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Georgia Law Review

Volume 1
Number 1 *Number 1*

Article 8

10-1-1966

The Law of Evidence in the Uniform Commercial Code

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Recommended Citation

N/A, N/A (1966) "The Law of Evidence in the Uniform Commercial Code," *Georgia Law Review*: Vol. 1: No. 1, Article 8.
Available at: https://digitalcommons.law.uga.edu/glr/vol1/iss1/8

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NOTES

THE LAW OF EVIDENCE IN THE UNIFORM COMMERCIAL CODE

The Uniform Commercial Code (hereinafter the UCC), first proposed in 1951 by the American Law Institute and the National Conference of Commissioners on Uniform State Laws,[1] has been adopted by forty-eight jurisdictions.[2] While the main purpose of the UCC is to clarify, simplify, and uniformalize commercial law throughout the states,[3] it will also affect the law of evidence in several areas. Those changes which reflect the trend of modern evidentiary rules will enable the UCC to fulfill its main purpose. However, in some areas the evidentiary aspects of certain commercial problems have not been solved and such failure can, to an extent, hinder the objective of creating uniformity throughout the various jurisdictions.

The purpose of this note is to explore the areas of evidence law affected by the UCC, to show how UCC rules relate to pre-existing rules, and to interpret the probable effect of such UCC provisions upon the law of evidence. The various sections of the UCC treated will be discussed under the broad categories of presumptions, hearsay, authentication, and relevance.[4]

I. PRESUMPTIONS

The term "presumption" is undoubtedly one of the most confusing, ambiguous, and controversial terms in a legal vocabulary,[5] both in meaning

1 Report No. 1 of the Permanent Editorial Board for the Uniform Commercial Code (1962). Reprinted at BRAUCHER & SUTHERLAND, COMMERCIAL TRANSACTIONS vii (1964).

Unless otherwise noted, references to the UCC will be to the 1962 Official Text with Comments.

2 The UCC has recently been adopted by Delaware, Mississippi, South Carolina, Vermont, Florida and North Carolina. The effective dates are: Vermont and Florida, Jan. 1, 1967; Delaware and North Carolina, July 1, 1967; South Carolina, Jan. 1, 1968; Mississippi, April 1, 1968. Only four jurisdictions have not adopted the UCC; they are: Arizona, Idaho, Louisiana, and Puerto Rico. Legislation in Arizona and Idaho is expected in 1967. Early legislation in Louisiana is not expected although the Louisiana State Law Institute is studying the UCC. See 3 UCC REP. SERV. Release 5 (July 6, 1966).

3 See UCC § 1-102. In addition to promoting uniformity, clarification and simplicity, the UCC is intended to promote stability while allowing for evolutionary growth of commercial law. See Vold, *Construing the Uniform Commercial Code: Own Twin Keys: Uniformity and Growth*, 50 CORNELL L.Q. 49, 60-62 (1964).

4 The parol evidence rule, UCC § 2-202, and the various rules of construction, UCC §§ 1-205, 2-208, 2-317, 3-118, are not discussed in this Note since they are actually rules of substantive law and not germane to the procedural topics discussed herein. See MCCORMICK, EVIDENCE §§ 213-14 (1954).

5 *E.g.*, McCormick, *Charges on Presumptions and the Burden of Proof*, 5 N.C.L. REV. 291 (1927). Professor McCormick states: "One ventures the assertion that 'presumption'

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and effect. There is even disagreement as to whether a presumption is a rule of law or a rule of evidence.[6] However, a presumption is generally defined as a rule of law which draws a particular inference as to the existence of one fact, not actually known, arising from its usual connection with other particular facts which are known or proved.[7]

There are several classifications of presumptions which may create rather than abolish confusion. First, the term "conclusive presumption" is misleading and does not really belong in a treatment of evidence. Wigmore states that there cannot be such a thing as a conclusive presumption.[8] The term means that when fact A is proven, fact B is to be taken as true, and no dispute by the adverse party is allowed. In effect, this establishes a substantive rule of law and not a rule affecting the burden of persuasion or of producing evidence. It has been stated that such a presumption is the product of a process of evolution. An example of this process is the fact of long-continued possession of land. While this fact once conferred the benefit of a rebuttable presumption of a lost grant, it has led to the later rule that long time possession itself confers ownership.[9] Second, the term "presumption of fact" should be discarded from a discussion of presumptions because, properly speaking, there are no presumptions of fact, only presumptions of law.[10] When speaking of the mental process of drawing conclusions from evidence employing logic and experience, it is better to speak in terms of inferences. If the jury is at liberty to find an ultimate fact, this should be termed an inference, not a presumption. In the case of a presumption the law draws a conclusion from the pleadings and the evidence, whereas in the case of an inference the jury draws the conclusion.[11]

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is the slipperiest member of the family of legal terms, except its first cousin, burden of proof." *Id.* at 295.

6 That a presumption is a rule of law see Gausewitz, *Presumptions*, 40 MINN. L. REV. 391 (1956); McBaine, *Presumptions; Are They Evidence?*, 26 CALIF. L. REV. 519 (1938). That a presumption is a rule of evidence see Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920).

7 See Illinois Central R.R. v. ICC, 206 U.S. 441, 459 (1907); Lincoln v. French, 105 U.S. (15 Otto) 614, 617 (1881); Manning v. Insurance Co., 100 U.S. (10 Otto) 693, 698 (1879); Shepherd v. Midland Mut. Life Ins. Co., 152 Ohio St. 6, 87 N.E.2d 156, 161 (1949).

8 9 WIGMORE, EVIDENCE § 2492 (3d ed. 1940).

9 MCCORMICK, *op. cit. supra* note 4, § 308, at 640 n.2.

10 Ryan v. Metropolitan Life Ins. Co., 206 Minn. 562, 289 N.W. 557, 559 (1939) (dictum); 9 WIGMORE, *op. cit. supra* note 8, § 2491.

11 See Cogdell v. Wilmington & W.R. Co., 132 N.C. 852, 44 S.E. 618, 619 (1903).

> The presumption has a technical force or weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption; but, in the case of a mere inference, there is no technical force attached to it. The jury, in the case of an inference, are [*sic*] at liberty to find the ultimate fact one way or the other as they [*sic*] may be impressed by the testimony. In the one case the law draws a conclusion . . . and in the other case the jury draws it.

Ibid.

Third, the term "permissive presumption" is a rule of law which permits, but does not require one fact to be found from another fact or group of facts which might not justify the finding as a matter of pure logic.[12] This type of presumption has been used to describe a situation in which a group of facts is considered *sufficient* to warrant the desired inference. Here, then, presumption would be used much the same as the term "prima facie case."[13] One leading authority[14] has suggested that the term "permissive presumption" be used and incorporated into the family of presumptions since judicial usage follows this method and since both permissive and mandatory presumptions have the advantage of the true presumption: that of allowing the proponent to "get to the jury."[15] On the other hand, it has been suggested that the use of the term "permissive presumption" will simply add more doubt and confusion to an already muddled area.[16]

Finally, the mandatory presumption, or the typical legally rebuttable presumption, is the type which requires that the jury find the presumed fact or facts to be true in the absence of sufficient rebutting evidence. According to Wigmore[17] and the Uniform Rules of Evidence, this is the true presumption. Uniform Rule 13 provides:

> 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.[18]

Similarly, the UCC has adopted the mandatory definition of the term presumption. Section 1-201(31) of the UCC provides:

> "Presumption" or "presumed" means that the trier of fact *must* find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence.[19]

Therefore, when the term presumed or presumption is used under the UCC, the mandatory characteristics will attach, and, absent proof contrary to the presumed fact, a jury must find the presumed fact to be true; in other words, the party benefitting from the presumption will be entitled to a directed verdict.

The major problem in this area concerns the precise burden or obligation that should be imposed upon a party against whom the rebuttable presumption operates. Two main theories exist regarding the type of burden to be

12 Gausewitz, *supra* note 6, at 392.

13 See Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 178, 192-93 (1931).

14 McCormick, *supra* note 5, at 297.

15 MCCORMICK, *op. cit. supra* note 4, § 308 at 640-41.

16 Brosman, *supra* note 13, at 193 n.176.

17 See 9 WIGMORE, *op. cit. supra* note 8, § 2490.

18 UNIFORM RULE OF EVIDENCE 13.

19 UCC § 1-201(31). (Emphasis added.)

placed on a party against whom a presumption operates and these theories differ in both procedure and effect.

The first theory, advocated by Thayer,[20] is that the sole effect of a presumption is to fix the *burden of producing evidence* on the party against whom it operates. This would require introduction of evidence sufficient only to avoid a directed verdict; so the presumption would vanish on the introduction of any evidence which, if believed, would support a verdict contrary to the presumption. It is not necessary that the jury actually believe the evidence, but only that the evidence be sufficient, if believed, to defeat the presumption. Under this view, therefore, the presumption is solely within the control of the trial judge. If no evidence is introduced to rebut the potential presumption, the judge will direct the jury to find the presumed fact if the basic fact is proved. If the requisite quantum of rebutting evidence is introduced, the case will be treated as though no presumption ever existed. Wigmore adopted this view[21] and many courts began to follow this approach. The Thayer-Wigmore view provided a clear analysis in an area which had been in a state of great confusion.

However, as early as 1920 several authorities began to feel that the Thayer-Wigmore approach was not completely in accord with the reasons behind the creation of presumptions.[22] They criticized this approach for giving too little vitality to rebuttable presumptions, thereby allowing a presumption to be defeated if a witness merely introduces evidence which a jury would not believe but which might, nevertheless, defeat a presumption. Certainly if strong reasons called the presumption into existence, it should not be considered so weak that it will be defeated by a mere recital of words. Professors Morgan and Maguire[23] have taken this second view, advocating the theory that a presumption should not only shift the burden of producing evidence but should also shift the burden of persuasion. Thus a presumption could not be so easily defeated, but would stand until the jury is persuaded that the presumed fact is more likely not to exist than to exist. Thus the trial judge would charge a jury that the presumption stands unless it is persuaded to the contrary.[24] According to Morgan, this sort of instruction is more valuable in that it is less confusing to a jury. At the same time such a rule gives vitality to presumptions, an element which is

20 THAYER, A PRELIMINARY TREATISE ON EVIDENCE 513-89 (1898); *accord*, McIver v. Schwartz, 50 R.I. 68, 145 Atl. 101 (1929).

21 9 WIGMORE, *op. cit. supra* note 8, § 2491.

22 See Bohlen, *supra* note 6.

23 See Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 923-24 (1931).

24 For cases approving the practice of instructing the jury on presumptions, see Hamilton v. Southern Ry., 162 F.2d 884, 888 (4th Cir. 1947); Wellisch v. John Hancock Mut. Life Ins. Co., 293 N.Y. 178, 56 N.E.2d 540, 542 (1944); Karp v. Herder, 181 Wash. 583, 44 P.2d 808, 810 (1935).

lacking under the Thayer-Wigmore approach. Of course, some presumptions should be entitled to more weight than others, and Morgan has suggested that presumptions and their resultant burden be classified according to the reasons for their creation.[25] Presumptions are usually based on strong probability, accessibility to the evidence, or social policy, and generally for such reasons the courts should require a contrary showing by a preponderance of the total evidence before the presumptions are defeated.

A clear example of the differing views on presumptions appears in a comparison of the approaches taken by the American Law Institute's Model Code of Evidence[26] and the later Uniform Rules of Evidence. Although the drafters of the Model Code were Professors Morgan and Maguire, their suggestions were defeated by a vote of 59 to 42 and the Model Code adopted the Thayer-Wigmore approach to the effect of a presumption. Rule 704 provides as follows:

> (1) Subject to rule 703, when 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 or the basic fact of an inconsistent presumption has been established.
>
> (2) Subject to rule 703, when the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact or the basic fact of an inconsistent presumption has been established, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action.[27]

In this manner the Model Code adopts the Thayer-Wigmore view that the sole effect of a presumption is to put on the party against whom it operates the burden of producing evidence. Such presumptions will be completely in the hands of the judge and the application of the rule will be simple.[28]

However, the Uniform Rules[29] have rejected the Model Code approach and have adopted the Morgan-Maguire view that a presumption should affect both the burden of persuasion and the burden of producing evidence. Rule 14 on the effect of presumptions provides:

> Subject to Rule 16, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption

25 Morgan, *supra* note 23.

26 ALI, MODEL CODE OF EVIDENCE (1942).

27 MODEL CODE OF EVIDENCE rule 704 (1942). (Emphasis added.)

28 Comment on Paragraph (2)(b) MODEL CODE OF EVIDENCE rule 704 (1942).

29 UNIFORM RULE OF EVIDENCE 14, Comm'r's Note.

> continues to exist and the burden of *establishing* the non-existence of the presumed fact is upon the party against whom the presumption operates, (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the non-existence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.[30]

Thus, under the Uniform Rules, as long as there is some probative connection between the basic facts and the presumed facts, the party against whom the presumption operates will bear not only the burden of producing evidence but also the burden of persuasion. The reason for adopting this middle-of-the-road approach rather than the stronger rule that all presumptions, even those with no probative connection between basic and presumed facts, affect the burden of persuasion would appear to lie in the drafter's fear of constitutional objections.[31]

These two theories give a useful frame of reference in evaluating the approach taken by the UCC. The last clause of section 1-201(31) of the UCC defining presumptions states that presumptions will stand "unless and until evidence is *introduced* which would support a finding of its non-existence." This indicates that the UCC has adopted the Thayer-Wigmore approach to presumptions. The language used is quite similar to that in the Model Code.[32]

Thus, a presumption under the UCC will place only the burden of producing evidence on the party against whom the burden operates. The result is that no matter how strong the probabilities or policy behind the creation of a UCC presumption, a mere recital by a party of facts which, if believed by the jury, could create a triable issue, will defeat the presumption. This is an unfortunate result. It would appear that since most UCC presumptions are based on the high probabilities of their being true, the heavier burden, *i.e.*, the burden of persuasion, should be placed on the person against whom the burden operates. The party who is claiming that the improbable has occurred and who generally has better access to the evidence should bear the burden of showing the fact by a preponderance of the total evidence.

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30 UNIFORM RULE OF EVIDENCE 14. (Emphasis added.)

31 That the stronger rule might violate due process, see Tot v. United States, 319 U.S. 463, 467 (1943); Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35, 42 (1910); Gausewitz, *supra* note 6, at 411.

32 See 1 NEW YORK LAW REVISION COMM. FOR 1955, REPORT ON THE STUDY OF THE UNIFORM COMMERCIAL CODE 285 (1955).

However, by contrast, the term "burden of establishing" has a strong meaning under the UCC. Section 1-201(8) defines this term as follows:

> "Burden of establishing" a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.

Thus a party given the "burden of establishing" under the UCC must show by a preponderance of the evidence that a presumed fact is or is not true. When this term is used under the UCC it will require that quantum of evidence which Morgan feels should follow a presumption.

Presumptions Under Article 3

Generally, the presumptions created in this article are clarifications and rewordings of law under the Negotiable Instruments Law.[33] Although the UCC speaks in terms of presumptions, and the NIL in terms of "deemed prima facie," there is little difference in the type of presumption created. The drafters of the NIL could have chosen a less ambiguous term, or could have provided a definition of "prima facie" as used under that act. It would seem, however, that any rule of law that requires the assumption of one fact from the establishment of another is a presumption, regardless of the language used. A legislature is likely to create a presumption in terms such as "shall be prima facie evidence" or "shall be presumptive evidence" rather than "there shall be a presumption that." In the main such statutes receive similar interpretation, *i.e.*, as mandatory presumptions.[34] One prominent authority on the NIL has stated that:

> These presumptions are merely prima facie and are not absolute or conclusive and must be received with caution, sometimes being entitled to considerable weight and sometimes to very little; generally their chief importance is to determine the burden or order of proof.[35]

This would indicate that the use of "prima facie" under the NIL creates the usual rebuttable presumption in that use of such terminology will shift the burden of producing or establishing evidence.[36]

There is no precise standard concerning the procedural effect of such "presumptions" under the NIL, *i.e.*, whether the party against whom the

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33 UNIFORM NEGOTIABLE INSTRUMENTS LAW. (Hereinafter cited as NIL.)

By 1924 the NIL had been adopted in all the states, territories and the District of Columbia. See BRITTON, BILLS AND NOTES § 3, at 12 (2d ed. 1961). See generally Eaton, *The Negotiable Instruments Law: Its History and Its Practical Operation*, 2 MICH. L. REV. 260 (1904).

34 See Brosman, *The Statutory Presumption*, 5 TUL. L. REV. 17, 41-43, n.68 (1930).

35 OGDEN, NEGOTIABLE INSTRUMENTS § 390, at 633 (5th ed. 1947).

36 See Comment, *Burden of Proof of Due Course Holding Under Negotiable Instruments Law*, 1 IND. L.J. 49, 52 (1926).

presumption operates has the burden of producing evidence or the burden of persuasion. Since the NIL does not define "presumption," "prima facie," or "burden of proof," the effect of using any of these terms is largely a question for state law which would ultimately depend on whether the jurisdiction involved adopted the Thayer-Wigmore approach or the Morgan-Maguire approach to presumptions. The UCC at least has the quality of definiteness in that it defines its own terms. If used according to its terms it should provide uniformity of treatment throughout the states.

Section 3-114(3) of the UCC provides that, "Where the instrument or any signature thereon is dated, the date is presumed to be correct"; whereas section 11 of the NIL states that where the instrument, an acceptance, or any indorsement thereon is dated, the date is deemed to be prima facie true. The UCC has expanded section 11 of the NIL to include any signature on the instrument.[37] Under the UCC approach to presumptions, the presumption would disappear when evidence is introduced which could show the date to be incorrect; a preponderance of the evidence would not be necessary.

Section 3-201(3) provides:

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

The above subsection should be read in conjunction with section 3-307(2) which provides:

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

The purpose of section 3-201(3) is to make it clear that the transferee without indorsement of an order instrument is not a holder and so is not aided by the presumption that he is entitled to recover on the instrument provided in section 3-307(2). However, proof of a transfer to him by a holder is proof that he has acquired the rights of a holder and that he is entitled to the presumption.[38] This section is merely a clarification of the law and has no similar counterpart under the NIL.

Section 3-307 of the UCC provides:

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

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37 Comment 3 to UCC § 3-114.

38 Comment 8 to UCC § 3-201(3).

(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.

This section, concerning the burden of establishing signatures, defenses, and due course holding, has given rise to conflicting opinions regarding both its effect and desirability. Although the NIL contains no provision with respect to proof of signatures, the UCC provides that all signatures are admitted unless specifically denied. This reverses the common law rule[39] which allowed evidence regarding the making of the instrument to be introduced, even under a general denial. The UCC further states that when denied, the burden of establishing a signature is placed on the party claiming under it. This burden would require proof by a preponderance of the evidence. However, at this point the UCC makes an about-face and states that, unless an action is to enforce the obligation of a purported signer who has died or become incompetent, the signature is presumed to be genuine or authorized. Thus the plaintiff would still not have to prove that the document is authentic until some evidence is introduced which would support a finding that the signature is forged or unauthorized. In order to put the signature in issue, the defendant need not introduce evidence sufficient for a directed verdict in his favor, yet he must present enough evidence to permit a finding in his favor. Section 3-307(1)(b) has been criticized on the ground that a party, who, by unsworn allegations, asserts genuiness gets the benefit of a presumption of the truthfulness of his allegations, even though the adverse party has filed a verified plea alleging forgery or execution without authority.[40] However, this criticism does not appear to be very well-founded since evidence on which the verified plea is based will, if strong enough, defeat the presumption. Once the presumption is defeated, then the burden will pass to the party claiming under it to prove its authenticity. The basis for the presumption is the practical matter that

39 Hoffstaeder v. Lichtenstein, 203 App. Div. 494, 196 N.Y. Supp. 577 (1922) (common law rule).

40 Britton, *Holder in Due Course—A Comparison of the Provisions of the Negotiable Instruments Law with Those of Article 3 of the Proposed Commercial Code*, 49 Nw. U.L. Rev. 417, 449 (1954).

forged signatures are generally uncommon and that normally such evidence is more accessible to the defendant.[41]

However since this presumption is based on both a high degree of probability and of accessibility to the evidence, it would appear to be desirable to place the burden of persuasion on the opposing party. Unfortunately, the UCC definition of a presumption precludes such a result, and passes the burden of persuasion to the party claiming under the instrument.[42]

The remainder of section 307 deals with the burden of proof in holder in due course problems. Subsections (2) and (3) are basically rephrasings and clarifications of section 59 of the NIL. Subsection (2) provides that once signatures are admitted and the instrument is produced, a holder may recover unless the defendant establishes a defense, and the defendant will have to do this by a preponderance of the total evidence under the UCC definition of "establishing." Until the defendant meets this burden there will be no issue as to whether a holder is a holder in due course. Thus, if at trial the plaintiff introduces an instrument in evidence, offers no further evidence, and the defendant offers no evidence, the plaintiff would be entitled to a directed verdict. This would also be the result under the NIL.[43] However, under the UCC, when a defense is shown the burden will shift to the plaintiff to give affirmative proof that he is holder in due course, *i.e.*, that he took in good faith and without notice.[44] Any defense under the UCC will shift the burden of proof; this reverses the rule under the NIL which found that a showing of want of consideration was not an adequate defense to shift the burden.[45]

Under the NIL there was a split of authority regarding proof of due course holding once the issue was in the trial, that is, after the defendant had shown a defense and defeated the presumption of due course holding. The majority rule, once the presumption was defeated, placed the burden of showing due course holding on the plaintiff who then had to convince the triers of fact of the existence of each of the three requisites of due course holding, *i.e.*, purchase for value, before it was overdue, and in good faith.[46] The minority view found that the burden was on the plaintiff only to the extent of producing sufficient evidence of due course holding to the point where he could prevent a directed verdict for the defendant.[47]

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41 Comment 1 to UCC § 3-307.

42 For the UCC definition of "burden of establishing" see UCC § 1-201(8).

43 See cases collected in BRITTON, BILLS AND NOTES § 105, at 441 n.1 (1st ed. 1943).

44 UCC § 3-307(3) and Comment 3.

45 Pitillo v. Demetry, 112 Ga. App. 643, 145 S.E.2d 192 (1965) (decided under UCC); Mitchell v. Baldwin, 88 App. Div. 265, 84 N.Y. Supp. 1043 (1903) (pre-UCC rule).

46 For an excellent statement of this rule, see Glendo State Bank v. Abbot, 30 Wyo. 93, 216 Pac. 700 (1923).

47 German-American Nat. Bank v. Lewis, 9 Ala. App. 352, 355, 63 So. 741, 743 (1913). See generally 12 AM. JUR. 2d *Bills and Notes* § 1212 (1964).

This split of authority would appear to fall neatly in line with the burden of producing evidence vs. burden of persuasion problem discussed earlier. If a jurisdiction adheres to the view that a presumption places only a burden of producing evidence on a party, it would probably, if applying the same principle to the NIL, fall under the minority rule. However, a jurisdiction which prefers the burden of persuasion approach would find that the NIL presumption created a burden of showing by a preponderance of the evidence that the fact is true, *i.e.*, due course holding. This is exactly the type of conflict which precise definitions of terms could have avoided under the NIL and which has been avoided under the UCC.

The UCC has settled this conflict and adopted the majority view. The UCC provides that when it is shown that a defense exists, the plaintiff may cut off that defense by establishing that he is a holder in due course or that he has acquired the rights of a prior holder in due course. Here again, under the UCC definition of "burden of establishing," the plaintiff will bear the full burden of persuasion by a preponderance of the total evidence.[48] The UCC does not speak in terms of presumptions or prima facie proofs as did the NIL, but merely states where the burden lies. The plaintiff must show in all respects that he is a holder in due course, *i.e.*, that the instrument was taken for value, in good faith, and without notice.[49] It appears that the UCC has adopted the preferable view.[50] On the principle that the heavier burden should rest on the party with the easiest access to the evidence, it seems clear that the burden should be on the holder to show that he is holding in due course. Otherwise purchasers of instruments could win their case, not because they are bona fide, but because the defendant might not be able to find the evidence necessary to show the plaintiff's fraud or bad faith.[51] This section has been praised for its comprehensiveness, organiza-

48 Comment 3 to UCC § 3-307.

49 UCC § 3-302; Comment 3 to UCC § 3-307.

50 See BRITTON, *op. cit. supra* note 33, § 104, at 263.

51 Originally § 3-307(3) began with the phrase "after evidence of a defense has been introduced . . . ." But between the 1952 draft and the 1956 recommendation this phrase was changed to read "after it is shown that a defense exists . . . ." This was to make it clear that no change in the quantum of evidence was intended and that the NIL rule was to be retained. Penney, *A Summary of Articles 3 and 4 and Their Impact in New York*, 48 CORNELL L.Q. 47, 62 (1962). Thus, it is clear that since the 1956 revision, the UCC requires the same amount of proof to establish a defense as was required under prior law, *i.e.*, a defense shown by a preponderance of the evidence. Therefore, the conclusion reached in 10 MERCER L. REV. 211, 213 (1958) that "the trend of the decisions seem [*sic*] to closely follow the intent of the statue [*sic*] [and] the results of these cases appear to require the introduction of a lesser amount of evidence, than that which is required under the N.I.L., to shift the burden of proof from the maker to the holder," is misleading. This conclusion was based on one cited case, Budget Charge Accounts, Inc. v. Mullany, 144 A.2d 438 (Pa. Super. 1958), which was decided under 1958 Pennsylvania law. However, Pennsylvania adopted the UCC in 1953, and this section was still in the original form in 1958. Thus, while the writer's conclusion might be valid under 1958 Pennsylvania law, it is

tion, clear diction, and anticipation and resolution of many questions.[52]

UCC section 3-414(2) states:

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

This section deals with the contract of the indorser, and the above-quoted subsection provides two presumptions. The first is that the indorsers are liable in the order in which they indorse; the second is that they in fact indorsed in the order in which their names appear. Parol evidence is admissible to show that they indorsed in another order or that they have made a separate agreement as to their liability.[53] This section does not change the law under the NIL, although the second presumption is new. Section sixty-eight of the NIL provides that ". . . indorsers are prima facie liable in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise."[54] The main difference between the NIL and UCC provisions is one of terminology.

Section 3-416(4) creates a presumption, from the addition of words of guaranty to the signature of one of two or more makers or acceptors, that the signature is for the accommodation of the others. This entire section is new; the NIL contains no provision relating to the liability of persons who sign negotiable instruments as guarantors. The section is intended to spell out liabilities on the instrument in terms of prevailing commercial understanding as to the meaning and effect of words of guaranty added to signatures on negotiable instruments.[55]

Section 3-419(2) dealing with conversion of negotiable instruments states:

> In an action against a drawee under subsection (1) the measure of the drawee's liability is the face amount of the instrument. In any other action under subsection (1) the measure of liability is presumed to be the face amount of the instrument.

This presumption is the rule generally applied to the conversion of negotiable instruments, *i.e.*, a party's obligation on the instrument is presumed to be face value.[56] This is the usual rebuttable presumption and any evi-

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incorrect if applied to any state which is not operating under the original version of the UCC.

52 Carrington, *Banking, Commercial Paper and Investment Securities Under the Uniform Commercial Code*, 14 WYO. L.J. 198, 204-05 (1960).

53 Comment 4 to UCC § 3-414.

54 *Accord*, George v. Bacon, 138 App. Div. 208, 123 N.Y. Supp. 103 (1910).

55 See Steinheimer, *Impact of the Commercial Code on Liability of Parties to Negotiable Instruments in Michigan*, 53 MICH. L. REV. 171, 203 (1954).

56 Comment 4 to UCC § 3-419.

dence may be admitted to show defenses. By contrast, the presumption regarding drawees is replaced by a rule of absolute liability.[57]

Section 3-503(2) provides:

> A reasonable time for presentment is determined by the nature of the instrument, any usage of banking or trade and the facts of the particular case. In the case of the uncertified check which is drawn and payable within the United States and which is not a draft drawn by a bank the following are presumed to be reasonable periods within which to present for payment or to initiate bank collection:
>
> (a) with respect to the liability of the drawer, thirty days after date or issue whichever is later; and
>
> (b) with respect to the liability of an indorser, seven days after his indorsement.

This subsection is similar to section 193 of the NIL[58] in its language defining reasonable time. However, the UCC has gone farther in providing specific time limits for certain instruments. This represents an extension of the time usually allowed under the cases decided under the NIL.

Where the issue was whether timely presentment had been made for the purpose of holding secondary parties liable, the law under the NIL consisted largely of the "one day" rule in the case of checks. The cases held that a holder of a check who did not present the check one day after he had received it, if drawn on a bank in the same city, discharged prior indorsers absolutely and discharged the drawer to the extent of the loss occasioned by the delay.[59] If the check was payable in another city, the collection process had to be initiated the day after receipt.[60] This rule was poor for several reasons.[61] Primarily it failed to take into account the varying banking habits of the community. A large business concern might not be able to process all its checks received in one day while it might inconvenience a small business to bank every day. Often an individual will carry a check in his pocket for several days. Furthermore, general distrust of banking has disappeared, and, with the advent of the Federal Deposit Insurance Corporation, a longer period should be reasonable. Besides, when businessmen are

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57 *Ibid.*

58 The NIL reads:

> In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

NIL § 193.

59 *E.g.*, Seager v. Dauphinee, 284 Mass. 96, 187 N.E. 94 (1933).

60 See cases collected in BRANNAN, NEGOTIABLE INSTRUMENTS LAW 1296-1302 (7th ed. Beutel 1948).

61 See generally Leary, *Commercial Paper: Some Aspects of Article 3 of the Uniform Commercial Code*, 48 KY. L.J. 198 (1960).

sufficiently concerned about the length of time checks may be outstanding to do something about it, the printed legend on the check, "Void after — days" usually selects a thirty or sixty day limit as reasonable.[62]

It therefore appears that the extension of the time limit in the UCC is a useful and realistic innovation. The drawer is reasonably expected to stand behind the check longer than the indorser since he expects it to be paid from his account and an indorser does not normally expect to pay it. Of course evidence could be introduced to show that the named time limits are unreasonable and thus defeat the presumption. However, the UCC has provided a more realistic approach than that under the NIL.[63]

Section 3-510, which deals with evidence of dishonor and notice of dishonor, provides that a regular protest,[64] stamp of the drawee, payor or presenting bank showing a refusal to accept or pay, or any books or records of the drawee, payor, or collecting bank showing dishonor will be "admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown."[65] The generally accepted rule has been that a notarized certificate of protest is sufficient prima facie evidence of the facts contained within the protest.[66] However the notary's certificate is not conclusive,[67] and evidence may be given to rebut or disprove the facts stated in the certificate.[68] The UCC has extended the rule to cover not only the certificate of protest but also the two protest substitutes, and also creates both a presumption of dishonor and of any notice of dishonor shown in the protest certificate. The NIL contained no provision stating the effect of protest as proof of dishonor.

Other Presumptions in the UCC

Section 8-105[69] dealing with securities is similar in wording and effect

62 Leary, *supra* note 61, at 228 n.82.

63 See Dluge v. Robinson, 204 Pa. Super. 404, 204 A.2d 279, 280 (1964) (seven day limit under UCC).

64 UCC § 3-510(a); see UCC § 3-509.

65 UCC § 3-510.

66 See, *e.g.*, *In re* Marwitz's Estate, 286 Pa. 191, 133 Atl. 220, 222 (1926); Latham v. Sheff, 193 App. Div. 576, 185 N.Y. Supp. 278, 279 (1920).

67 See Latham v. Sheff, *supra* note 66, at 280; Sulzbacher v. Bank of Charleston, 86 Tenn. 201, 6 S.W. 129 (1887).

68 See Thorn v. Aler, 92 W. Va. 290, 114 S.E. 741, 742 (1922).

69 This section provides:

(1) Securities governed by this Article are negotiable instruments.

(2) In any action on a security

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

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

(c) when signatures are admitted or established production of the instrument

to section 3-307 discussed earlier.[70] It states that securities are negotiable instruments under the section, and that, absent specific denial, signatures on the security or necessary indorsements are admitted. Signatures are presumed to be genuine, but the ultimate burden of establishing their authenticity will be on the party claiming under them. Thus, evidence sufficient to create an issue as to authenticity must be introduced, and then the presumption will disappear. There the party claiming under the instrument must show authenticity by a preponderance of the total evidence. Once the signature is admitted or established, a holder is entitled to recover unless a defense is established. This means that the defendant has the "burden of establishing" within the UCC definition,[71] and would have to show his defense by a preponderance of the total evidence. Then, once a defense is established, the burden shifts back to the plaintiff who must show by a preponderance of the total evidence that he or a person under whom he claims is one against whom the defense is ineffective.

This section is clear in its effect, but again, as in section 3-307, it is subject to some criticism for its approach to the presumption of authenticity of signatures. The basis for this presumption is that forgeries rarely appear, and any evidence on the subject is more accessible to the defendant, and on this basis it seems unreasonable to allow the presumption to be overcome by a mere production of evidence to the contrary.[72]

Section 4-103(3) provides:

> Action or non-action approved by this article or pursuant to Federal Reserve regulations or operating letters constitutes the exercise of ordinary care and, 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 of by this Article, *prima facie* constitutes the exercise of ordinary care.[73]

The use of the term "prima facie" here is unfortunate. This section basically sets out methods and standards by which ordinary care in banking practices may be determined. When the UCC speaks in terms of presumptions or burden of establishing it is clear what quantum of evidence will be

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entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security; and

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

UCC § 8-105.

70 See text accompanying notes 39-52 *supra*.

71 UCC § 1-201(8).

72 See text accompanying notes 41-42 *supra*.

73 UCC § 4-103(3). (Emphasis added.) For definitions of "Federal Reserve regulations," "Federal Reserve operating letters," "Clearing House Rules," etc. see Comment 3 to UCC § 4-103.

required by a party to rebut the presumption or to maintain his burden. However, when the drafters switch to the term "prima facie" the UCC clarification in this area suddenly becomes murky. How must a party proceed against a prima facie case of due care? If due care is treated as a presumption under the UCC, he must only introduce evidence which would create a triable issue. But if the burden of establishing has thus passed to him, he must show by a preponderance of the total evidence that the nonexistence of ordinary care is more probable than is its existence. The Comments are of little help here. They state that the evidence here 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."[74] But this is little or no assistance. The court, through its charge to the jury and control over the trial, will have the ultimate power over whether "prima facie" here is treated as creating a presumption or as creating a burden of establishing.

However, perhaps more helpful is the language in the Comments that "the prima facie rule does, however, impose on the party contesting the standards to establish that they are unreasonable, arbitrary, or unfair."[75] The use of the words "to establish" might indicate that it was the intent of the drafters to create a burden of establishing here and therefore the prima facie case of ordinary care could be overcome only by showing by a preponderance of the total evidence that ordinary care did not exist.

Another approach would be to assume that the creation of a prima facie case here is meant to shift the burden to the opposite party. Burden under the UCC is defined as a "burden of establishing"; therefore the party against whom the prima facie case operates will have the burden of persuasion. However, such a conclusion is speculative and the intent of the drafters is unclear.[76] Use of another term or a definition of prima facie would provide uniformity from an evidentiary viewpoint, but as the statutory language now stands "prima facie" will most probably be treated according to state law and thus will maintain its confused and multifarious meanings. It would appear that the better approach would have been to provide that the burden of establishing the non-exercise of ordinary care is on the party claiming such non-exercise. This would adopt the Morgan-Maguire theory that when there are sound reasons for creating a presumption or burden, it should not be so easily rebutted, but should require a showing against it by a preponderance of the total evidence. Similarly, section 1-202 has provided that a third party document under an existing contract "shall be prima facie

74 Comment 4 to UCC § 4-103.

75 *Ibid.* (Emphasis added.)

76 *But see* 1 NEW YORK LAW REVISION COMM. FOR 1955, REPORT ON THE STUDY OF THE UNIFORM COMMERCIAL CODE 288 (1955), where it is stated that "presumptions are in fact created by this subsection although the word 'presumption' is not used." However, no reasons are given for this conclusion.

evidence of its own authenticity. . . ."[77] Again the problem is presented whether the UCC has created a presumption within its definition or has required a shift in the burden of establishing as defined under the UCC. This should have been clarified, since such usage could, to an extent, defeat the basic goal of the UCC—achieving uniformity throughout the states. Although the drafters of the UCC intended to leave some areas open for future development, it is unlikely that an area such as this will develop to any beneficial extent.

Section 7-302 of the UCC sets up a method by which an issuer of a through bill of lading may show the amount of damages he has paid to a shipper. This method would be used against a connecting carrier who is primarily liable for damages. The section provides that any "receipt judgment, or transcript thereof"[78] shall show the amount paid by the issuer to the party damaged. This section was taken from the Interstate Commerce Act and has been treated under that Act as a typical rebuttable presumption.[79] Similar treatment will undoubtedly be given these words under the UCC. This section is treated in detail under the section on hearsay.[80] However, since none of the UCC "presumption" or "burden of establishing" terminology was used here, it appears that this section will receive various treatments by the states regarding the effect of the presumption, *i.e.*, whether the burden of producing evidence or the burden of establishing along with the burden of producing will pass to the party against whom the presumption operates.

Finally, the use of the word "presumption" in Comment six to section 2-313 should be mentioned. The section deals with express warranties and section 2-313(1)(c) provides:

> Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

Comment six on the above subsection states in part:

> 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. But there is no escape from the question of fact.

The section itself creates no presumption, and the reference by comment to the word presumption seems erroneous. The section creates no presumption to the effect that if a sample was shown prior to the contract of sale that the court would be required, barring evidence to the contrary, to find

77 See text accompanying note 144 *infra.*

78 UCC § 7-302(3).

79 See text accompanying note 123 *infra.*

80 See text accompanying notes 116-133 *infra.*

that the sale was by sample. The question of whether the sample was the basis of the bargain could be one for the court or jury, depending on the evidence.[81]

II. HEARSAY

Hearsay has been defined as "testimony in court or written evidence of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."[82]

Until the middle of the sixteenth century there was no objection to the use of hearsay evidence by a jury. However, during the following two centuries courts gradually came to the conclusion that all statements to be used as testimony should be made only where the person to be affected by them has an opportunity of testing them by way of cross-examination. By the middle of the eighteenth century this rule against hearsay was accepted as a fundamental part of the law.[83] Although the main objection to hearsay is the lack of opportunity to cross-examine; other reasons espoused for its rejection are that the statement was not made by a party under oath, that there is no confrontation by the declarant, and that there is a danger that a witness may report a statement inaccurately.[84]

Gradually some exceptions to the hearsay rule have developed, and it is chiefly in the area of exceptions that the UCC has had some effect. The basis for exceptions to the hearsay rule is usually found in a great need for the evidence, the inaccessibility of the actual declarant, and a high degree of trustworthiness in the hearsay matter. The UCC has affected the hearsay rule in four limited areas: proof of dishonor of foreign bills of exchange; admissibility in evidence of price lists and market quotations; admissibility of receipts in evidence to show the amount of damages paid by an initial carrier under a through bill of lading; and proof of facts in third party documents to a contract.

Proof of Dishonor

Under the NIL the drawer and indorser of a foreign bill of exchange could not be held liable upon dishonor of the instrument unless it had been properly protested.[85] Protest in a strict sense means the formal certifi-

81 See 1 NEW YORK LAW REVISION COMM. FOR 1955, *op. cit. supra* note 76, at 286.

82 MCCORMICK, EVIDENCE § 225, at 460 (1954).

83 See generally 5 WIGMORE, EVIDENCE §§ 1364-66 (3d ed. 1940).

84 See *Id.* at §§ 1361-63.

85 NIL § 152. This section states:

> Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and endorsers

cate drawn up and signed by a notary indicating that he had presented the bill for acceptance and that it had been refused.[86] The main function of the certificate of protest is evidentiary,[87] *i.e.*, to avoid a situation in which dishonor of a foreign bill would have to be proven by parol evidence.[88] A foreign bill under the NIL was defined as any bill not both drawn and payable within the same state.[89]

It has generally been agreed at common law and under the NIL that a notary's certificate of protest is admissible in evidence as an exception to the hearsay rule to prove dishonor.[90] The basis for this exception is that the duty to furnish a certificate is sufficiently implied from the nature of a notary's office to warrant the admission in evidence of his statement without calling him.[91] However, the doctrine of protest is subject to some criticism since failure to comply with its strict requirements will result in a complete discharge of drawers and indorsers.[92] With the speed of modern travel and the disappearing significance of state boundaries the protest doctrine becomes particularly harsh. A person should not upon failure to protest lose his rights largely because the check he receives payable in his state was drawn in another. Yet if a person does protest it can cause a certain amount of inconvenience and expense. Therefore, a strong case is made in favor of eliminating protest as a condition precedent to a drawer's or indorser's liability, and in favor of substituting a new rule of evidence which would permit easier proof of dishonor.

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are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

BRANNAN, NEGOTIABLE INSTRUMENTS LAW § 152, at 1105 (6th ed. Beutel 1938); see Mischnick v. Dime Sav. Bank, 260 Mich. 639, 245 N.W. 541 (1932) (failure to protest dishonored foreign bill of exchange discharged drawer). Liabilities of a drawer were determined by the law of the place where he drew the bill of exchange. So a bill drawn in New York payable in Austria is a foreign bill and must be protested in order to hold the drawer even though Austrian law does not require protest. Amsinck v. Rogers, 189 N.Y. 252, 82 N.E. 134 (1907). Protest was not required for promissory notes payable and negotiable at a bank and discounted by a bank. Williams v. Paintsville Nat'l Bank, 143 Ky. 781, 137 S.W. 535 (1911).

86 NIL § 153; see Maury v. Winlock & Toledo Logging & RR., 148 Wash. 572, 269 Pac. 815 (1928); Comment 2 to UCC § 3-509. However, the same term has been used loosely to refer to the entire process of presentment, notice of dishonor and protest. Gleason v. Thayer, 87 Conn. 248, 87 Atl. 790 (1913); see Comment 2 to UCC § 3-509.

87 See Comment 6 to UCC § 3-501.

88 Kardynal v. Grezezinski, 255 Mich. 421, 238 N.W. 213, 214 (1931) (dictum).

89 NIL § 129. For the pre-NIL definitions, see Armstrong v. American Exch. Nat'l Bank of Chicago, 133 U.S. 433 (1890); Davies & Vincent v. Bank of Commerce, 27 Ariz. 276, 232 Pac. 880 (1925).

90 5 WIGMORE, *op. cit. supra* note 83, § 1675.

91 *Ibid.*

92 See 1 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 502 (1964).

The UCC has accomplished this. In so doing it has given broad expansion to hearsay exceptions in this area. First, the UCC has eliminated any need for protest except where the dishonored draft on its face appears to be drawn or payable outside the United States; thus eliminating the strict NIL requirement of protest on drafts between separate states.[93] Even though the UCC does not always require protest, it could be desirable in certain situations.[94] For instance, protest could be convenient where process does not run to another state, where deposition costs would be high, or where a witness would have to travel long distances to testify as to dishonor. Where protest is still required, the UCC has reduced the need for a formal protest by providing two protest substitutes. Section 3-510 provides:

> The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:
> (a) a document regular in form as provided in the preceding section which purports to be a protest;
> (b) the purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor;
> (c) any book or record of the drawee, payor bank, or any collecting bank kept in the usual course of business which shows dishonor, even though there is no evidence of who made the entry.

Since the two protest substitutes, stamps of the drawee bank and bank records, will be admitted in evidence to show presumptive[95] proof of dishonor, they will clearly be evidence of the facts asserted in the stamp or record and as such are clearly hearsay.

The first substitute, stamps of the drawee, appears to be a new exception to the hearsay rule. None of the common law exceptions would have permitted the introduction of a stamp or ticket on a document to show presumptively the truth of the matter asserted on the stamp. However, for the stamp, ticket, or other writing to be admissible it must state that acceptance or payment has been refused for "reasons consistent with dishonor."[96] These would include stamps stating "not sufficient funds," "account garnished," "no account," or "payment stopped."[97] The basis of the

93 UCC § 3-501(3). The protest requirement remains in effect as to international drafts because it is generally required by foreign law. See Comment 6 to UCC § 3-501. Although § 3-501(3) does not specifically mention "checks" it would appear that the same rule applies to international checks, since a check is defined as a "draft drawn on a bank and payable on demand." UCC § 3-104(2)(b).

94 See UCC § 3-501(3).

95 See text accompanying notes 64-68 *supra*.

96 UCC § 3-510(b).

97 Comment 2 to UCC § 3-510.

new exception to the hearsay rule appears to lie in the fact that a drawee's statement that payment is refused for insufficient funds has always been commercially acceptable as proof of dishonor, has a high degree of reliability and should therefore be satisfactory evidence in any court.[98]

The second exception regarding books and records of a drawee, payor bank or any connecting bank, is not a new exception to the hearsay rule, but is an expansion of the common law exception admitting business records which are regular entries in the course of business.[99] The common law exception was subject to the limitations that the book entry must be regular, entered at or near the time of the transactions involved, and a recorder or his informant must be unavailable.[100] Furthermore, to be admissible the entries had to be "original," and not merely transcribed records or copies.[101] The most burdensome aspect of this rule was the requirement that the entrant, or, in the case of a cooperative entry based on information given by other employees, both the entrant and informants must be proven to be unavailable for production as witnesses. Accordingly, many courts have adopted the view that common sense requires a relaxation of these rules, and have given the trial judge discretion to dispense with the production of entrants and informants and to permit the records to be verified by a supervising officer who can testify that they have been regularly kept.[102] This rule would apply where the inconvenience of production outweighs the value of producing the entrants and informants for examination and cross-examination. It remained for legislation to do the rest, and many state legislatures simplified matters by adopting the Uniform Business Records as Evidence Act.[103] Under this act it is only necessary that a custodian of the records testify as to a document's mode of preparation, identify the records and testify whether it was made in the regular course of business at or near the time of the recorded event. On the basis of this testimony the judge may decide whether the record should be admissible.[104]

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98 *Ibid.*

99 See generally Ginsburg, *The Admissibility of Business Records in Evidence*, 29 NEB. L. REV. 60 (1949) (discussion of the hearsay exception).

100 For cases recognizing the rule and explaining its basis, see Missouri Forged Tool Co. v. St. Louis Car Co., 205 S.W.2d 298, 301 (Mo. App. 1947) (dictum); Edsall v. Rockland Paper Co., 38 Del. 495, 194 Atl. 115, 117 (1937) (dictum); Gus Dattilo Fruit Co. v. Louisville & N.R.R., 238 Ky. 322, 37 S.W.2d 856, 857 (1931) (dictum). See also MCCORMICK, *op. cit. supra* note 82, at § 283.

101 Stark v. Burkitt, 103 Tex. 437, 129 S.W. 343, 344 (1910) (dictum); see 5 WIGMORE, *op. cit. supra* note 80, at §§ 1532, 1558.

102 *E.g.*, Jennings v. United States, 73 F.2d 470 (5th Cir. 1934); see 5 WIGMORE, *op. cit. supra* note 83, at § 1530.

103 UNIFORM BUSINESS RECORDS AS EVIDENCE ACT. See generally Note, *Revised Business Entry Statutes: Theory and Practice*, 48 COLUM. L. REV. 920 (1948); 47 HARV. L. REV. 1044 (1934).

104 UNIFORM BUSINESS RECORDS AS EVIDENCE ACT § 2; see Rossomanno v. Laclede Cab Co.,

The UCC provision, allowing proof of protest by "any book or record," is stated in language even broader than that of the Uniform Business Records as Evidence Act. On its face the UCC seems to require only a showing that the record used to prove dishonor was kept in the usual course of business. The UCC explicitly provides that such records will be admissible "even though there is no evidence of who made the entry." There is no provision requiring a showing of the time of the entry, or that any particular person testify as to the particular entry's being made in the usual course of business. Even though the UCC does not spell out these requirements, it is doubtful that failure to do so will result in any great variations. The dishonor of an instrument would generally be recorded almost immediately upon receipt, and any of a number of bank officials could testify that such records are kept in the usual course of the banking business. The above provision, along with that admitting stamps in evidence, is based on the high improbability that bank records, or the records of the drawee, will show any dishonor which did not in fact occur; or that a holder will attempt to proceed on the basis of dishonor if he could in fact have obtained payment.[105] This section, simplifying the admissibility in evidence of books and records, will not make any major change in the law of a state which has adopted the Uniform Business Records as Evidence Act, but in a state which has not done so the UCC will make a marked change in this area of hearsay.

The requirement of producing all entrants and informants undoubtedly served its purpose in an era when small businesses were predominant. However, the showing of the identity and unavailability of absent entrants or informants where the records are those of a large business imposes a burden of preliminary proof which may be so expensive as to be prohibitive. In large business organizations records will be kept by numerous persons, and information for the records will come from countless sources. Furthermore, even if the entrants or informants can be located, it is doubtful whether they will have any recollection of a particular entry, and their evidence will be a routine statement that they correctly reported and recorded the matter in question. On this basis it would seem that the UCC has adopted a realistic and commercially reasonable approach to proof of dishonor.

Price Lists and Market Quotations

In a few narrow and usually well-defined classes of cases an exception has been made to the hearsay rule in order to admit into evidence certain commercial and professional lists, registers, and reports. Although newspaper

328 S.W.2d 677, 681 (Mo. 1960); Green v. Cleveland, 50 Ohio L. Abs. 605, 79 N.E.2d 676, 677, *aff'd*, 150 Ohio 441, 83 N.E.2d 63 (1948). For a simplified version of the Uniform Act see UNIFORM RULE OF EVIDENCE 63 (13).

105 Comment 3 to UCC § 3-510.

articles are generally held inadmissible to prove the truth of the facts they contain,[106] price lists and market reports are an important exception.[107] Such lists and reports are also found in trade journals and magazines circulated either within various occupational groups or to the public generally. However, the limits applied to this hearsay exception are somewhat indefinite. Some courts have followed a strict view in holding such evidence inadmissible unless the manner in which the list was compiled, where the information was obtained, and whether the quotations of prices were derived from actual sales or otherwise is shown.[108] Various reasons have been advanced for excluding such documents and the testimony based thereon. A newspaper summary of prices covering several months has been rejected on the grounds that, since the prices were not current, they would probably not be relied on by the business world.[109] A price list printed exclusively for company salesmen and not for the public generally has also been rejected.[110] Prior to the adoption of the UCC, Massachusetts[111] would not admit such reports, however reliable, if better evidence was obtainable.[112]

The UCC has put an end to some of these somewhat unrealistic common law views.[113] Under UCC section 2-724 any price list or market report

106 *E.g.*, Kengla v. Stewart, 82 Ariz. 365, 313 P.2d 424 (1957); State v. Otis Elevator Co., 10 N.J. 504, 92 A.2d 385 (1952); Bebbington v. California W. States Life Ins. Co., 30 Cal. 2d 157, 180 P.2d 673 (1947).

107 *E.g.*, Baush Mach. Tool Co. v. Aluminum Co. of America, 79 F.2d 217 (2d Cir. 1935); Mohr v. Shultz, 86 Idaho 531, 388 P.2d 1002 (1964); State v. Carrano, 27 N.J. Super. 382, 99 A.2d 426 (1953); see 6 WIGMORE, *op. cit. supra* note 83, at § 1704.

108 Whelan v. Lynch, 60 N.Y. 469 (1875), discussed in 6 WIGMORE, *op. cit. supra* note 83, at § 1704; see Atlantic Nat'l Bank v. Moore, 29 Ariz. 346, 241 Pac. 601 (1925) (evidence of market price inadmissible where source undisclosed and uncertain); Baglin v. Earle Eagle Mining Co., 540 Utah 572, 184 Pac. 190 (1919) (evidence of stock price hearsay where method of compilation unclear); Jones v. Ortel, 114 Md. 205, 78 Atl. 1030 (1910) (evidence inadmissible where paper not shown to be accepted by trade). *But see* Mt. Vernon Brewing Co. v. Teschner, 108 Md. 158, 69 Atl. 702 (1908) (evidence admissible where accepted by trade, even without evidence of how obtained).

109 See Atlantic Nat'l Bank v. Korrick, 29 Ariz. 468, 242 Pac. 1009 (1926); Atlantic Nat'l Bank v. Moore, 29 Ariz. 346, 241 Pac. 601 (1926). In these cases the courts held that for a newspaper to be admissible it had to be found reliable by persons dealing with the commodity, and the prices must be published contemporaneously with the market in order that they might be relied on.

110 National Cash Register Co. v. Underwood, 56 R.I. 379, 185 Atl. 909 (1936).

111 MASS. GEN. LAWS ANN. ch. 106 (1963).

112 Doherty v. Harris, 230 Mass. 341, 119 N.E. 863 (1918); *cf.*, Pennsylvania RR. v. Newmyer, 100 A.2d 456, (1953); Pierce v. Miller, 107 Neb. 851, 187 N.W. 105 (1922).

113 UCC § 2-724. This section states:

> Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports on official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

Ibid. Compare UNIFORM RULE OF EVIDENCE 63 (30).

printed in official publications, trade journals, newspapers, or periodicals of general circulation will be admissible; and, in the absence of a compelling challenge, such reports should offer an adequate basis for a verdict.[114] This section approves the sensible approach of allowing the evidence to be admitted while its weight may be questioned. Many of the stricter rules not admitting such evidence are more properly limited to the weight of such evidence and not to its admissibility.

In this area the UCC gives uniformity and liberality to an already existing exception to the hearsay rule. This codification can be justified and commended on the same basic principles which allowed the early judicial exceptions. The basic theory of the hearsay rule is that many possible sources of inaccuracy and untrustworthiness which may lie underneath a witness' assertions may be exposed by cross-examination. But this theory may be superfluous in an instance where a statement offered is clearly free from the risk of inaccuracy and untrustworthiness. Furthermore, the theory may be impossible to apply where the procurement of the witness would be impossible or highly impracticable. These principles, circumstantial probability of trustworthiness and necessity,[115] are the basis for allowing market reports and price lists to overcome hearsay objections. The necessity of admission in these cases lies in the inaccessibility of the authors, compilers, and publishers and in the enormous inconvenience in summoning every person who took part in making the list or record. Also the probability of the trustworthiness of such reports is exceedingly high. The author knows that his work will be consulted by professionals and that it will have no professional or commercial value unless it is accurate. Furthermore, there ordinarily would be no motive for an author of such a commercial report to falsify that report. Use of the compilations by a trade or profession over a considerable length of time complements the reliability argument. Thus, the adoption of the broad UCC rule provides a sensible approach in a business world which demands ever-increasing use of such commercial reports.

Proof of Damages—Through Bill of Lading

Section 7-302(3) of the UCC provides:

> The issuer of such through bill of lading or other document shall be entitled to recover from the connecting carrier or such other person in possession of the goods when the breach of the obligation under the document occurred, the amount it may be required to pay to anyone entitled to recover on the document therefor, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any

114 Comment to UCC § 2-724.

115 For a good discussion of these principles see 5 WIGMORE, *op. cit. supra* note 83, at §§ 1421-22.

> expense reasonably incurred by it in defending any action brought by anyone entitled to recover on the document therefor.

This section makes the issuer of a through bill of lading[116] liable for loss caused by the issuer or any connecting carrier. It also gives the issuer, after it has been required to pay the loss, a remedy over against the particular carrier causing the loss.[117] In an action against the particular connecting carrier, the issuer may prove the amount of damages he paid or must pay by "any receipt, judgment, or transcript thereof."[118]

This section of the UCC was based on the Carmack Amendment[119] to the Interstate Commerce Act, and subsection three, quoted above, allowing proof of damages by any receipt or transcript of a judgment, was taken verbatim from that amendment. This part of the amendment was intended not only to simplify the remedy of the shipper, but also to make the remedy over of the initial carrier or issuer of the through bill of lading as complete and convenient as possible.[120] Decisions under this section of the UCC will probably be strongly influenced by judicial interpretations of the Carmack Amendment to the Interstate Commerce Act. This subsection not only changes the law of evidence, but on its face leaves some questions open. These questions have, however, been settled under Interstate Commerce Act decisions. The UCC does not state whether the party ultimately liable, *i.e.*, the connecting carrier at fault, may be joined as a third party defendant, but this practice has been allowed under the Interstate Commerce Act.[121] Further, there is some ambiguity as to the procedural effect of the words "shall be entitled to recover . . . the amount it may be required to pay to anyone entitled to recover on the document therefor, as may be evidenced by any receipt, judgment, or transcript thereof."[122] It is not clear whether this is intended to be conclusive or prima facie evidence. Although the words sound conclusive, it has been held under the Interstate Commerce Act that these words create a prima facie case only.[123] This evidence, of course, will

116 A *through* bill of lading is one by which a railroad contracts to transport over its own line for a certain distance carloads of merchandise or stock, there to deliver same to its connecting lines to be transported to the place of destination at a fixed rate per carload for the whole distance.
BLACK, LAW DICTIONARY 210 (4th ed. 1951).

117 UCC § 7-302(1)(2).

118 UCC § 7-302(3).

119 49 U.S.C. § 20(12) (1964).

120 See Kansas City & M. Ry. v. New York Cent. & H.R.R., 110 Ark. 612, 163 S.W. 171, 174 (1914).

121 See First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 733 (E.D. Tenn. 1962).

122 UCC § 7-302(3). That *recovery* of the judgment is not a condition precedent under the Carmack Amendment, see Palmer v. Agwilines, 42 F. Supp. 239, 242 (E.D.N.Y. 1941).

123 Central of Ga. Ry. v. Sims, 161 Ala. 295, 53 So. 826 (1910) (statute does not violate due process).

be prima facie only as to amount of damages, and will have no bearing on the issue of whether the third party was or was not the cause of the damage. The admission of an official document, such as a transcript of record, into evidence will involve no change in evidence law, as this is a standard exception to the hearsay rule.[124] Judgments are generally admissible to show the amount and fact of a recovery.[125]

The provision that a receipt of payment will constitute evidence of the amount of damages represents a change in the law of evidence. Most courts have followed the rule that an ordinary receipt for money given by a third person is not competent evidence, but is merely a hearsay declaration of the person who signed it, not made under oath and made without opportunity for cross-examination.[126] However, a number of courts have recognized that receipts may be admissible in evidence under various exceptions to the hearsay rule, such as that approving the reception of ancient documents,[127] or that admitting declarations of a deceased person against his interest.[128] Receipts have occasionally been admitted as corroborative evidence,[129] and a few courts have, without discussing competency, held such receipts admissible.[130] Occasionally receipts have been held admissible as official documents where they were given by a public official whose duty required that he receive payments and issue receipts.[131]

The UCC has created a new exception. It will apply to receipts issued by a shipper for payment to him by the issuer of a through bill of lading. Any receipt will be held admissible and will constitute prima facie evidence of the amount paid. Although this section does not explicitly state that his evidence is prima facie, that is the interpretation given by the courts to the similar provision in the Interstate Commerce Act.[132]

Of course any payment made by the issuer to the shipper in settlement for damages must be made subject to the usual standards of good faith and commercial reasonableness. Thus, a connecting carrier who is sued by the issuer for causing the actual damage could undoubtedly introduce evidence

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124 5 WIGMORE, *op. cit. supra* note 83, at § 1684.

125 JONES, COMMENTARIES ON EVIDENCE §§ 1806, 1825 (2d ed. 1926).

126 See Wisconsin Steel Co. v. Maryland Steel Co., 203 Fed. 403 (7th Cir. 1913) (dictum); Hornsby v. Vensen, 12 Ga. App. 696, 78 S.E. 267 (1913).

127 Woods v. Montevallo Coal & Transp. Co., 84 Ala. 560, 3 So. 475 (1888) (receipt over 20 years old).

128 *E.g.*, Wilson v. Birt, 77 Colo. 206, 235 Pac. 563 (1925).

129 Hayes v. Illinois Cent. R.R., 83 So. 2d 160, 164 (1955) (dictum); Cain v. Mead, 66 Minn. 195, 68 N.W. 840 (1896); see Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432, 436 (1925).

130 See Carmichael v. Williams, 286 S.W.2d 456, 459 (1956); Knoble v. Ritter, 145 Pa. Super. 149, 20 A.2d 848, 851 (1941).

131 See Laist v. Nichols, 139 Cal. App. 202, 33 P.2d 866, 869 (1934) (tax receipt); Rogers v. Keith, 148 Ala. 225, 42 So. 446 (1906).

132 See note 123 *supra.*

showing actual fraud, or such gross negligence in settlement that it would constitute a legal fraud. This was the approach taken in interpreting the Interstate Commerce Act.[133]

The relaxation of the hearsay rule in this area appears to be a useful and realistic approach. This relaxation will simplify the remedy of the initial carrier and avoid, in most cases, the necessity of producing as witnesses the parties who actually made the receipt. A false receipt would be so simple to identify in a case such as this that it is highly unlikely that a person would attempt a falsification. This factor, coupled with the inconveniences of producing the actual signer, provide a sound basis for allowing this hearsay exception.

The main problem with this section is that it leaves a few questions unanswered which could have been easily clarified by a few additional words, either in the statute itself or in the comments. For instance, it should be pointed out that the receipt or judgment constitute prima facie, and not conclusive proof of damages. It would also be useful to add that the connecting carriers may be joined as third party defendants by the issuer if he so desires. Even though these problems have been largely resolved by case law under the Interstate Commerce Act, some sort of official clarification by the drafters should have been supplied.

Finally, section 1-202 provides:

> A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness *and of the facts stated in the document by the third party.* (Emphasis added.)

The last clause of the above provision clearly creates a new exception to the hearsay rule. The list of documents is meant to be illustrative. The exception appears to be based on the common business experience that such documents are almost always reliable.[134] This new exception will relieve a party from the burden of bringing to court the many persons who may be involved in third party contracts. However, it should be noted that this exception applies only to actions arising out of the contract which authorized the document. So if an action were based on a bill of lading, even though the bill might be ancillary to a larger contract, this section would not apply and standard hearsay objections would be allowed.

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133 See Kansas City & M. Ry. v. New York Cent. & H.R.R., 110 Ark. 612, 163 S.W. 171 (1914) (dictum).

134 Comment 2 to UCC § 1-202.

Authentication

"A writing, of itself, is evidence of nothing, and therefore is not, unless accompanied by proof of some sort, admissible as evidence."[135] This statement represents the common law attitude toward the admission of documents into evidence. As a general rule, before writings or documents will be received in evidence, their due and valid execution or genuineness and authenticity must be established.[136] This rule has been applied to writings of all kinds.[137] Therefore, a writing and any signature on it must be proved or identified before it will be admissible in evidence.[138] In a few special situations, however, proof of authenticity would not be required. These situations include: (1) admissions by opponents of a document's genuineness;[139] (2) ancient documents;[140] (3) acknowledged instruments;[141] (4) replies to letters.[142] Also, proof of execution or authentication may be dispensed with in some situations where statutes require proof of authenticity only if execution has been denied or otherwise appropriately challenged.[143] This is the approach taken under the UCC. The drafters have relaxed the rule requiring preliminary proof of authenticity in several areas. These areas include third party documents under a contract, signatures on negotiable instruments, and certificates of protest.

Third Party Documents

Section 1-202 of the UCC provides:

> A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence

135 Stamper v. Griffin, 20 Ga. 312, 320-21 (1856).

136 See, *e.g.*, Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd., 265 F.2d 418, 422-23 (2d Cir. 1959).

137 See 7 WIGMORE, EVIDENCE § 2145 (3d ed. 1940).

138 See, *e.g.*, Summers v. McDermott, 138 F.2d 338, 339 (3d Cir. 1943).

139 Tracy, *The Introduction of Documentary Evidence*, 24 IOWA L. REV. 436 (1939).

140 The theory of admissibility of such a document is that of necessity. So long a time has lapsed that witnesses are not likely to be available. The general rule is that the document must be at least 30 years old, *e.g.*, Fronsoe v. Bushnell, 251 Fed. 850 (6th Cir. 1918), must come from proper custody, Carter v. Maryland & P. Ry., 112 Md. 599, 77 Atl. 301 (1910), under circumstances which are not suspicious, see Schmitt v. City of Carbondale, 257 Pa. 451, 101 Atl. 755 (1917), and in certain instances the proponent must prove possession of an instrument of conveyance, Beverly v. Burke, 9 Ga. 440 (1851).

141 See 9 WIGMORE, *op. cit. supra* note 137, at § 2576.

142 See 7 WIGMORE, *op. cit. supra* note 137, at § 2153. Proper proof in the record that the original letter was sent to which the proferred document is a reply is an essential prerequisite. Consolidated Grocery Co. v. Hammond, 175 Fed. 641 (5th Cir. 1910).

143 See note 145 *infra*.

> of its own authenticity and genuineness and of the facts stated in the document.

This section rejects the need for a preliminary showing of authenticity, but only for documents offered in evidence which have been required under an existing contract. Therefore, the applicability of the section is limited to actions arising out of the contract which authorized the document. The documents listed in the sections are intended to be illustrative and not all inclusive,[144] and such documents will constitute prima facie evidence of their authenticity.

Although this section is limited in scope, it provides a useful innovation since most documents which it covers have traditionally been found reliable by the business community. The section is actually quite similar in effect to those statutes enacted in some states which permit the admission into evidence of any relevant document without preliminary proof of authenticity, as long as it is not specifically denied or challenged.[145]

Signatures

Similar to the provisions for third party documents are the provisions for establishing signatures on negotiable instruments and securities.[146] Both relevant sections provide that unless a signature is specifically denied in the pleadings, it is admitted. This changes the old law which required preliminary proof of authenticity of all signatures.[147] The Comments state that the reason for requiring a specific denial, is to give a plaintiff notice of a claim of forgery or lack of authority of the signer, and thus to give the plaintiff an opportunity to prepare his defenses.[148] Whether a denial will be based on information and belief, or on knowledge insufficient to form a belief will depend on local pleading rules.[149]

The plaintiff is not required to prove a signature's authenticity until some evidence is introduced which would support a finding that the signature is forged or unauthorized. This is due to the fact that section 3-307(1)(b) creates a presumption that signatures are genuine. To reiterate, signatures will not be in issue at all until specifically denied. But once denied, even though they are in issue, the defendant will not have to prove their authenticity until the presumption in his favor is defeated.

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144 Comment 2 to UCC § 1-202.

145 See McCormick, Evidence § 186, at 396-97 (1954).

146 *Compare* UCC § 1-202 (third party documents), *with* UCC § 3-307 (negotiable instruments) *and* UCC § 8-105 (securities).

147 See Comment 1 to UCC § 3-307.

148 Comment 1 to UCC § 3-307.

149 *Ibid.*

Evidence of Dishonor

Section 3-510, which gives the effect of protest as evidence, and provides two substitutes for protest as proof of dishonor, has not made any substantial change in authentication requirements. Although authenticity is mentioned in the Comments, the statute itself makes no reference to authentication requirements. It merely provides that a formal certificate of protest, a stamp by the drawee, or bank records "are admissible in evidence and create a presumption of dishonor . . . ."[150]

However, in the Comments the drafters state that "a document regular in form which purports to be a protest" will not require the holder to prove authenticity, although its authenticity may be overturned by contrary evidence.[151] This is not new; a certificate of protest has generally been held admissible without proof of authenticity, since it is notarized and sufficient authority is implied from the notary's office and from his seal to waive any need for further authentication.[152] The Comments make no reference to authenticity requirements for the protest substitutes, *i.e.*, stamp of the drawee and bank records. With no specific provision, courts will probably follow the common law rules and require proof of authenticity of any stamp and records, even though the words in the statute, "are admissible in evidence," might be interpreted to imply that no showing of authenticity is required unless a specific objection is raised. This is unfortunate, as it seems highly unlikely that checks returned with an "insufficient funds" stamp or bank records would ever be forged or unauthorized. The authentication of such documents may well require unnecessary and burdensome documentation that could have been easily avoided by a few minor changes in the wording.

Relevancy

The UCC contains few provisions concerning relevancy. However, this topic does not lend itself to any sort of extensive statutory treatment. This conclusion is based on the premise that the relevancy of any fact is tested mainly by logic. The inferences which might reasonably be drawn from a fact will continue to be questions for the courts to decide on the basis of common sense.[153]

The Uniform Rules of Evidence define relevant evidence: "Relevant evidence" means evidence having any tendency in reason to prove any material fact.[154] This definition encompasses the two main factors on which evidence is often excluded from a trial as irrelevant. First, the evidence must be

150 UCC § 3-510.

151 Comment 1 to UCC § 3-510.

152 See note 87 *supra*, *cf.* Kardynal v. Grezezinski, 255 Mich. 421, 238 N.W. 213 (1931).

153 See Commissioner's Note to UNIFORM RULE OF EVIDENCE 1(2).

154 UNIFORM RULE OF EVIDENCE 1(2).

material, that is, the proposition which it is meant to prove must be properly provable in that case. For instance, since contributory negligence is no defense under workmen's compensation laws, evidence offered of such negligence would be immaterial.[155] Second, the evidence offered must tend to be probative of the proposition at which it is directed. Various tests have been espoused for determining relevancy,[156] but the better method appears to be to ask whether the evidence offered renders the desired inference more probable than it would be without the evidence.[157] The question of relevancy is primarily one for the court, and whether any particular item is relevant or not will depend on the facts of each case. Thus, a categorical or statutory treatment of relevancy to any large extent would be pointless.

However relevance is not the final test. It should also appear that the benefits of using the evidence outweigh the burdens. Admissions of some relevant evidence could have such bad side effects that it would be excluded on those grounds. Evidence could, even though relevant, arouse the passions of a jury and thus prejudice the case.[158] Also, evidence might create a side issue that could unduly distract the jury from main issues.[159] The evidence offered may consume an undue amount of time,[160] or might be an unfair surprise.[161] McCormick, in discussing the desirability of setting fixed standards in the field of relevancy, aptly stated:

> It seems better to discard the term "legal relevancy" altogether. Its use tends to emphasize conformity to precedent in an area where the need for discretionary responsibility for weighing of value against dangers in the particular case should be stressed.[162]

Section 1-205 deals with and defines the terms "course of dealing" and "usage of trade." The UCC does not give any absolute rule regarding the relevancy of these terms, but generally notes that they "give particular meaning to and supplement or qualify terms of an agreement."[163] Course of dealing is restricted to a sequence of conduct between the parties, such as a practice or method of dealing which regularly occurs in a given locality,

155 See McCORMICK, *op. cit. supra* note 145, § 151, at 314.

156 These tests are discussed in McCORMICK, *op. cit. supra* note 145, § 152, at 317-18.

157 Professor McCormick approves this rule. *Id.* at 318. See also James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 699 (1941).

158 Rogers v. Rogers, 80 N.H. 96, 114 Atl. 270 (1921).

159 Veer v. Hagemann, 334 Ill. 23, 165 N.E. 175 (1929); McCaffrey v. Schwartz, 285 Pa. 561, 132 Atl. 810 (1926).

160 ". . . so far as the introduction of collateral issues goes, that objection is a purely practical one.—a concession to the shortness of life." Reeve v. Dennett, 145 Mass. 23, 11 N.E. 938, 943-44 (1887) (Holmes, J.).

161 Kurn v. Radencic, 193 Okl. 126, 141 P.2d 580 (1943); Thompson v. American Steel & Wire Co., 317 Pa. 7, 175 Atl. 541 (1934); see James, *supra* note 157, at 703.

162 McCORMICK, *op. cit. supra* note 145, § 152, at 321.

163 UCC § 1-205(3).

vocation, or trade. It is a factor to use in finding the true commercial meaning of an agreement.[164]

Thus, the UCC has defined these terms in a general section. This was not done under the Uniform Sales Act, although that act, in several instances, recognized the probative value of such evidence.[165] This does not represent a change in the law, but merely a clarification and definition. Wigmore recognized the utility of such evidence and stated, regarding its relevance:

> In evidencing a custom of usage (*i.e.*, the habit of a body of persons) by specific instances, the . . . principle . . . is applicable . . . that the instances offered (a) should be sufficiently numerous to indicate a fairly regular course of business, and (b) should occur under conditions substantially similar to that in question.[166]

Of course, even though the UCC provides that a course of dealing and usage of trade may be useful in interpreting an agreement, such factors must be relevant in that they must pertain to an issue in the case and must have probative value. The UCC has also provided that evidence of usage of trade may not be admissible if, in the court's opinion, unfair surprise has occurred. The party using such evidence may give notice that he will use such evidence, and the sufficiency of this notice will also be a question for the court.[167] This is in accord with the view that even though certain evidence may be relevant, there may be other more powerful factors which could prevent its admission, *e.g.*, unfair surprise. It is doubtful whether this section will have any tangible effect on the law of evidence in this area other than providing the courts with a rather broad definition of the terms "course of dealing" and "usage of trade."

Section 2-723 deals with the proof of market price in the case of anticipatory breach of a sales contract. The section provides that damages based on market price will be determined as of the time the aggrieved party learned of the breach.[168] The section then goes on to state that if evidence is not available at the time or place where the breach occurs to show market price, then evidence of the price in a commercially reasonable substitute time or place may be used.[169] Again, such evidence, if it pertains to usage of trade, even if relevant, may not be used without proper notice to the other party in order to prevent surprise. The following section[170] states that market reports and other general periodicals may be used to determine

164 See Comment 4 to UCC § 1-205.

165 See UNIFORM SALES ACT §§ 9(1), 15(5), 18(2), 71.

166 2 WIGMORE, *op. cit. supra* note 137, § 379, at 316; see 1 WIGMORE *op. cit. supra* note 137, § 94.

167 UCC § 1-205(6).

168 UCC § 2-723(1).

169 UCC § 2-723(2).

170 UCC § 2-724.

market price.[171] The section implies the obvious, that evidence of current prices of goods will be relevant to the issue of determining any damages based on market price.

Section 3-503(2) is similar in effect to the above section. This subsection merely provides that in determining a reasonable time for presentment, one must look to the nature of the instrument, usage of banking or trade, and the facts of the particular case. This is similar to the mode of determination stated in section 193 of the NIL. It is implied here that usages may be relevant, but again, relevancy will ultimately rest in the discretion of the court and the facts of any particular case. Section 1-205 would apply here, and notice would have to be given that evidence of a usage of trade was being introduced.

Section 2-208 takes the strongest step regarding relevancy in the UCC. That section provides:

> (1) Where the contract for sale involves repeated occasion for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.
>
> . . . .
>
> (3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

Under this section a course of performance will always be relevant to determine the meaning of an agreement. Since section 1-205(6) applies only to usage of trade, it would not be necessary here to give notice to the other party that evidence relating to a course of dealing would be introduced. This is reasonable since such material is readily accessible to the two parties and there would be no unfair surprise. Course of dealing relates only to conduct between the conducting parties and not to conduct of other men in the business as a whole.

Although writers feel iron-clad rules such as this one regarding relevancy are improper,[172] there would appear to be little danger here that such evidence would ever be immaterial or without probative value. Perhaps it would have been preferable to use the word admissible rather than the word relevant. The use of the word relevant implies that such evidence will always have probative value, and this might not always be the case. However, regardless of probative value, it could have been stated that such evi-

171 See text accompanying notes 106-115 *supra.*

172 See text accompanying note 162 *supra.*

dence will always be admissible, and then the jury would have been allowed to weigh the relevance as it sees fit. Alternatively, it could have been provided that such evidence shall not be excluded on grounds of relevancy. This would appear to be more in line with the proper definition of the term since it could hardly be stated about any fact that it will *always* be relevant in a class of cases. This is, of course, merely a matter of semantics and definition; the effect of the section will be the same regardless of which phraseology is adopted.

Conclusion

A survey of evidence law in the UCC reveals several factors. A few sections were drafted with the clear intent of affecting evidentiary aspects of commercial law. These sections, in general, show a modern approach and a desire to avoid the older time-consuming and unnecessary rules. Examples of sections with this beneficial approach are those simplifying the authentication process, and those allowing broader exceptions to the hearsay rule. However, other sections of the UCC may have an effect on evidence law that the drafters may well have wished to avoid. Those areas using undefined and confusing terminology, such as the use of "prima facie," will certainly not lend any uniformity to the commercial law of the nation.

Although the over-all effect of the UCC on evidence law is good, the statutes do not show the close consideration which evidence problems deserve. Although it would not be a simple matter to regulate the states in this regard, it is clear that different approaches to evidence under similar factual situations could result in diametrically opposed results in different states. This factor would show that, to achieve uniformity, more than a passing consideration of this problem is necessary. Where the drafters treated evidence problems specifically, they showed an intent to liberalize old rules and facilitate speedier and more efficient trial procedures. A liberal judicial approach toward evidence problems in cases decided under the UCC will further the main purposes behind the creation of such uniform laws.

J. A. B., III