15/348

#63 11/15/76

Memorandum 76-96

Subject: Study 63 - Evidence Code

In 1972, the Law Revision Commission considered an article by Justice Kaus that was critical of certain provisions of the Evidence Code that permit jury determination of foundational facts. See Memorandum 72-29 (attached following the exhibits to this Memorandum).

The problem that concerned Justice Kaus is summarized in Exhibit VI to this Memorandum.

The Commission determined that it would not go ahead with further consideration of this matter unless the State Bar was of the view that the matter merited further study. We received responses from the State Bar but failed until now to bring this matter back for further Commission consideration.

The State Bar Committee on Criminal Law and Procedure (Exhibit I attached) is of the view that continued study of the changes suggested by Justice Kaus is unnecessary. Moreover, that committee is opposed to the amendments suggested by Justice Kaus. The State Bar Committee on Administration of Justice was of the view that the Commission might wish to study this matter. See Exhibit II (expressing some doubt as to whether Justice Kaus' proposed wording would solve the problem).

We also wrote to the California Trial Lawyers Association requesting an expression of their views. William P. Camusi, responding for the association, objects to any revision. See Exhibit III attached.

Judge (now Justice) Bernard S. Jefferson (Exhibit IV), who is the author of the California Evidence Benchbook (published by the Conference of California Judges) wrote opposing the amendments suggested by Justice Kaus. See Exhibit IV. (We had solicited the views of the Conference of California Judges, and this is the only response we received as a result.)

Exhibit V is an additional letter objecting to the revision of the Evidence Code as suggested by Justice Kaus.

It is the staff recommendation that the Commission give no further consideration of the revisions proposed by Justice Kaus. It is apparent

that the revisions are highly controversial, and evidence experts disagree on whether they are desirable. The staff has the highest regard for Justice Kaus; but we see no reasonable possibility of obtaining legislative enactment of his proposals even if the Commission determined that they were sound.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 76-96 EXHIBIT I 63,10-3

THE STATE BAR OF CALIFORNIA

HAROLD F. BRADFORD
Legislative Representative

ROOM 1003
926 J STREET
SACRAMENTO 95814
TELEPHONE 444-2762
AREA CODE 916

May 2, 1972

John H. DeMoully, Esq.
Executive Secretary
California Law Revision Commission
Stanford School of Law
Stanford, Ca. 94305

Dear Mr. DeMoully:

Reference is made to your February 15, 1972, letter wherein you indicated that the Law Revision Commission was soliciting views concerning the desirability of making certain revisions in Evidence Code Sections 403, 1222 and 1223. The revisions were suggested by Justice Otto M. Kaus in a recent law review entitled, All Power to the Jury--California's Democratic Evidence Code, 4 Loyola U. of L.A. L. Rev. 233 (1971).

The State Bar Committee on Criminal Law and Procedure had an opportunity to review these suggested revisions at the monthly meeting of the committee in April, 1972. Generally, the committee was of the opinion that there is no great present need for enactment of these amendments to the Evidence Code. Further, by a split vote, the committee was opposed to the specific amendments suggested by Judge Kaus. The majority of the committee was of the opinion that the suggested amendments to the Evidence Code would erode the accused's right to a jury trial, by taking issues away from the consideration and determination of the jury and substituting a determination by the judge.

In conclusion, the committee, in addition to its opinion that the need for the suggested revisions is not presently imminent, further is of the opinion that continued study of these esoteric changes is unnecessary.

Very truly yours,

Gerald E. Utti

Gerald E. Utti
Assistant Legislative
Representative

cc: Messrs. Eades and Hooley

ES	
AES	
AC	
AA	

Memo 76-96 EXHIBIT II 63.10-30

THE STATE BAR OF CALIFORNIA

601 MCALLISTER STREET
SAN FRANCISCO 94102
TELEPHONE 922-1440
AREA CODE 415

August 25, 1972

John DeMoully, Executive Secretary
California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

This is to advise you that the Board of Governors at its August, 1972 meeting had before it the 1972 Annual Report of the Committee on Administration of Justice. The committee in that report among other things commented on recommendation of Justice Otto M. Kaus concerning revision of the Evidence Code regarding admissibility of evidence. The Board upon recommendation of the committee wishes to suggest to the Law Revision Commission that it may wish to place this matter on its agenda for study. Appropriate excerpt from the report of the Committee on Administration of Justice is enclosed.

Very truly yours,

Mary G. Wailes
Assistant Secretary

MGW:dfb

Enclosure

cc: Messrs. D. Robinson, Janofsky, Benas, Hufstedler, Malone, Bradford, and Eades

ES	
AES	
AC	
AA	

EXCERPT FROM 1972 ANNUAL REPORT
COMMITTEE ON ADMINISTRATION OF JUSTICE

(6) Evidence Code 403, 1222, 1223 - Admissibility of Evidence.

Origin: Law Revision Commission.

The Law Revision Commission has solicitated the views of the State Bar concerning the desirability of making certain revisions to the Evidence Code recommended by Justice Otto M. Kaus in a recent article in the Loyola University Law Review. Justice Kaus points out that under present code provisions, the jury is allowed to decide the existence of preliminary facts under the guise of its being an issue of relevance (1) where the admissibility of a hearsay statement depends upon the speaker being a specific person, (2) where the admissibility of a hearsay statement depends upon an agent's authority to make admissions on behalf of his principle, and (3) where preliminary facts are necessary to admit evidence concerning adoptive admissions and co-conspirator's statements. In these instances Justice Kaus urges that the judge should determine, by a preponderance of the evidence, that the preliminary fact exists. This would eliminate those instances where the jury first determines that a preliminary fact exists which makes certain evidence then admissible but such evidence is later determined not to be admissible and the court can only instruct the jury to disregard it.

The Committee agrees that there is a problem in this field, but (1) its magnitude is not known, and (2) the Committee has some doubt as to whether Justice Kaus' proposed wording accomplishes the purpose. It therefore recommends that the Law Revision Commission place the matter on its Agenda for study.

Memo 76-96 EXHIBIT III 63.10-30

Law Offices of
WILLIAM P. CAMUSI

TWENTY FOURTH FLOOR
606 SOUTH OLIVE STREET
LOS ANGELES, CALIFORNIA 90014
TELEPHONE (213) 624-1451

May 1, 1972

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Revision of Evidence Code Sections 403, 1222, and 1223

Attention: John DeMoully, Executive Secretary

Dear John:

While there is much to be said for Justice Kaus' comments in his recent law revision article, I think the Law Commission did a careful job on the question of preliminary fact matters. If it is logical and relatively easy to apply, I prefer that the trier of fact decide the existence or nonexistence of preliminary facts insofar as this can reasonably be done.

Until additional experience would indicate otherwise, I would not recommend any revisions of the above-referenced Evidence Code Sections.

Sincerely,

William P. Camusi

WILLIAM P. CAMUSI

WPC/k
cc: James Frayne

ES	
AES	
AC	
AA	

Memo 76-96 EXHIBIT IV

CHAMBERS OF
The Superior Court
LOS ANGELES, CALIFORNIA 90012
BERNARD S. JEFFERSON, JUDGE

TELEPHONE
(213) 625-3414

April 24, 1972

John H. DeMoully
Executive Secretary
California Law Review Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

I am writing to register my objections to the proposed amendments to Evidence Code §§ 403, 1222 and 1223 suggested by Justice Otto M. Kaus. It is my opinion that the suggested amendments are neither necessary nor particularly desirable.

Justice Kaus seems to be trying to place preliminary fact issues into the same simple mold attempted by Professor Morgan in his approach that preliminary facts issues pertaining to relevancy should be decided by the jury and those dealing with competency should be decided by the trial judge. Experience has demonstrated that this cannot be done. The value of the present Evidence Code solution is in the detailed listing of those preliminary fact issues that are to be determined by the jury and those that are to be decided by the trial judge. It is not too material whether a designation of "relevancy" be given to one set of preliminary fact determinations and a designation of "competency" be given to the other class of preliminary fact determinations.

In suggesting that the preliminary fact issue of the identity of an actor or declarant should be decided by the trial judge, Justice Kaus argues that this issue does not relate to relevancy and hence is a preliminary fact issue to be decided by the trial judge. This idea is not correct.

For example, let us suppose that a defendant in a criminal case testifies and the prosecution offers to impeach him by introducing a record of a felony conviction of a person of the defendant's name. The defendant objects to the proffered evidence on the ground that he is not the subject of such felony conviction and was not even in the state where the conviction occurred on the date of the conviction. In this

RS	
AFS	

case, defendant raises the issue of the identity of an actor. If the record of conviction is that of another person of the same name, it is simply not relevant to attack defendant's credibility. Why should this issue of relevancy be taken from the jury and given to the trial judge?

Here is another example. A defendant is prosecuted for robbery. A witness testifies that he saw a man running from the scene immediately after the crime was committed. Defendant objects to the testimony of the witness on the ground that defendant was not the fleeing person. If the fleeing person was not the defendant, but some other person, the witness's testimony is irrelevant on the issue of defendant's guilt. Justice Kaus would take this relevancy issue away from the jury.

Similarly, identity of a hearsay declarant may well be an issue of relevancy. For example, suppose that the police arrest three persons immediately after there has been a theft of merchandise from a store and carries all three persons in a patrol car to the police station. It ends up that only the defendant is prosecuted. At the defendant's trial, the police officer testifies that while transporting the three suspects to the police station, he fully advised them of their Miranda rights and the defendant then spoke up and said, "It was I who stole the goods." Defendant objects to the testimony on the ground that it was one of the other suspects who made the statement. How can Justice Kaus contend that the identity of the declarant is not a question of relevancy? If another suspect made the statement, it is not relevant as it cannot possibly have a tendency in reason to prove that defendant committed the offense.

It also appears that Justice Kaus would amend Evidence Code § 403 to do away with a party's right to a jury instruction on the three preliminary fact issues remaining to the effect that unless the jury finds the preliminary fact to exist, it should disregard the proffered evidence. I do not think that this right to a jury instruction should be taken from a party. It is true that in most cases of relevancy, personal knowledge of a witness, or the authenticity of a writing, a party does not seek such an instruction but is content to argue the matter of failure of proof to the jury. But there are instances in which a party desires that such an instruction be given to the jury. It is my considered opinion that Evidence Code § 403 is correct in requiring the trial judge to give such an instruction if a party requests such an instruction.

Justice Kaus seeks to amend Evidence Code § 1222 to make the trial judge the final arbiter of the preliminary fact of authorization for a hearsay statement of one person to be admitted against a party as an authorized admission. What is the advantage to be gained in taking this issue away from the jury? It appears to me to be a perfectly good rule of evidence to have the trial judge decide only whether the evidence of authorization is such that a reasonable jury could find that a party authorized the declarant to speak.

The preliminary fact issue of whether a defendant spoke words authorizing A to make a statement constituting an admission is no different in principle from an issue of whether defendant spoke words constituting a personal admission. Under Evidence Code § 1220, if a party denies that he made any such statement, the ultimate issue of whether he made such a statement has to be decided by the jury. If, instead, the question is whether a party made a statement of authorization to A, there is no good reason why that issue should be taken from the jury.

The same problem exists with the suggested amendment to Evidence Code § 1223. I see no good reason for taking from the jury the preliminary fact issue of the existence of a conspiracy that makes a coconspirator's hearsay statement an authorized admission of a defendant. Justice Kaus seems to think that the jury cannot properly handle instructions to the effect that the jury must first find the existence of the conspiracy before it may give any validity to the coconspirator's statement. If such an argument is sound, it goes too far. It would justify doing away with the jury entirely on the theory that a jury is unable to comprehend and follow jury instructions. As a trial judge, I have more confidence in the ability of our jurors.

The theory of having a jury decide preliminary fact issues that revolve around relevancy is that these have been historically jury questions to decide. For the most part, the Evidence Code has attempted to keep for jury determination those issue that historically have been issues for the jury to decide. The preliminary fact issues which Justice Kaus proposes to take from the jury are issues which fall into this historical category. I think they should remain in this category.

The changes suggested by Justice Kaus will neither produce a more logical concept of a division of issues between judge and jury nor will it produce any easier operation of evidentiary rules, nor will it produce a more accurate determination of factual issues in our adversary system. My study of the law

April 24, 1972

of evidence and my years of experience as a lawyer and trial judge all lead me to the conclusion that the Law Review Commission should not recommend to the Legislature the proposed amendments to Evidence Code §§ 403, 1222 and 1223.

Very truly yours,

Bernard S. Jefferson

BSJ:ks

ADDRESS ALL COMMUNICATIONS
TO THE COMMISSION
CALIFORNIA STATE BUILDING
SAN FRANCISCO, CALIF. 94102
TELEPHONE: (415) 557- 1355

Public Utilities Commission

STATE OF CALIFORNIA

FILE No.

April 7, 1972

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

Dear Mr. DeMoully:

RE: REVISION OF EVIDENCE CODE SECTIONS 403, 1222 and 1223

In reply to your inquiry of February 15, it is the considered opinion of this office that the rights of parties will be better protected by retaining these sections in their present form.

We recognize that the provisions at issue represent an interweaving of the traditional role of the judge as the arbiter on admissibility of evidence and that of the jury as the trier of fact, and that instances may arise where the judge must admit evidence even though he is not satisfied as to proof of a necessary, underlying fact.

However, we consider this preferable to narrowing the right of a jury to determine the effect and value of evidence submitted to it and agree with the Assembly Committee on Judiciary's comment that, "if the judge finally determined the existence or nonexistence of the preliminary fact, he would deprive a party of a jury decision on a question the party has a right to have decided by the jury."

For these reasons we recommend against the proposed revisions.

Very truly yours,

Mary Moran Pajalich

MARY MORAN PAJALICH
Chief Counsel

ES	
AES	

Memo 76-96 EXHIBIT VI

STATE OF CALIFORNIA RONALD REAGAN, Governor

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW—STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305
(415) 321-2300, EXT. 2479

February 15, 1972

LETTER OF TRANSMITTAL

Re: Revision of Evidence Code Sections 403, 1222, and 1223

The Law Revision Commission solicits your views concerning the desirability of making certain revisions in Evidence Code Sections 403, 1222, and 1223.

The revisions were suggested by Justice Otto M. Kaus in a recent law review article. See Kaus, All Power to the Jury--California's Democratic Evidence Code, 4 Loyola U. of L.A. L.Rev. 233 (1971). Justice Kaus states (pages 233-235 of his article):

> The admissibility of evidence often depends on some preliminary fact being found true. Frequently the finding must be based on conflicting evidence. The orthodox rule with respect to the allocation of such fact finding functions between court and jury was stated by Morgan: "[w]here the relevancy of *A* depends upon the existence of *B*, the existence of *B* should normally be for the jury; where the competency of *A* depends upon the existence of *B*, the existence of *B* should always be for the judge." In other words, if the evidence is relevant, but its competency under a technical rule of admissibility depends on proof of some other fact—such as the legality of an arrest, the loss of a letter, criminal purpose in seeking legal advice or the unavailability of a hearsay declarant—the existence or nonexistence of that fact is determined, with finality, by the court. While there are times when reasonable men may differ whether a particular preliminary fact determines relevance or competency, in the vast majority of situations the orthodox rule, if understood, is easily applied. The California Evidence Code has made a commendable and nearly successful effort to structure California law along orthodox lines. The conversion was long overdue. No California opinion of which I am aware had enunciated a general principle, orthodox or heretical, that could be applied to newly encountered situations with any assurance. Thus pre-Code case law had entrusted the preliminary fact finding function in cases of confessions, dying declarations, and spontaneous statements to both the

court and the jury. On the other hand the job of finding the foundational facts, which the proponent of co-conspirators' statements has to prove, was entrusted entirely to the jury; it was immaterial that the court was satisfied that the foundational evidence was a bag of lies. All it could do was to instruct the jury that it should not consider the co-conspirators' statements if it, in turn, found the foundation to be wanting.

For reasons which I do not understand the California Law Revision Commission retained at least one of the former heresies and came up with a few of its own.

To be specific, the Code and its comments place into the hands of the jury the determination of the identity of the speaker where the admissibility of a hearsay statement depends on the speaker being a particular person, and of an agent's authority to make an admission on behalf of a principal. It also gives to the jury the determination of all preliminary facts in the case of an adoptive admission and the pre-Code rule with respect to co-conspirators' statements is retained. In all these situations the hearsay statement must be conditionally received—and therefore heard by the jury—on a mere prima facie showing of admissibility, regardless of whether the court thinks that the showing is credible.

[Emphasis added; footnotes omitted.]

In the four instances mentioned in the last paragraph quoted above, Justice Kaus urges that the judge should determine by a preponderance of the evidence that the preliminary fact exists. In his law review article, he develops the reasons for his suggested revisions.

Justice Kaus has drafted amendments to Sections 403, 1222, and 1223 of the Evidence Code that would effectuate his suggestions. These are attached (green sheets).

The Commission has decided to solicit the views of various interested persons and organizations before it determines whether it will recommend any change in the Evidence Code in response to the suggestions of Justice Kaus. We would appreciate receiving a statement of your views on the suggestions. We need your views not later than May 1, 1972.

Sincerely,

John H. DeMoully
Executive Secretary

403. (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

(1) The relevance ~~of the proffered evidence~~ , including the authenticity of a writing, depends on the existence of the preliminary fact; or

(2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony ~~;~~ .

~~(3) The preliminary fact is the authenticity of a writing; or~~

~~(4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.~~

(b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial.

~~(c) If the court admits the proffered evidence under this section, the court:~~

~~(1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.~~

~~(2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.~~

(c) If the court admits the proffered evidence and subsequently determines that a jury could not reasonably find that the preliminary fact exists, it shall instruct the jury to disregard the proffered evidence.

1222. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and

(b) The evidence is offered either after admission of evidence ~~sufficient to sustain a finding of such authority~~ that satisfies the court that such authority has been proved or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

1223. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;

(b) The statement was made prior to or during the time that the party was participating in that conspiracy; and

(c) The evidence is offered either after admission of evidence ~~sufficient to sustain a finding of~~ which satisfies the court that the facts specified in subdivisions (a) and (b) are proved or, in the court's discretion as to the order of proof, subject to the admission of such evidence.