions discussed hereinafter are rebuttable presumptions, and not rules of law masquerading under the title of irrebuttable presumption.

and, (3) an excuse for his refusal of continued prejudicial change of position (usually performance). The Uniform Commercial Code recognizes that such clauses serve valid economic objectives, but also that they are subject to abuse. It is the handling of the latter problem with which we are concerned. Section 1-208 provides:

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral 'at will' or 'when he deems himself insecure' or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

Obviously, it was intended to cast upon the obligor the burden of persuading the triers of fact that the existence of the fact (lack of good faith) is more probable than its non-existence. It is undeniably true that the defendant obligor's burden is a very heavy one. Subjective intent is elusive indeed, and the obligor has the burden of establishing the negative because the obligee might not otherwise be able to prove the affirmative, *i.e.*, the existence of good faith. Does it therefore follow that the obligee may simply, *ipse dixit*, declare himself "insecure" and accelerate, with nothing more? If so, the section almost creates an irrebuttable presumption.

The Kentucky Court of Appeals recently encountered this problem in *Fort Knox Nat'l Bank v. Gustafson*,⁴¹ which involved an attempted acceleration of the maturity date of a note secured by a security interest in a mobile diner. The note permitted acceleration if the "holder felt insecure." In discussing the proof of good faith, the court stated:

We construe the latter provision [definition of "burden of establishing" in section 1-201(8)] as requiring the submission to the jury of the issue of good faith *unless the evidence relating to it is no more than a scintilla, or lacks probative value having fitness to induce conviction in the minds of reasonable men.* (Emphasis added).

Whether one finds the court's wording intellectually satisfying or not, it is hard to find fault in its conclusion that the "basic fact" of the presumption is *not* the mere act of attempted acceleration. It is rather the act *plus* some amount of evidence regarding circumstances supporting the alleged feeling of insecurity from which the trier of fact could conclude that good faith was the motivating factor. Such construction in no way emasculates the "whip hand" given the obligee, and it does give some protection to the obligor who is all but defenseless.

The Uniform Commercial Code distinguishes between an attempt

41. 385 S.W.2d 196, 200 (Ky. 1964).

to *disclaim*⁴² a warranty in connection with a sales contract and an effort to *limit* the remedies for breach which might otherwise accrue as a result of the presence of the warranty. Section 2-719(3) provides:

Consequential damages may be limited or excluded unless the limitation 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.

We have already seen that the treatment of "prima facie" in the Code is something less than satisfactory. There are severe problems presented by 2-719(3),⁴³ but whether it creates a presumption affecting the burden of proof should not be one of them. The clear trend in the extremely volatile area of products liability law is toward manufacturer and distributor accountability for defective or dangerous goods placed on the market. Indeed, perhaps the Code, by allowing limitation of consequential damages, is not so restrictive toward the prospective defendant-manufacturer as is the developing tort law—this seems particularly so if the consumer's "injury" is only economic. However, the draftsmen have made the section consistent with the policy of products liability law by apparently placing the risk of non-persuasion on the defendant-manufacturer.

How shall (or should) the "prima facie" unconscionability created in section 2-719(3) work in practice? Having cast upon him who attempts to limit consequential damages in this context the burden of establishing by a preponderance of the evidence that such limitation is conscionable, what must he show to bear his burden? The controversial unconscionability provision of the UCC is apposite here, specifically section 2-302(2):⁴⁴

When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.⁴⁵

Under section 2-719(3) it seems that any argument which would

42. UNIFORM COMMERCIAL CODE § 2-316 sets forth the rules for disclaiming the warranty itself.

43. For an excellent comparison of the provisions of § 2-316 dealing with disclaimer of warranty and those of § 2-719 dealing with limitation of liability, see R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 7.03[2] (1966).

44. For a delightful and exhaustive treatment of the unconscionability provision of the Code, see Leff, *Unconscionability and the Code—the Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

45. It should be pointed out that the unconscionability provision of the UNIFORM COMMERCIAL CODE, § 2-302, requires the court to make the finding of unconscionability. Much of the criticism of the section reflects a fear that a runaway jury might rely on hindsight to relieve a party from a contract which has become unprofitable

bar recovery of consequential damages for personal injury from consumer goods would fail unless the seller presents evidence of the "commercial setting, purpose and effect." Consumer protection from personal injury is a laudable, supportable end. The use of the novel unconscionability concept of the Code, wedded to the rebuttable presumption affecting burden of proof, is a reasonable way to obtain it. The seller is in a much better position to know and to be able to prove the "commercial setting, purpose and effect."

D. Presumptions by Implication

There are at least three Commercial Code sections which clearly, albeit inferentially, create rebuttable presumptions.⁴⁶ Particularly interesting is the fact that, in the case of all three, 2-202, 2-720 and 7-403, the presumption is of a character requiring the party against whom it operates not merely to introduce sufficient evidence to create an issue as to the non-existence of the presumed fact for the trier of fact, but to establish its non-existence by a preponderance of the evidence.

The parol evidence rule, which is, of course, a rule of substantive law, forbids the admission of evidence to contradict or vary the terms or to enlarge or diminish the obligation of a written instrument or deed, except upon grounds of fraud, accident or mistake.⁴⁷ Section

for him, even though at the time of its making the parties to it were on a parity with respect to their knowledge of what might occur in the future. Even under pre-Code law provisions excluding consequential damages have been enforced as law matters of course. See, e.g., *Graves Ice Cream Co. v. Rudolph W. Wurlitzer Co.*, 267 Ky. 1, 100 S.W.2d 819 (1937); *Despatch Oven Co. v. Rauenhorst*, 229 Minn. 436, 40 N.W.2d 73 (1949); *Associated Spinners, Inc. v. Massachusetts Textile Co.*, 75 N.Y.S.2d 263 (1947); *Crandall Eng'r Co. v. Winslow Marine Ry. & Ship Bldg. Co.*, 188 Wash. 1, 61 P.2d 136 (1936). Courts have been loathe to find limitations of liability or disclaimers of warranty absent clear contractual language to that effect. See Note, *Provisions in Contract for Sale Affecting the Remedies of the Buyer for Breach of Warranty*, 28 COLUM. L. REV. 466 (1928).

46. Under the UNIFORM SALES ACT, §§ 14 & 16, a sale by sample or description created a warranty of merchantability, but this was an implied warranty. Section 2-313 of the UNIFORM COMMERCIAL CODE creates an express warranty where there is a sale by sample or description. The section itself says nothing about any presumption, but Comment 6, in discussing a sale where a sample is used, states that "in general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain." On the surface this would appear to be an irrebuttable presumption, and therefore a rule of law; but the remainder of Comment 6 suggests that it is capable of being rebutted. If it is rebuttable, it would almost certainly be a presumption affecting the risk of non-persuasion. Any other interpretation of it would emasculate the treatment of the sale by sample or description as being one creating an express warranty. Compare UNIFORM COMMERCIAL CODE § 9-308(4) which creates an apparently illogical irrebuttable presumption regarding cash proceeds. In this connection see, G. CALMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 45.9 (1965).

47. See, e.g., *C. McCORMICK, EVIDENCE* §§ 210-22 (1954).

2-202 of the Commercial Code "loosens up" the parol evidence rule by abolishing the pre-Code presumption that a writing (apparently complete) is a total integration, and by requiring the court to make a finding that the parties intended a total integration, before "consistent additional terms" (parol) are to be excluded. Section 2-202 states:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The Comments clearly reveal the policy involved, not only in abrogating the positive presumption of intended integration but also in establishing the negative presumption. The basis for the presumption is of course the high degree of probability of non-integration thought by the draftsmen to exist. This premise is, at best, a debatable one, but uniformity of interpretation and execution of legislative purpose dictate that the presumption be treated as one affecting the risk of non-persuasion. Noteworthy also is the fact that he who contends for integration must satisfy the court, for ultimately it is a question of law.⁴⁸

The Sales Article of the Code grants to both seller and buyer several different remedies in the event of breach. There is no "election of remedies" trap for the aggrieved party and the pursuing of one remedy does not preclude resort to an alternative or cumulative remedy in order to make the party whole. In the heat of the moment, however, the innocent party may make statements evidencing his intention to cancel, to rescind, to call it off and the like. Section 2-720 is designed to protect the wronged party by preserving all his remedies, including the seeking of damages, despite indiscreet and improvident statements he may make:

Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

Implicit in the section is the recognition that an aggrieved contracting party may deliberately choose to abandon all remedies save can-

⁴⁸ RESTATEMENT (SECOND) OF CONTRACTS § 229 (1932) treats the parol evidence rule as one of substantive law.

cellation or revocation of acceptance. However, in all probability, such a choice will rarely be made. For this reason, as well as for the clear policy of preserving to the complaining party *all* his remedies, the presumption should be treated as one affecting the burden of proof.⁴⁹

Section 7-403 of the Commercial Code deals in general with the obligation of an issuer-bailee who has issued a document of title to redeliver the goods upon demand by a holder of the document of title:

- (1) The bailee must deliver the goods to a person entitled under the document who complies with subsections (2) and (3), unless and to the extent that the bailee establishes any of the following:
 - (a) delivery of the goods to a person whose receipt was rightful as against the claimant;
 - (b) damage to or delay, loss or destruction of the goods for which the bailee is not liable [but the burden of establishing negligence in such cases is on the person entitled under the document];
 - (c) previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouseman's lawful termination of storage;
 - (d) the exercise by a seller of his right to stop delivery pursuant to the provisions of the Article on Sales (Section 2-705);
 - (e) a diversion, reconsignment or other disposition pursuant to the provisions of this Article (Section 7-303) or tariff regulating such right;
 - (f) release, satisfaction or any other fact affording a personal defense against the claimant;
 - (g) any other lawful excuse.

Strong factors of policy, including superior accessibility to the evidence compel the conclusion that a presumption affecting burden of proof was intended. Similar language—but less specific than here—in section 8 of the Uniform Warehouse Receipts Act was construed as superseding the common law rule that a bailee merely had the burden of coming forward with evidence sufficient to overcome the legal presumption of negligence.⁵⁰ “As to each of the seven defenses listed in section 7-403(1),” says Professor Braucher, “the bailee would seem to have the full burden of proof or risk of non-persuasion.”⁵¹

49. For a discussion of UNIFORM COMMERCIAL CODE § 2-720, see Anderson, *Repudiation of a Contract Under the Code*, 14 DEPAUL L. REV. 1 (1964). The Comment states: “This section is designed to safeguard a person holding a right of action from any unintentional loss of rights by the ill-advised use of such terms as ‘cancellation,’ ‘rescission,’ or the like. Once a party's rights have accrued they are not to be lightly impaired by concessions made in business decency and without intention to forego them. Therefore, unless the cancellation of a contract expressly declares that it is ‘without reservation of rights,’ or the like, it cannot be considered to be a renunciation under this section.”

50. *Denning Warehouse Co. v. Widener*, 172 F.2d 910 (10th Cir. 1949).

51. R. BRAUCHER, *DOCUMENTS OF TITLE UNDER THE UNIFORM COMMERCIAL CODE* § 3.41 (1958).

If negotiable documents of title are to pass as "couriers without luggage" in the channels of commerce, the transferees and holders must be insulated, insofar as it is feasible to do so, from the claims and equities of the bailee-issuer. This goes to the very heart of negotiability, and Professor Braucher is clearly correct in his analysis of the burden of proof to be borne by the bailee.

E. Presumptions Affecting Burden of Producing Evidence

There are nine sections of the Uniform Commercial Code which expressly create rebuttable presumptions affecting the burden of producing evidence.⁵² An examination of underlying policy, degree of probability of the existence of the presumed fact and accessibility to the evidence demonstrates that all of these considerations point toward a presumption affecting burden of producing evidence. Moreover, the definition of "presumption," incomplete and ambiguous though it may be, at worst suggests the type of presumption under discussion here. Concluding that it is quite possible that different courts would reach different results concerning the proper classification (i.e., the effect on burden of proof in both senses) of the Code presumptions, it is not surprising that the California Law Revision Commission has recommended that the presumptions created in these nine sections be classified as presumptions affecting the burden of producing evidence.⁵³

It may be argued that this result is unfortunate in view of the fact that most, if not all of the presumptions are premised on a high degree of probability of the existence (or non-existence) of the presumed fact. Even if this were in fact the basis for all the presumptions created in the nine sections involved, as we have already seen, a good case could be made for having the presumption affect only the burden of producing evidence. The party claiming that the improbable has occurred is already facing a difficult problem in attempting to create a triable issue for the finder of fact; to require him to establish the fact by a preponderance may be nearly impossible.

Three of the sections of the Code which create rebuttable presumptions—3-114, 3-304, and 3-503—involve the setting of arbitrary limits measuring the minimum time for reasonableness in which certain action may be taken. There are two bases underlying these presumptions: (1) it would be a waste of time and effort to permit unseemly wrangling over attempts to prove the essentially unproveable, at least within the range of reasonableness; and (2) though arbitrary,

52. These are §§ 3-114(3), 3-304(3)(c), 3-307(1)(b), 3-414(2), 3-416(4), 3-419(2), 3-503(2), 3-510, & 8-105(2)(b).

53. See 8 CALIFORNIA LAW REVISION COMMISSION, REPORTS, RECOMMENDATIONS AND STUDIES 309, 311 (1966).

it is preferable that the legislature establish time limits for the acts concerned, subject to a contrary showing by the party against whom the presumption works.

Other sections, exclusive of sections 3-307 and 8-105, involve situations where the underlying inference is strong and where there may be a lack of accessibility to evidence on the part of the one enjoying the benefits of the presumption. Once countervailing proof is introduced, it is appropriate that the presumption disappear.

Sections 3-307 and 8-105 warrant special consideration. These sections, worded almost identically, provide the presumption that a person is a holder in due course of negotiable instruments and investment securities. Section 3-307 reads:

(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.

It is immediately obvious that the Code treatment is different from that under the pre-Code law. Under N.I.L. section 59:

When it is shown that the title of any person who has negotiated the instrument is defective, the burden is on the holder to prove that he is some person other than whom he claims acquired the title in due course. . . .

It is to be noted "defective title" has been changed to "defense exists."

With regard to defenses of the maker arising after the negotiation of the instrument to the holder, the Code effects a change. Under the N.I.L., the presumption still acted in the holder's favor, and the burden of proof did not shift. That this will not be the result under the Uniform Commercial Code is confirmed by the recent decision of *United Securities Corp. v. Bruton*,⁵⁴ where the defense arose after negotiation to the plaintiff.

Under the Uniform Negotiable Instruments Law, "[e]very holder

54. 213 A.2d 897 (D.C. Mun. Ct. App. 1965).

is deemed prima facie to be a holder in due course.⁵⁵ When a maker under the N.I.L. pleaded that the plaintiff was not a holder in due course, the burden was on the one in possession to prove that he was a "holder," i.e., that he held title and the instrument was negotiated to him. The burden was then on the maker to establish defective title to prevent the holder from being a holder in due course. The burden of proof to establish fraud was met when the maker proved the fraud by a preponderance of the evidence. To satisfy this burden, the maker had to establish that the holder had not taken the instrument under such conditions, "that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."⁵⁶ If the maker failed in this respect, the holder was entitled to a judgment on the note without further proof than that necessary to make out a prima facie case. The majority of cases held that when the maker had established a defense by a preponderance of the evidence, the burden shifted to the holder to show that he was the holder in due course for value and without notice of an infirmity.⁵⁷

There are, of course, two types of defenses: those good against the holder in due course, and those which are not. Under section 3-307(3) of the Code, when it is shown that a defense of the latter type exists, the burden of establishing that he is the holder in due course falls upon the holder. Although the Comments in section 3-307 make it fairly clear that the defendant must establish by the preponderance of the evidence that a defense exists, the trend of the decisions seems to require the introduction of a lesser amount of evidence than a preponderance.⁵⁸ Indeed, the cases relying on UCC section 3-307(3) seem to hold that the maker need only introduce a quantity of evidence sufficiently strong for the maintenance of the action. It is small consolation to the holder that the defendant will ultimately be required to establish his defense by a preponderance of the evidence. The presumption is lost and if the holder does not produce evidence that he is a holder in due course the maker will be entitled to a directed verdict. If these decisions are correct, then

55. UNIFORM NEGOTIABLE INSTRUMENTS LAW § 59. See W. BRITTON, *BILLS AND NOTES* § 103 (2d ed. 1961).

56. UNIFORM NEGOTIABLE INSTRUMENTS LAW § 52(4).

57. See cases cited in W. BRITTON, *BILLS AND NOTES* § 104 (2d ed. 1961).

58. See, e.g., *Pitillo v. Demetry*, 145 S.E.2d 792 (Ga. App. 1965); *Korzenik v. Supreme Radio, Inc.*, 347 Mass. 309, 197 N.E.2d 702 (1964); *Unadilla Nat'l Bank v. McQueer*, 27 App. Div. 2d 778, 277 N.Y.S.2d 221 (1967); *Pugatch v. David's Jewelers*, 53 Misc. 2d 327, 278 N.Y.S.2d 759 (1967); *Peoples Bank of Aurora v. Haar*, 421 P.2d 817 (Okla. 1966); *Norman v. World Wide Distributors, Inc.*, 202 Pa. Super. 53, 195 A.2d 115 (1963); *Westring v. Cheyenne Nat'l Bank*, 393 P.2d 119 (Wyo. 1964). Compare, however, *Kinyon, Actions on Commercial Paper: Holder's Procedural Advantages Under Article 3*, 65 MICH. L. REV. 1441 (1967).

this is a fundamental change in the burden of proof requirement.

Such decisions are unfortunate, for they constitute an erosion of the rights of the holder in due course. There is some language in the Comments supporting these decisions,⁵⁹ and as regrettable as it may be, apparently the intent here was to create a rebuttable presumption affecting only the burden of producing evidence.

IV. CONCLUSION

The treatment by the Uniform Commercial Code of presumptions and burden of proof problems at many points presents a murky situation indeed. Much of the difficulty which may be expected will result from interpretation of the Code sections dealing with presumptions and burden of proof. This problem could be alleviated by amendments to the Code classifying the presumptions according to whether they affect the burden of proof in the sense of the risk of non-persuasion, or the burden of proof in the sense of the burden of producing evidence. In most instances, the underlying policy giving rise to the presumptions in the first place provides a reasonable and rational classification without too much difficulty. California's resolution of the problem seems eminently reasonable.

Difficulties presented by loose language in the Comments which is likely to be confusing could be corrected without difficulty. Clarification of the Comments is a task easy to perform, but convincing the legislatures of forty-nine states which have enacted the Code that they should make highly technical amendments necessary to clarify the presumption problem would be a most difficult task. However, in view of the change in substantive result which may obtain as a result of lack of uniformity in construction and interpretation, it is an effort which should be undertaken.

59. UNIFORM COMMERCIAL CODE § 3-307, Comments 1 & 3.