#34(L) 4/13/64

Second Supplement to Memorandum 64-21

Subject: Study 34(L) - Uniform Rules of Evidence (Article I. General Provisions--Amendments and Repeals)

Attached as Exhibit I (pink) is a suggested draft of the "Amendments and Repeals" portion of the tentative recommendation on Article I. In connection with this draft, it should be noted that Professor Chadbourn recommended the repeal of the sections we propose to repeal. See also Professor Degnan's Research Study (Part I) for a research study covering all but one of the sections proposed to be repealed in the attached material.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Second Supplement to
Memo 64-21

EXHIBIT I

AMENDMENTS AND REPEALS

Set forth below are a number of existing statutes that should be repealed in light of the Commission's tentative recommendation concerning Article I (General Provisions) of the Uniform Rules of Evidence. The reason for the suggested repeal is given after each section. References to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission. All the sections listed below are in the Code of Civil Procedure.

Section 1823 provides:

> 1823. DEFINITION OF EVIDENCE. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

Section 1823 should be repealed. It is superseded by the definition of "evidence" in Rule 1(1).

Section 1824 provides:

> 1824. DEFINITION OF PROOF. Proof is the effect of evidence, the establishment of a fact by evidence.

Section 1824 should be repealed. It is superseded by the definition of "proof" in Rule 1(3).

Section 1825 provides:

> 1825. DEFINITION OF LAW OF EVIDENCE. The law of evidence, which is the subject of this part of the Code, is a collection of general rules established by law:
> 1. For declaring what is to be taken as true without proof;
> 2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,
> 3. For the production of legal evidence;
> 4. For the exclusion of whatever is not legal;
> 5. For the determining, in certain cases, the value and effect of evidence.

Section 1825 should be repealed. This section, which merely states in general terms the content of Part IV of the Code of Civil Procedure, serves no useful purpose. No case has been found where the section was pertinent to the decision.

Section 1827 provides:

> 1827. FOUR KINDS OF EVIDENCE SPECIFIED. There are four kinds of evidence:
> 1. The knowledge of the court;
> 2. The testimony of witnesses;
> 3. Writings;
> 4. Other material objects presented to the senses.

Section 1827 should be repealed. It is superseded by the definition of "evidence" in Rule 1(1).

Section 1828 provides:

> 1828. There are several degrees of evidence:
> 1. Primary and secondary.
> 2. Direct and indirect.
> 3. Prima facie, partial, satisfactory, indispensable, and conclusive.

Section 1828 attempts to classify evidence into a number of different categories, each of which in turn is defined by the sections that follow, i.e., Sections 1829 through 1837. This very elaborate classification system represents the analysis of evidence law of a century ago. Writers, courts, and lawyers today use different classifications and different terminology. Accordingly, Section 1828 should be repealed. To the extent that the terms defined in Sections 1829 through 1837 should be retained, those terms are defined in the revised rules.

Sections 1829 and 1830 provide:

> 1829. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents.

1830. Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument or oral evidence of its contents is secondary evidence of the instrument and contents.

Sections 1829 and 1830 should be repealed. These sections serve no definitional purpose in the existing statutes and are not a correct statement of law. See the research study, infra at 9-11. Moreover, these sections appear to state a "best evidence" rule that is inconsistent with Revised Rule 20 and existing law. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IX. Authentication and Content of Writings), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 117-121 (1964).

Sections 1831 and 1832 provide:

1831. DIRECT EVIDENCE DEFINED. Direct evidence is that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example: if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it, is direct.

1832. INDIRECT EVIDENCE DEFINED. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred.

Sections 1831 and 1832, together with Section 1957 (set out infra), should be repealed. Sections 1831 and 1832 draw a distinction between "direct" and "indirect" evidence, the more common name for "indirect" evidence being circumstantial evidence. The existing statutes do not use the defined terms, and the distinction is not drawn in the tentative recommendations of the Law Revision Commission. Under the tentative recommendations, circumstantial evidence, when relevant, is as admissible as direct evidence.

The repeal of Sections 1831 and 1832 will not affect the instructions that are to be given to the jury in appropriate cases as to the difference between direct and circumstantial evidence. See the research study, infra at 12-13. Nor will the repeal of these sections affect the case law or other statutes relating to what evidence is sufficient to sustain a verdict or finding.

Section 1834 provides:

> 1834. PARTIAL EVIDENCE DEFINED. Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts. For example: on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterwards connected with the fact in dispute.

Section 1834 should be repealed. The substance of this section is stated as a rule of law, rather than as a definition, in the last sentence of subdivision (4) of Revised Rule 8.

Section 1836 provides:

> 1836. INDISPENSABLE EVIDENCE DEFINED. Indispensable evidence is that without which a particular fact cannot be proved.

Section 1836 should be repealed. This section serves no useful purpose. The defined term is not used in the existing statutes and is not used in the tentative recommendations of the Law Revision Commission. See the research study, infra at 21.

Section 1837 provides:

> 1837. CONCLUSIVE EVIDENCE DEFINED. Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it.

Section 1837 should be repealed. The section is unnecessary and is inconsistent with the definition of "evidence" stated in Revised Rule 1(1). See research study infra at 21-26.

Section 1838 provides:

> 1838. CUMULATIVE EVIDENCE DEFINED. Cumulative evidence is additional evidence of the same character, to the same point.

Section 1838 should be repealed. This term is not used in the existing statutes and is not used in the tentative recommendations of the Law Revision Commission. The deletion of Section 1838 will have no effect on Revised Rule 45, which states the principle that cumulative evidence may be excluded but does not use the words "cumulative evidence." Nor will the deletion of Section 1838 have any effect on the last sentence of Code of Civil Procedure Section 2044, which reads: "The court, however, may stop the production of further evidence on any particular point when the evidence upon it is already so full as to preclude reasonable doubt." See discussion of Revised Rule 45 in Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 612, 639-644 (1964).

Section 1839 provides:

> 1839. CORROBORATIVE EVIDENCE DEFINED. Corroborative evidence is additional evidence of a different character, to the same point.

Section 1839 should be repealed. The case law that has developed under the various code sections that require corroborating evidence provides better definitions of what constitutes "corroborating evidence" for the purposes of those sections than does Section 1839. In fact, Section 1839 is rarely cited or relied on in the cases. See, e.g., People v. Bowley, 59 Cal.2d 855, 31 Cal. Rptr. 471, 382 P.2d 591 (1963).

Some cases indicate that an instruction on what constitutes corroborating evidence is adequate if given in the words of Section 1839. E.g., People v.

Sternberg, 111 Cal. 11, 43 Pac. 201 (1896). See also People v. Monteverde, 111 Cal. App.2d 156, 244 P.2d 447 (1952). On the other hand, CALIFORNIA JURY INSTRUCTIONS, CRIMINAL provides a better definition of corroborating evidence--a definition derived from the case law rather than from Section 1839. See e.g., CAL. JURY INSTRUCTIONS, CRIMINAL § 822 (Revised)(1962 Pocket Part)(corroboration of testimony of accomplices):

> 822. Corroborative evidence is additional evidence to the same point and although it need not be sufficient standing alone to support a conviction, it must relate to some act or fact which is an element of the offense with which the defendant is charged. It must, in and of itself and independent of the evidence which it supports, fairly and logically tend to connect the defendant with the commission of the alleged offense. Corroborative evidence may consist of other evidence of circumstances, the testimony of a witness other than an accomplice, or the testimony or admissions, if any, of the defendant.
>
> In determining whether an accomplice has been corroborated you must first assume the testimony of the accomplice to be removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense. If there is none you must acquit the defendant. If there is such evidence then his testimony is corroborated. But before you may convict the defendant you must find from all the evidence that it carries the convincing force required by law.

Similar instructions dealing with the requirement of corroborating evidence in other types of criminal cases are contained in the same publication. See CAL. JURY INSTRUCTIONS, CRIMINAL §§ 203 (Revised)(possession of stolen property), 235 (Revised)(possession of stolen property), 592-C (Revised)(abortion), and 766 (perjury).

The repeal of Section 1839 will have no effect on the interpretation of the sections in various codes that require corroborating evidence. The case law that has developed under these sections will continue to determine what constitutes corroborating evidence for the purposes of the particular sections. The repeal of Section 1839 will, however, eliminate the inconsistency between Section 1839 (which appears to restrict corroborative

evidence to evidence of a "different character") and the case law which includes "additional evidence," i.e., either additional evidence of the same kind or evidence differing in kind.

Section 1868 provides:

> 1868. EVIDENCE CONFINED TO MATERIAL ALLEGATION. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must ttherefore be avoided. It is, however, within the discretion of the court to permit inquiry into collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

Section 1868 should be repealed. It is superseded by Revised Rules 1(2), 7(3), and 45.

Subdivisions 1, 15, and 16 of Section 1870 provide:

> 1870. FACTS WHICH MAY BE PROVED ON TRIAL. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> * * * * *
>
> 1. The precise fact in dispute;
>
> * * * * *
>
> 15. Any other facts from which the facts in issue are presumed or are logically inferable;
>
> 16. Such facts as serve to show the credibility of a witness, as explained in Section 1847.

Subdivisions 1, 15, and 16 of Section 1870 are superseded by the definition of "relevant evidence" in Rule 1(2).

Section 1957 provides:

> 1957. INDIRECT EVIDENCE CLASSIFIED. Indirect evidence is of two kinds:
> 1. Inferences; and,
> 2. Presumptions.

Section 1957 should be repealed. See the discussion, supra, concerning the repeal of Section 1832 (defining indirect evidence).

STATE OF CALIFORNIA

C A L I F O R N I A L A W
R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION AND A STUDY

relating to

The Uniform Rules of Evidence

Article I. General Provisions

May 1964

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

Draft: January 17, 1964
Revised: February 5, 1964
Revised: March 5, 1964

LETTER OF TRANSMITTAL

To His Excellency Edmund G. Brown
Governor of California
and to the Legislature of California

The California Law Revision Commission was directed by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article I (General Provisions) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultant, Professor James H. Chadbourn, formerly of the U.C.L.A. Law School, now of the Harvard Law School. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission.

This report is one in a series of reports being prepared by the Commission on the Uniform Rules of Evidence, each report covering a different article of the Uniform Rules.

In preparing this report the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

Respectfully submitted,

JOHN R. McDONOUGH, JR.
Chairman

April 1964

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article I. General Provisions

The Uniform Rules of Evidence (hereinafter sometimes designated as "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature directed the Law Revision Commisssion to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.

The tentative recommendation of the Commission on Article I (General Provisions) of the Uniform Rules of Evidence is set forth herein. This article consists of Rules 1 through 8. Rule 1 contains definitions of words and phrases used in the Uniform Rules. Rules 2 through 8 are rules of general application governing the operation of the Uniform Rules.

Rules 1 through 8 are difficult to consider in isolation, since they necessarily influence and are influenced by later specific portions of the Uniform Rules. Nevertheless, this tentative recommendation has been prepared so that it may be considered in connection with the Commission's tentative recommendations covering other articles of the Uniform Rules.

Part IV of the Code of Civil Procedure (consisting of Sections 1823-2104)

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[1] A pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 30 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

regulates evidence. The introductory portion (Sections 1823-1839) of Part IV consists of definitions and preliminary statements that are somewhat comparable to the definitions contained in Rule 1. In addition, the Preliminary Provisions (Sections 1-32) of the Code of Civil Procedure contain definitions and general provisions that apply to Part IV of the Code of Civil Procedure. However, only those existing statute sections which clearly will be replaced by the provisions of Revised URE Article I are considered in this tentative recommendation. A subsequent recommendation will consider whether the other definitions and general provisions found in the existing evidence statutes should be retained, revised, or repealed.

The Commission tentatively recommends that URE Article I, revised as hereinafter indicated, be enacted as the law in California.[2] In the material which follows, the text of each rule proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Commission are shown in strikeout and italics. Each rule is followed by a comment setting forth the major considerations that influenced the recommendation of the Commission and explaining those revisions that are not purely formal or otherwise self-explanatory. For a detailed analysis of the various rules and the California law relating to URE Article I, see the research study beginning on page 000.

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[2] The final recommendation of the Commission will indicate the appropriate code section numbers to be assigned to the rules as revised by the Commission.

#34

ARTICLE I. GENERAL PROVISIONS

RULE 1. DEFINITIONS.

As used in these rules, unless the context otherwise requires:

(1) "Evidence" [~~is the~~] means [~~from which inferences may be drawn as a basis of proof in duly constituted~~] testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact in judicial or fact finding tribunals [~~, and includes testimony in the form of opinion, and hearsay~~].

(2) "Relevant evidence" means evidence having any tendency in reason to prove or disprove any [~~material~~] disputed fact.

(3) "Proof" is [~~all of the evidence before the trier of the fact relevant to a fact in issue which tends to prove the existence or non-existence of such fact.~~] the effect of evidence, that is, the establishment of a fact by evidence.

(4) "Burden of proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with "burden of persuasion." Unless a statute or rule of law specifically requires otherwise, the burden of proof requires proof by a preponderance of the evidence.

(5) "Burden of producing evidence" means the obligation of a party to introduce evidence [~~when necessary~~] sufficient to avoid [~~the risk of~~] a [~~directed verdict or~~] peremptory finding against him [~~on a material issue of~~] as to the existence or nonexistence of a disputed fact.

(6) "Conduct" includes all active and passive behavior, both verbal and non-verbal.

(7) "The hearing" [~~unless some other is indicated by the context of the rule where the term is used,~~] means the hearing at which the question under a rule is raised, and not some earlier or later hearing.

(8) "Finding of fact," "finding," or "finds" means the determination from [~~proof~~] evidence or judicial notice of the existence or nonexistence of a fact. A ruling on the admissibility of evidence implies [a] whatever supporting finding of fact is prerequisite thereto; [~~no~~] a separate or formal finding is [~~required~~] unnecessary unless required by [a] statute [~~of this state~~].

[~~(9) "Guardian" means the person, committee, or other representative authorized by law to protect the person or estate or both of an incompetent or of a sui juris person having a guardian and to act for him in matters affecting his person or property or both. An incompetent is a person under disability imposed by law.~~]

(9) "Court" means the Supreme Court, a district court of appeal, superior court, municipal court or justice court, but does not include a grand jury.

(10) "Judge" [~~means member or members or representative or representatives of a court conducting a trial or hearing at which evidence is introduced.~~] includes a court commissioner, referee, or similar officer, authorized to conduct and conducting a court proceeding or court hearing.

(11) "Trier of fact" includes [~~a jury and~~] a judge when he is trying an issue of fact other than one relating to the admissiblity of evidence and a jury.

(12) "Verbal" includes both oral and written words.

(13) "Writing" means handwriting, typewriting, printing, photostating, photographing and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.

(14) "Action" includes a civil action or proceeding and a criminal action or proceeding.

(15) "Civil action" means a civil action or proceeding.

(16) "Criminal action" means a criminal action or proceeding.

(17) "Public entity" includes the State, a county, city, district, public authority, public agency, and any other political subdivision or public corporation.

(18) "State" means the State of California, unless applied to the different parts of the United States. In the latter case, it includes the District of Columbia and the territories.

COMMENT

This rule contains definitions of words and phrases used in the Revised Rules.

Subdivision (1)--"Evidence." This subdivision defines "evidence" broadly to include the testimony of witnesses, tangible objects, sights (such as a jury view or the appearance of a person exhibited to a jury), sounds (such as the sound of a voice demonstrated for a jury), and any other thing that may be presented to any tribunal as a basis of proof. The definition includes anything offered whether or not it is technically inadmissible and whether or not it is received. Thus, for example, Rule 63 uses "evidence" to refer to hearsay which may be excluded as inadmissible, but which may be admitted if no proper objection is made. Cf. Rule 4. And when inadmissible hearsay or opinion testimony is admitted without objection, there will be no doubt under this definition that it constitutes evidence.

Subdivision (1) is a better statement of existing California law than Code of Civil Procedure Section 1823, which defines "judicial evidence." Although Code of Civil Procedure Section 1823 by its terms restricts "judicial evidence" to that "sanctioned by law," the general principle is well established that matter which is technically inadmissible under an exclusionary rule is nonetheless evidence and may be considered in support of a judgment if offered and received without proper objection or motion to strike. E.g., People v. Alexander, 212 Cal. App.2d 84, 98, 27 Cal. Rptr. 720, 727 (1963)("illustrations of this principle are numerous and cover a wide range of evidentiary topics such as incompetent hearsay, secondary

evidence violating the best evidence rule, inadmissible opinions, lack of foundation, incompetent, privileged or unqualified witnesses, and violations of the parole evidence rule"). See Witkin, California Evidence 751-753 (1958).

As to whether presumptions are evidence, see Tentative Recommendation and a Study relating to the Uniform Rules of Evidence (Article III. Presumptions), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES *** (1964) [not yet prepared].

The word "evidence" is used in Revised Rules 1(2), 1(3), 1(4), 1(5), 1(10), 1(11), 2, 4, 5 (introductory clause), 5(1), 5(3), 6, 7, 8(1), 8(2), 8(3), URE Rules 14 and 16, and Revised Rules 19(3), 19(4), 20, 21(1), 21(1)(b), 21(2), 21(3), 22(2), 22(3), 22(4), 22(5), 24(3), 25(5), 25(6), 28(2)(g), 34(4), 36(4), 38, 39(2), 39(3), 41, 45, 46, 47(1), 47(2)(introductory clause), 47(2)(b), 47(3)(introductory clause), 47(3)(b), 47(4), 47(5), 48, 49, 51, 52(1), 52(2), 52.5, 53, 54, 63, 63(1)(b), 63(3)(a), 63(3)(b), 63(9)(a), 63(9)(b), 63(9)(c), 63(14), 63(21), 63(21.1), 63(22), 63(26), 63(27), 63(28), 63(32), 65, 66, 66.1, 67, 67.5, 67.7(4), 68(2), 70(1)(introductory clause), 70(1)(f), 70(1)(g), 70(2).

Subdivision (2)--"Relevant evidence." The definition of relevant evidence as "evidence having any tendency in reason to prove any disputed fact" is consistent with existing law. E.g., Larson v. Solbakken, ___ Cal. App.2d ___, 34 Cal. Rptr. 450, 455 (1963); People v. Lint, 182 Cal. App.2d 402, 415, 6 Cal. Rptr. 95, (1960).

Subdivision (2) recognizes that no precise or universal test of relevancy can be stated; the question in each case must be determined by logic and experience. See Larson v. Solbakken, ___ Cal. App.2d at ___, 34 Cal. Rptr. at 455-456; Witkin, California Evidence, 135-136 (1958). Obviously,

under subdivision (2) as under existing law, the trial judge has wide discretion in determining which evidence is relevant evidence and his decision will not be disturbed on appeal unless there is a clear showing of abuse of discretion.

"Disputed" has been substituted for "material" because the latter term is ambiguous. It is sometimes used to refer to a matter in dispute between the litigating parties (see Witkin, California Evidence 132-33), and it is sometimes used to refer to that which is of some importance or consequence (see, e.g., People v. Boggess, 194 Cal. 212, 235 (1924) ("remoteness . . . [may] be so great as to render . . . evidence . . . immaterial"); People v. Arrangoiz, 24 Cal. App.2d 116, 118 (1937); Black, Law Dictionary (4th ed. 1951); Merriam-Webster, New International Dictionary (2d ed. 1951).

"Relevant evidence" is used in Revised Rule 7(f).

Subdivision (3)--"Proof." This subdivision, for all practical purposes, states existing California law as found in Code of Civil Procedure Section 1824, which provides: "Proof is the effect of evidence, the establishment of a fact by evidence."

"Proof" is used in Revised Rules 1(1), 1(4), 1(8), 5(1), and 8(1), URE Rule 16, and Revised Rules 28.5, 63(9)(a)(ii), and 63(9)(b)(ii).

Subdivisions (4) and (5)--"Burden of proof" and "burden of producing evidence." These definitions are useful for they provide a convenient means for distinguishing between the burden of proving the issues of the case and the burden of going forward with the evidence. They recognize a distinction that is well established in California. Witkin, California Evidence 71-79 (1958). The practical effect of the distinction will be considered in the Tentative Recommendation on Article III (Presumptions).

A sentence has been added to subdivision (4) in order to make clear that when "burden of proof" is used in these rules, it refers to the burden of proving the fact in question by a preponderance of the evidence unless a heavier burden of proof is specifically required.

The reference to "directed verdict" has been deleted from subdivision (5) as unnecessary. The only use of the term defined in subdivision (5) is in Revised Rule 8(1) where it is used in a provision stating that the judge determines who has the burden of producing evidence upon a preliminary question of fact upon which the admissibility of evidence depends. The immediate effect of a failure to discharge the burden imposed is, of course, a peremptory--that is, a final or conclusive--finding of the preliminary fact question adverse to the party upon whom the burden was placed and the admission or exclusion of the evidence the admissibility of which was dependent upon the preliminary determination. In some situations, this preliminary determination might result in a directed verdict, but in some other situations it might result in a nonsuit, in a judgment under Code of Civil Procedure Section 638.1, or in merely the admission or exclusion of evidence. The reference to "directed verdict", therefore, was deleted to avoid any implication that any other judgments or orders that might eventuate from the peremptory finding and resultant ruling on the admissibility of evidence were intentionally excluded from the definition.

"Burden of proof" is used in Revised Rule 8(1), URE Rule 16, and Revised Rule 28.5. "Burden of producing evidence" is used in Revised Rule 8(1).

Subdivision (6)--"Conduct." "Conduct" is used in Revised Rules 22(4), 27(4)(i), 41, 46, 47(1), 47(3)(a), 48, 49, 51, 52(1), 52.5, 53, 62(1) ("non-verbal conduct"), 63(8)(b), 63(12)(a), and 65.

Subdivision (7)--"The hearing." The word "hearing" appears in Revised Rules 1(10), 22.3(5), 62(6)(c), 62(6)(e), 62(8)(a), 63 (opening paragraph), 63(1)(introductory clause), 63(1)(a), 63(1)(b), 63(3)(b), 63(3.1)(c), 63(5), 63(9)(introductory clause), and 70(1)(c).

Subdivision (8)--"Finding of fact." The URE definition has been revised so that it applies whether "finding of fact, "finding," or "finds" is used in a particular rule. The terms are used interchangeably in the defined sense in the URE.

The second sentence of subdivision (8), which states that a ruling on the admissibility of evidence implies whatever supporting finding of fact is prerequisite thereto, is consistent with existing law. Wilcox v. Berry, 32 Cal.2d 189, 195 P.2d 414 (1948)(where evidence is properly received, the ground of the court's ruling is immaterial); City and County of San Francisco v. Western Air Lines, Inc., 204 Cal. App.2d 105, 22 Cal. Rptr. 216 (1962) (where evidence is excluded, the ruling will be upheld if any ground exists for the exclusion).

"Finding of fact" is used in Revised Rules 34(3) and 36(3). The word "finds" or "finding" is used in Revised Rules 1(5), 4, 5, 8(2), 8(3), URE Rule 14, and Revised Rules 19(2), 25(1), 42, 43(1), 45, 56(1), 56(2), 56(3), 62(7)(a), 63(3)(introductory clause), 63(3.1)(introductory clause), 63(4)(a), 63(4)(b), 63(5), 63(6)(introductory clause), 63(10), 63(12) (introductory clause), 63(13), 63(14)(introductory clause), 63(15)(introductory clause), 63(16), 63(18)(introductory clause), 63(19)(introductory clause), 63(23), 63(24)(introductory clause), 63(27)(a), 63(27)(b), 63(27.1), 63(29)(introductory clause), 63(30), 67, 67.5(introductory clause), 67.7(4), 68 (introductory clause), 68(2), 70(1)(introductory clause), 70(2)(a), 70(2)(b), 70(2)(c).

Subdivision (9)--"Guardian." This definition has been deleted as unnecessary. The term "guardian" is well understood and, apparently, was defined in the URE in order to include those persons, such as conservators, who are appointed by a court to act in a similar capacity. The word "guardian" is used only in Revised Rules 26(1)(a)(ii), 26(1)(c)(ii), 27(1)(b)(ii), 27.3(1)(b)(ii), and 28(1), and those rules refer specifically to a conservator where such a reference is appropriate.

Subdivision (9)--"Court." This subdivision has been added to the URE rule. The word "court" appears in Revised Rules 1(10), 2, 4(b), 5 (introductory clause), 9(3)(d), 9(3)(g), 12(2), 12(3), 22.3(2), 22.3(5), 27.3(4)(h), 37.5(2), 37.7(1), 39(1)(b), 39(2), 62(6)(d), 62(7)(b), 62(8)(b), and 70(1)(b). The word is also used, but not in its defined sense, in Revised Rules 10(2)(b)("open court") and 70(1)(g)("in court").

Subdivision (10)--"Judge." The word "judge" appears in Revised Rules 1(11), 5(1), 5(2), 6, 8(1), 8(2), 8(3), 9(4)(a), 10(1), 10(2)(b), 10.5, 11(1), 11(2), 12(1), 12(2), 12(3), URE Rule 15, and Revised Rules 17(1)(introductory clause), 17(1)(a), 19(2), 19(4), 21(1), 22(2)(introductory clause), 23(2), 25(1), 37.5(2), 37.7(1), 42, 43(1), 45, 56(1), 56(2), 56(3), 57(2), 58, 61(1), 61(2), 62(7)(a), 62(7)(b), 63(3)(introductory clause), 63(3.1) (introductory clause), 63(4)(a), 63(4)(b), 63(5), 63(6), 63(9)(a)(ii), 63(10), 63(12), 63(13), 63(14)(introductory clause), 63(15)(introductory clause), 63(16), 63(18)(introductory clause), 63(19)(introductory clause), 63(23), 63(24)(introductory clause), 63(27)(a), 63(27)(b), 63(27.1), 63(29)(introductory clause), 63(30), 67.5(introductory clause), 68 (introductory clause), 70(1)(g), 70(2)(a), 70(2)(b), 70(2)(c).

Subdivision (11)--"Trier of fact." Reference is made to "trier of fact" in Revised Rules 1(3), 8(2), 8(3), 8(4), 19(1), 23(2), 25(7), 25(8), 39(1)(a), 39(3), 56(4), 61(1), and 67.7(4).

Subdivision (12)--"Verbal." The word "verbal" is used in Revised Rule 1(6) and in Revised Rule 62(1)("non-verbal").

Subdivision (13)--"Writing." This definition is considerably broader than the comparable definition found in Section 17 of the Code of Civil Procedure. The definition in subdivision (13) will apply to the comprehensive evidence statute which will be based on the revised rules and the definition in Code of Civil Procedure Section 17 will continue to apply to those provisions that are not included within the comprehensive evidence statute.

"Writing" is referred to in Revised Rules 7(d), 7(e), 10(2)(b), 22(1), 26(4)(e), 26(4)(f), 27(4)(d), 27(4)(e), 27.3(4)(d), 27.3(4)(e), 63(1)(c), 63(13), 63(15)(introductory clause), 63(15)(a), 63(15)(b), 63(16), 63(17)(a), 63(17)(b), 63(29)(introductory clause), 63(29)(a), 63(29.1), 67, 67.5(introductory clause), 67.5(3), 68(introductory clause), 68(1), 68(2), 68(3), 68(4), 69 (introductory clause), 70(1)(a), 70(1)(b), 70(1)(c), 70(1)(d), 70(1)(e), 70(1)(f), 70(1)(g), 70(2)(a), 70(2)(b), 70(2)(c), 71 (introductory clause), 71(1), and 72.

Subdivision (14)--"Action." The term "action" is used in Revised Rules 1(15), 1(16), 8(2), 10.5, 12(1), 12(3), 21(2), 22.3(2), 22.3(5), 43(1), 47(2), 47(3), 52.5, 62(8)(a), 62(8)(b), 62(8)(c), 63(3)(b), 63(3.1)(b), 63(3.1)(c), 63(6), 63(7), 63(9)(c), 63(10), 63(21.1), and 70(1)(c).

Subdivision (15)--"Civil action." The term "civil action" is used in Revised Rules 1(14), 63(3.1)(b), 63(7), 63(9)(c), and 63(21.1).

Subdivision (16)--"Criminal action." Reference is made to "criminal action" in Revised Rules 1(14), 8(2), 21(2), 47(2), 47(3), 52.5, 63(3)(b), 62(3.1)(b), 63(6), 63(10), and 70(1)(c).

Subdivision (17)--"Public entity." "Public entity" is referred to in Revised Rules 22.3(3), 22.3(6), 22.3(8), 25(6), 26(1)(a), 26(1)(c), 34(2) (introductory clause), 34(2)(b), 34(3), 36(1)(introductory clause), 36(1)(b), 36(3), 37.7(2), 62(4)(b), 63(22), 67.7(1)(b), and 67.7(2)(b).

Subdivision (18)--"State." The definition of "state" is one that appears in several of the California codes. See, for example, Fish and Game Code § 83; Insur. C. § 28. When used to refer to other states, the word includes Puerto Rico, even though Puerto Rico is now considered a "commonwealth." Detres v. Lions Building Corp., 234 F.2d 596 (1956).

The term is used in Revised Rules 1(17), 9(1) (a), 9(1)(c), 9(3)(a), 9(3)(b), 9(3)(c), 9(3)(d), 10.5, 22.3(2), 22.3(7), 22.3(8), 24(1), 26(1)(d), 27(1)(d), 27.3(1)(d), 34(2)(a), 34(3), 36(1)(introductory clause), 36(1)(a), 36(3), 62(4)(introductory clause), 62(4)(a), 62(4)(b), 62(5), 63(6)(b), 63(6)(c), 63(15)(a), 63(19)(a), 63(22), 63(27)(b), 67.7(1)(b), 67.7(2)(b), 68(1), 68(3), and 68(4).

RULE 2. SCOPE OF RULES

Except [~~to-the-extent-to-which-they-may-be-relaxed-by-other proceedural-rule-or~~] as otherwise provided by statute, these rules [~~shall~~] apply in every proceeding, both criminal and civil, conducted by [~~or-under-the-supervision-of~~] a court in which evidence is introduced, including proceedings conducted by a court commissioner, referee or similar officer.

COMMENT

By Rule 2, these rules of evidence are expressly made applicable only in proceedings conducted by California courts. The rules do not apply in administrative proceedings, legislative hearings, or other proceedings unless made applicable by some statute or rule so providing.

These rules will be applicable to a certain extent in proceedings other than court proceedings under the provisions of some statutes. For example, Government Code Section 11513 provides that a finding in an administrative proceeding under the Administrative Procedure Act may be based only on evidence that would be admissible over objection in a civil action. Penal Code Section 939.6 provides that a grand jury, in investigating a charge, "shall receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." Rule 22.5 of these rules, as recommended by the Commission, makes the rules of

evidence relating to privileges applicable in all proceedings of any kind in which testimony can be compelled to be given. An administrative agency may, for reasons of convenience, adopt these rules or some portion of them for use in its proceedings. But, in the absence of any such statute or rule, Rule 2 provides that these rules will have force only in court proceedings.

The preliminary phrase has been revised in recognition that some statutes will make these rules applicable in proceedings other than court proceedings as well as relax their provisions.

RULE 3. EXCLUSIONARY RULES NOT TO APPLY TO UNDISPUTED MATTER.

~~[If upon the hearing there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege.]~~

COMMENT

The Commission disapproves Rule 3. This rule would permit proof, by evidence that is otherwise inadmissible, of facts concerning which "there is no bona fide dispute between the parties."

In criminal cases, the application of Rule 3 would violate our historic tradition that a criminal defendant may always require the prosecution to prove by competent evidence all matters relating to his guilt.

In civil cases, a variety of pretrial devices already in use in this State make Rule 3 largely unnecessary. For example, Code of Civil Procedure Sections 2033 and 2034 provide for pretrial requests for admissions and impose sanctions for improper failure to make the requested admissions. Discovery, the pretrial conference, the summary judgment procedure, and judicial notice are other means that may be available in a particular case to provide protection against the harassment, expense, and delay occasioned by a strict insistence on the requirements of formal proof. Moreover, as a matter of policy, a party should be limited to the pretrial procedures presently available; he should not be permitted to wait for the trial and then to attempt to persuade the judge that the dispute over the issue is not a "bona fide dispute between the parties." Not only would it be extremely difficult for a trial judge to make this determination, but also there is the possibility that the rule might generate additional appeals from trial court determinations.

RULE 4. EFFECT OF ERRONEOUS ADMISSION OF EVIDENCE.

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to strike the evidence timely [~~interposed~~] made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding.

COMMENT

Subdivision (a) of Rule 4 will codify the well-settled California rule that a failure to make a timely objection to, or motion to strike, inadmissible evidence waives the right to complain of the erroneous admission of evidence. See Witkin, California Evidence (1958) 732-34. Rule 4 will also codify the related rule that the objection or motion must specify the ground for objection, a general objection being insufficient. Witkin, California Evidence 732-41.

Subdivision (b) of Rule 4 reiterates the requirement of Article VI, Section 4 1/2 of the California Constitution, that a judgment may not be reversed nor may a new trial be granted on account of an error unless the error is prejudicial.

RULE 5. EFFECT OF ERRONEOUS EXCLUSION OF EVIDENCE

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless [~~(a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b)~~] the court which passes upon the effect of the error or errors is of opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding and it appears of record that:

(1) The substance, purpose, and relevance of the expected evidence was made known to the judge by the questions asked, an offer of proof, or by any other means; or

(2) The rulings of the judge made compliance with subdivision (1) futile; or

(3) The evidence was sought by questions asked during cross-examination.

COMMENT

Rule 5, like Rule 4, reiterates the requirement of the California Constitution that judgments may not be reversed, nor may new trials be granted, on account of an error unless the error is prejudicial. Cal. Const. Art. VI, § 4 1/2.

The provisions of Rule 5 requiring an offer of proof or other disclosure of the evidence improperly excluded have been revised to reflect exceptions

to the rule that have been recognized in the California cases. Thus, an offer of proof is unnecessary where the judge has limited the issues so that an offer to prove matters related to excluded issues would be futile. Lawless v. Calaway, 24 Cal.2d 81, 91 (1944). An offer of proof is also unnecessary when an objection is improperly sustained to a question on cross-examination. People v. Jones, 160 Cal. 358 (1911); Tossman v. Newman, 37 Cal.2d 522, 525-26 ("no offer of proof is necessary to obtain a review of rulings on cross-examination").

RULE 6. LIMITED ADMISSIBILITY.

When [~~relevant~~] evidence is admissible as to one party or for one purpose and is inadmissible as to other parties or for another purpose, the judge upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

COMMENT

Rule 6 expresses the existing, but uncodified, California law which requires the judge to instruct the jury as to the limited purpose for which evidence may be considered when such evidence is admissible for one purpose and inadmissible for another. Adkins v. Brett, 184 Cal. 252 (1920).

Under Rule 45, as under existing law, the judge would be permitted to exclude such evidence if he deemed it so prejudicial that a limiting instruction would not protect a party adequately and the matter in question can be proved sufficiently by other evidence. See discussion in Adkins v. Brett, 184 Cal. 252, 258 (1920).

The word "relevant" has been deleted as unnecessary, for evidence is admissible only if it is relevant. Code Civ. Proc. § 1868.

RULE 7. GENERAL ABOLITION OF DISQUALIFICATIONS AND PRIVILEGES OF WITNESSES, AND OF EXCLUSIONARY RULES.

Except as otherwise provided [~~in these Rules~~], by statute:

(a) Every person is qualified to be a witness.[~~; and~~]

(b) No person has a privilege to refuse to be a witness. [~~; and~~]

(c) No person is disqualified to testify to any matter. [~~; and~~]

(d) No person has a privilege to refuse to disclose any matter or to produce any object or writing. [~~; and~~]

(e) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing. [~~; and~~]

(f) All relevant evidence is admissible.

COMMENT

Rule 7 is the keystone of the Uniform Rules of Evidence. It abolishes all pre-existing rules relating to the competency of evidence or witnesses. Under the URE scheme, all rules disqualifying persons to be witnesses or limiting the admissibility of evidence must be found, if at all, among the Uniform Rules of Evidence.

The approval of Rule 7, modified as indicated, is recommended in order that the purpose of the URE--to codify the law relating to the admissibility of evidence--might be fully realized. Rule 7 precludes the possibliity that additional restrictions on the admissibility of evidence will remain valid in addition to those restrictions declared in the URE.

The phrase "in these rules" has been changed to "by statute" in order to avoid any implication that the validity of statutory restrictions on

the admissibility of evidence--such as the restrictions on speed trap evidence provided in Vehicle Code Sections 40803-40804--will be impaired by these rules.

It should be noted that Code of Civil Procedure Section 1868, which is not affected by this recommendation, makes explicit what is assumed by the URE--that evidence is not admissible unless it is "relevant evidence."

RULE 8. PRELIMINARY INQUIRY BY JUDGE.

(1) As used in this rule:

(a) "Preliminary fact" means a fact upon the existence of which depends the admissibility or inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or non-existence of a privilege.

(b) "Proffered evidence" means evidence, the admissibility or inadmissibility of which is dependent on the existence of a preliminary fact.

(2) When the [~~qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition~~] the existence of a preliminary fact is [~~in issue~~] disputed, [~~the issue is to be determined by the judge and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises.~~] its existence shall be determined as provided by this rule. [~~The judge may hear and determine such matters out of the presence or hearing of the jury, except that~~] On the admissibility of a confession or admission of a defendant in a criminal action, the judge [~~, if requested,~~] shall hear and determine the question out of the presence and hearing of the jury unless otherwise requested by the defendant. On the admissibility of other evidence, the judge may hear and determine the question out of the presence or hearing of the jury. In determining the existence of a preliminary fact under subdivisions (3) and (5), exclusionary rules of evidence do not apply except for Rule 45 and the rules of privilege.

[~~But~~] This rule [~~shall not be construed to~~] does not limit the right of a party to introduce before the [~~jury~~] trier of fact evidence relevant to weight or credibility.

(3) Subject to subdivisions (4) and (5), when the existence of a preliminary fact is disputed, the judge shall indicate to the parties who has the burden of producing evidence and the burden of proof on the issue as implied by the rule under which the question arises, and he shall determine the existence or nonexistence of the preliminary fact.

(4) 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 judge finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when:

(a) The relevance of the proffered evidence depends on the existence of the preliminary fact; or

(b) The preliminary fact is the personal knowledge of the witness concerning the subject matter of his testimony; or

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

(d) The proffered evidence is of a statement or other conduct by a particular person and the disputed preliminary fact is whether that person made the statement or did the act.

The judge may admit conditionally the proffered evidence, subject to the evidence of the preliminary fact being supplied later in the course of the trial.

(5) Whenever the proffered evidence is claimed to be privileged under Rule 25, the person claiming the privilege has the burden of showing, in

the manner provided in Rule 24, that the proffered evidence might incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the judge that the proffered evidence cannot possibily have a tendency to incriminate the person claiming the privilege.

COMMENT

Rule 8 generally. Rule 8 sets forth the well settled rule that preliminary questions of fact upon which the admissibility of evidence depends must be decided by the judge. Code Civ. Proc. § 2102.

Under existing law, a judge determines some preliminary factual questions on the basis of all of the evidence presented to him by both parties, resolving any conflicts in that evidence. See, for example, People v. Glab, 13 Cal. App.2d 528, 57 P.2d 588 (1936), in which the judge considered conflicting evidence and decided that a proposed witness was not married to the defendant and, therefore, was competent to testify. See also Fairbank v. Hughson, 58 Cal. 314 (1881). On the other hand, on some preliminary factual questions, the judge does not resolve conflicts in the evidence submitted on the preliminary question, and the proffered evidence must be admitted upon a prima facie showing of the preliminary fact. Reed v. Clark, 47 Cal. 194, 200 (1873). For example, acts of an agent or co-conspirator are admissible against a defendant upon a prima facie showing of the agency or conspiracy. Union Constr. Co. v. Western Union Tele. Co., 163 Cal. 298, 125 Pac. 242 (1912); People v. Steccone, 36 Cal.2d 234, 223 P.2d 17 (1950).

Rule 8 has been expanded to distinguish between those situations where the judge must be persuaded of the existence of the preliminary

fact and those situations where he must admit the evidence upon a prima facie showing of the preliminary fact.

Subdivision (1). The terms "preliminary fact" and "proffered evidence" have been defined in the interest of clarity.

"Preliminary fact" is defined to distinguish a fact upon which the admissibility of evidence depends from the fact sought to be proved by that evidence. The URE uses the word "condition" for this purpose. The word "condition" is confusing, however, for it implies that a rule must be worded conditionally, i.e., with "if" or "unless", for Rule 8 to apply. The use of the term "preliminary fact" makes clear that Revised Rule 8 applies to all preliminary fact determinations.

"Proffered evidence" is defined to avoid confusion between the evidence whose admissibility is in question and the evidence offered on the preliminary fact issued. "Proffered evidence" includes the testimony to be elicited from a witness who is claimed to be disqualified; it includes testimony or tangible evidence claimed to be privileged; and it includes any other evidence to which objection is made.

Subdivision (2)--generally. This subdivision provides that preliminary questions of fact upon which the admissibility of evidence depends are to be determined in accordance with Revised Rule 8. The subdivision then prescribes certain procedures that must be observed in the determination of preliminary fact questions.

Subsequent subdivisions provide that the judge determines whether proffered evidence is admissible, i.e., whether it may be considered by the trier of fact; but subdivision (2) makes clear that the judge's decision on admissibility does not preclude the parties from introducing evidence before the trier of fact relevant to the weight and credibility of the evidence.

The procedures specified in subdivision (2) will change existing California law in certain significant respects that are discussed below.

Subdivision (2)--preliminary hearing on confession. Subdivision (2) requires the judge to determine the admissibility of a confession out of the presence and hearing of the jury unless the defendant requests otherwise. Under existing law, whether the preliminary hearing is held out of the presence of the jury is left to the judge's discretion. People v. Gonzales, 24 Cal.2d 870, 151 P.2d (1944); People v. Nelson, 90 Cal. App. 27, 31, 265 Pac 366 (1928).

The existing rule permits evidence that may be extremely prejudicial to be heard by the jury. For example, in People v. Black, 73 Cal. App. 13, 238 Pac. 374 (1925), the alleged coercion consisted of threats to send the defendants to New Mexico to be prosecuted for murder. To avoid this kind of prejudice, subdivision (2) requires the preliminary hearing to be conducted out of the presence and hearing of the jury unless the defendant otherwise requests.

Subdivision (2)--admissibility of evidence on preliminary determination by judge. Subdivision (2) provides that most exclusionary rules of evidence do no apply during a preliminary hearing held by the judge to determine whether evidence is admissible under subdivisions (3) and (5). However, the privilege rules are applicable and the judge may exclude evidence under Rule 45 if it is cumulative or of slight probative value. Subdivisions (3) and (5) provide the procedure for determining the admissibility of evidence under rules designed to prevent the introduction of evidence either for reasons of public policy or because the proffered evidence is too unreliable to be presented to the trier of fact. Subdivision (4)

provides the procedure for determining whether there is sufficient competent evidence on a particular question to permit that question to be submitted to the trier of fact; hence, all rules of evidence must apply to a hearing held under subdivision (4).

Under existing California law, the rules governing the competency of evidence do apply during the preliminary hearing. People v. Plyler, 126 Cal. 379, 58 Pac. 904 (1899)(affidavit cannot be used to show death of witness at preliminary hearing to establish foundation for introduction of former testimony at trial).

This change in California law is desirable. Many reliable, and in fact admissible, hearsay statements must be held inadmissible if the formal rules of evidence apply to the preliminary hearing. For example, if witness W hears X shout, "Help! I'm falling down the stairs", the statement is admissible only if the judge finds that X was actually falling down the stairs while the statement was being made. If the only evidence that he was falling down the stairs is the statement itself, or the statements of bystanders who can no longer be identified, the statement must be excluded. Although the statement is admissible as a substantive matter under the hearsay rule, it must be held inadmissible if the formal rules of evidence are rigidly applied during the judge's preliminary inquiry.

The formal rules of evidence have been developed largely to prevent the presentation of weak and unreliable evidence to a jury of laymen, untrained in sifting evidence. Thayer, Preliminary Treatise on Evidence, 509 (1898). The hearsay rule is designed to assure the right of a party to cross-examine the authors of statements being used against him. Morgan,

Some Problems of Proof 106-17 (1956). Where factual determinations are to be made solely by the judge, the right of cross-examination is not uniformly required and frequently he is permitted to determine the facts entirely from hearsay in the form of affidavits and to base his ruling thereon. Code Civ. Proc. § 2009 (general rule); Code Civ. Proc. § 657 subd. 2 (affidavits used to show jury misconduct); Buhl v. Wood Truck Lines, 62 Cal. App.2d 542, 144 P.2d 847 (1944)(jury misconduct); Church v. Capital Freight Lines, 141 Cal. App.2d 246, 296 P.2d 563 (1956) (competency of juror); and see Cont. Ed. Bar, California Condemnation Practice 208 (1960)(affidavits used to determine amount of immediate possession deposit in eminent domain case); see also Witkin, California Procedure 1648 (1954).

No reason is apparent for insisting on a more strict observation of the rules of evidence on matters to be decided by the judge alone when the question is raised during trial than when the question is raised before or after trial. In ruling on the admissibility of evidence, he should be permitted to rely on affidavits and other hearsay that he deems reliable. Accordingly, Revised Rule 8 is recommended in order to provide utmost assurance that all relevant and competent evidence will be presented to the trier of fact.

Subdivision (3)--generally. Subdivision (3) requires the judge to determine the existence or nonexistence of disputed preliminary facts except in certain situations covered by subdivisions (4) and (5). Under subdivision (3), the judge first indicates to the parties who has the burden of proof and the burden of producing evidence on the disputed issue as implied by the rule under which the question arises. For example, Rule 63 indicates that the burden of proof is usually on the proponent of the

evidence to show that the proffered evidence is within a hearsay exception. Thus, if the disputed preliminary fact is whether the proffered statement was spontaneous as required by Rule 63(4), the proponent would have the burden of persuading the judge as to the spontaneity of the statement. On the other hand, the privilege rules usually place the burden of proof on the objecting party to show that a privilege is applicable. Thus, if the disputed preliminary fact is whether a witness is married to a party and, hence, privileged to refuse to testify against that party under Rule 27.5, the burden of proof is on the witness to persuade the judge of the existence of the marriage.

After the judge has indicated to the parties who has the burden of proof and the burden of producing evidence, the parties submit their evidence on the preliminary issue to the judge. If the judge is persuaded by the party with the burden of proof, he finds in favor of that party in regard to the preliminary fact and either admits or excludes the proffered evidence as required by the rule under which the question arises. If the judge is not persuaded by the party with the burden of proof, he finds against that party on the preliminary fact and either admits or excludes the proffered evidence as required by the rule under which the question arises.

Subdivision (3) is generally consistent with existing California law. Code Civ. Proc. § 2102 ("All questions of law, including the admissibility of testimony, [and] the facts preliminary to such admission, . . . are to be decided by the court").

Illustrative of the preliminary fact issues to be decided under subdivision (3) are the following:

Rule 17--disqualification of a witness for lack of mental capacity. Under existing law, as under these rules, the party objecting to a proffered

witness has the burden of proving lack of capacity. People v. Craig, 111 Cal. 460, 469 (1896); People v. Tyree, 21 Cal. App. 701, 706 (1913).

Rule 21(3)--conviction of a crime offered to attack credibility, and the disputed preliminary fact is whether a pardon or some similar relief has been granted.

Rules 23-40--previleges. Under these rules, as under existing law, the party claiming privilege has the burden of proof on the preliminary facts. San Diego Professional Ass'n v. Superior Court, 58 Cal.2d 194, 199, 23 Cal. Rptr. 384, 373 P.2d 448 (1962)("The burden of establishing that a particular matter is privileged is on the party asserting that privilege . . . "); Chronicle Publishing Co.,v. Superior Court, 54 Cal.2d 548, 565, 7 Cal. Rptr. 109, 354 P.2d 637 (1961). The proponent of the proffered evidence, however, has the burden of proof upon any preliminary fact necessary to show that an exception to the privilege is applicable. Cf. Agnew v. Superior Court, 156 Cal. App.2d 838, 840, 320 P.2d 158 (1958); Abbott v. Superior Court, 78 Cal. App.2d 19, 21, 177 P.2d 317 (1947)(intimating that a prima facie showing by proponent is sufficient where issue is whether communication between attorney and client was made in contemplation of crime).

Rules 52, 52.5, 53--admissions made during compromise negotiations. The disputed preliminary fact to be decided by the judge is whether the admission occurred during compromise negotiations or at some other time. These rules place the burden on the objecting party to satisfy the judge that the admission occurred during such negotiations.

Rule 55.5--qualifications of an expert witness. Under existing law, too, the proponent must show his expert to be qualified, and it is error for the judge to submit the qualifications of the expert to the jury. Elbe v. Peluso, 80 Cal. App.2d 154, 181 P.2d 680 (1947); Fairbank v. Hughson, 58 Cal. 314 (1881).

Rules 62-66--hearsay. When hearsay evidence is offered, two preliminary fact questions may be raised. The first question relates to the authenticity of the proffered declaration--was the statement actually made by the person alleged? The second question relates to the existence of those circumstances that make the hearsay sufficiently trustworthy to be received in evidence--was the declaration spontaneous, the confession voluntary, the business record trustworthy? Under these rules, questions relating to the authenticity of the proffered declaration are decided under subdivision (4). See discussion below. But other preliminary fact questions are decided under subdivision (3).

For example, the court must decide whether a statement offered as a dying declaration was made under a sense of impending doom, and the proponent of the evidence has the burden of proof on the issue. Cf., People v. Keelin, 136 Cal. App.2d 860, 873, 289 P.2d 520 (1955); People v. Pollock, 13 Cal. App.2d 747, 754 (1939). Under the rules, the proponent of a hearsay declaration would have the burden of proof on the unavailability of the declarant as a witness under Rule 63(3) or Rule 63(10); but the party objecting to the evidence would have the burden of proving under Rule 62(7) that the unavailability of the declarant was procured by the proponent to prevent the declarant from testifying.

Rules 70, 72--best evidence rule and photographic copies as best evidence rule. Under subdivision (3), as under existing law, the trial judge is required to determine the preliminary fact necessary to warrant reception of secondary evidence of a writing, and the burden of proof on the issue is on the proponent of the secondary evidence. Cf., Cotton v. Hudson, 42 Cal. App.2d 812 (1941).

Subdivision (3)--spontaneous statements, dying declarations, and confessions. Subdivision (3) is generally consistent with existing California law. However, it will make a substantial change in the existing law relating to spontaneous statements, dying declarations, and confessions. Under existing California law, the judge considers all of the evidence and decides whether evidence of this sort is admissible, as indicated in subdivision (3). But if he decides the proffered evidence is admissible, he submits the preliminary question to the jury for a final determination whether the confession was voluntary, whether the dying declaration was made in realization of impending doom, or whether the spontaneous statement was in fact spontaneous; and the jury is instructed to disregard the statement if it does not believe the condition of admissibility has been satisfied. People v. Baldwin, 42 Cal.2d 858, 866-67, 270 P.2d 1028 (1954) (confession--see instruction at 866); People v. Gonzales, 24 Cal.2d 870, 876-77, 151 P.2d 251 (1944)(confession); People v. Singh, 182 Cal. 457, 476, 181 Pac. 987 (1920)(dying declaration); People v. Keelin, 136 Cal. App.2d 860 871, 289 P.2d 520 (1955)(spontaneous declaration).

Under subdivision (3), the judge's rulings on these questions will be final. The jury will not get a "second crack." The change is desirable. The existing rule is a temptation to the weak judge to avoid difficult

decisions by "passing the buck" to the jury. The existing rule requires the jury members to perform the impossible task of erasing the hearsay statement from their minds if they conclude that the condition of admissibility has not been met. A complex instruction to this effect is needed. Frequently, the evidence presented to the judge out of the jury's presence must again be presented to the jury so that it can rule on the admissibility question intelligently.

Revised Rule 8 deals only with the admission of evidence at the trial level. Hence, the finality of the judge's rulings on the admissibility of confessions will have no effect on the well-settled rule that an appellate court will make an independent determination of the voluntariness of a confession upon the basis of the uncontradicted facts or the facts as found by the trial court. Watts v. Indiana, 338 U.S. 49, 50-52 (1948); People v. Trout, 54 Cal.2d 576, 583, 6 Cal. Rptr. 759, 354 P.2d 231 (1960); People v. Baldwin, 42 Cal.2d 858, 867, 270 P.2d 1028 (1954).

Subdivision (4). As indicated in the discussion of subdivision (3), the judge does not determine in all instances whether or not a preliminary fact exists or does not exist. At times, the judge must admit the proffered evidence if there is prima facie evidence--i.e., evidence sufficient to sustain a finding--of the preliminary fact. See, for example, Reed v. Clark, 47 Cal. 194, 200 (1873). Subdivision (4) has been added to Revised Rule 8 to cover those situations in which the judge is required to admit the proffered evidence upon a prima facie showing of the preliminary fact.

Some writers have distinguished those situations where the judge must admit the proffered evidence upon a prima facie showing of the preliminary fact from those situations where the judge must determine the existence of

the preliminary fact on the ground that the former questions involve the relevancy of the proffered evidence while the latter questions involve the competency of the evidence that is relevant. Maguire and Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392 (1927); Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165 (1929). Accordingly, this comment will use the term "relevancy" to characterize those preliminary fact questions to be decided by the judge under subdivision (4).

When evidence is admissible if relevant, and its relevance depends on the existence of some preliminary fact, the judge is required by subdivision (4) to admit the proffered evidence if there is evidence sufficient to sustain a finding of the preliminary fact. The judge does not decide whether or not the preliminary fact actually exists. The judge determines only the sufficiency of the evidence to sustain a finding of the preliminary fact because he is passing on the basic issues in dispute between the parties; hence, the judge's function is merely to determine whether there is sufficient evidence to permit a jury decision on the question. 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 that the party has a right to have the jury decide.

For example, if the question of A's title to land is in issue, A may seek to prove his title by deed from a former owner, O. Rule 67 requires that the deed be authenticated, and the judge, under Rule 8, must rule on the question of authentication. If A introduces sufficient evidence

to sustain a finding of the genuineness of the deed, the judge is required to admit it. If the judge, on the basis of the adverse party's evidence, decided that the deed was spurious and not admissible, the judge would have resolved the basic factual issue in the case. A would be deprived of a jury finding on the issue even though entitled to a jury decision and even though he had introduced sufficient evidence to warrant a jury finding in his favor.

Hence, in ruling on questions of relevancy, the judge's rulings are preliminary only. He does not decide finally whether a document is authentic or whether a witness has personal knowledge; if he did so he would be usurping the function of the jury.

Existing California law is in accord. If P seeks to fasten liability upon D, evidence as to the actions of A is inadmissible because irrelevant unless A is shown to be the agent of D. On this question, the California cases agree, evidence as to the actions of A is admissible upon a prima facie showing of agency only. Brown v. Spencer, 163 Cal. 589, 126 Pac. 493 (1912). The same rule is applicable when a person is charged with criminal responsibility for the acts of another because they are conspirators. See discussion in People v. Steccone, 36 Cal.2d 234, 238, 223 P.2d 17 (1950).

Because it is not always clear when a preliminary question is one of relevancy, the subdivision specifies certain preliminary fact questions that may arise under the rules that should be decided by the judge under subdivision (4).

Illustrative of the preliminary fact questions under these rules that should be decided under subdivision (4) are:

Rule 19--the requirement of personal knowledge. A prima facie showing of personal knowledge seems to be sufficient under the existing California practice. See, for example, People v. Avery, 35 Cal.2d 487, 492, 218 P.2d 527 (1950)("Bolton testified that he observed the incident about which he testified. His testimony, therefore, was not incompetent under section 1845 of the Code of Civil Procedure."); People v. McCarthy, 14 Cal. App. 148, 151, 111 Pac. 274, 275 (1910).

Rule 21(1)--conviction of a witness for a crime, offered to attack credibility. The preliminary fact issue to be decided under subdivision (4) would be whether the person convicted was actually the witness. This involves the relevancy of the evidence--obviously, the conviction of another does not affect the witness' credibility--and should be a question to be resolved by the jury. The judge should not be able to decide finally that it was the witness who was convicted and prevent a contest of that issue before the jury. The existing law is uncertain in this regard; however, it seems likely that prima facie evidence of the identity of the person convicted is sufficient to warrant admission of the evidence. See People v. Theodore, 121 Cal. App.2d 17, 28, 262 P.2d 630 (1953)(relying on presumption of identity of person from identity of name). Subdivision (4) does not affect the special procedural rule in Rule 21 itself requiring the proponent of the evidence to make the preliminary showing out of the hearing of the jury.

Rule 56(1)--requires lay opinion to be based on personal perception. This is merely a specific application of the personal knowledge requirement in Rule 19.

Rule 63(1)--pretrial statements of witnesses. These are prior inconsistent statements, prior consistent statements made before bias arose, and recorded memory. In each case, the evidence is relevant and probative if the witnesses to the statements are credible, and the credibility of the witnesses testifying to these statements should be decided finally by the jury. Hence, evidence should be admitted upon prima facie evidence of the preliminary fact. California cases discussing the nature of the foundational showing required are few. However, the practice seems to be consistent with subdivision (4), for the cases permit the prior statements to be admitted merely upon a prima facie showing. See, Schneider v. Market Street Ry., 134 Cal. 482, 492, 66 Pac. 734 (1901)(prior inconsistent statements: "Whether the statements made to Glassman and Hubbell were made by Meley, or by some other man, was a question for the jury. Both witnesses testified that they were made by him."); People v. Neely, 163 Cal. App.2d 289, 312, 329 P.2d 357 (1958)(two prior consistent statements held admissible because "jury could properly infer . . . the motive to fabricate arose after the making of the two statements"); People v. Zammora, 66 Cal. App.2d 166, 224, 152 P.2d 180 (1944)(recorded memory).

Rule 63(7)--admissions of a party. Existing California law apparently requires but a prima facie showing that the party made the alleged statement. Eastman v. Means, 75 Cal. App. 537, 242 Pac. 1089 (1925). This analysis seems sound. Obviously, an admission of liability by O is irrelevant to a determination of A's liability. The relevancy of an admission depends on the fact that a party made the statement.

Rule 63(8)--authorized and adoptive admissions. Both the question of authorized admissions (by an agent of a party) and the question of adoptive

admissions involve the relevancy of the proffered evidence. Both kinds of admissions are admitted because they are statements made by a party --either under principles of agency or by his act of adoption--that are inconsistent with his position at the trial. Hence, like direct admissions, their relevancy depends on the fact that the party made the proffered statement through an agent or by his own act of adoption. Accordingly, the proffered evidence is admissible upon a prima facie showing of the foundational fact. Existing law is in accord. Sample v. Round Mountain Citrus Farm Co., 29 Cal. App. 547, 156 Pac. 983 (authorized admission); Southers v. Savage, 191 Cal. App.2d 100, 12 Cal. Rptr. 470 (1961)(adoptive admission).

Rule 63(9)(b)--admission of co-conspirator. This is another form of authorized admission. Hence, the proffered evidence is admissible upon a prima facie showing of the conspiracy. Existing law is in accord. People v. Robinson, 43 Cal.2d 132, 137, 271 P.2d 865 (1954).

Rule 63(9)(c)--admissions of third persons whose liability is in issue. Under existing California law, the preliminary showing required is the same as if the declarant were being sued directly; hence, a prima facie showing of the making of the statement is sufficient to warrant its admission. Iangley v. Zurich General Accident & Liability Insur. Co., 219 Cal. 101 (1933).

Hearsay--identity of declarant. For most hearsay evidence, admissibility depends upon two preliminary determinations: (1) Did the declarant actually make the statement as claimed by the proponent of the evidence? (2) Does the statement meet certain standards of trustworthiness required by some exception to the hearsay rule?

The first determination involves the relevancy of the evidence. For example, if the issue is the state of mind of X, a person's statement of

his state of mind has no tendency to prove X's state of mind unless the declarant was X. Relevancy depends on the fact that X made the statement. Accordingly, if otherwise competent, a hearsay statement should be admitted upon a prima facie showing that the claimed declarant made the statement.

The second determination involves the competency of the evidence. It must meet the requisite standards of an exception to the hearsay rule or, despite its relevance, it must be kept from the trier of fact because it is too unreliable or because public policy requires its suppression. For example, if an admission was in fact made by a defendant to a criminal action, the admission is relevant. But public policy requires that the admission be held inadmissible if it was not given voluntarily.

The admissibility of some hearsay declarations is dependent solely upon the determination that the statement was made by the declarant claimed by the proponent of the evidence. Some of these exceptions to the hearsay rule--such as prior statements of trial witnesses, admissions--have been mentioned specifically above. As the only preliminary fact to be determined involves the relevancy of the evidence, these declarations should be admitted upon a prima facie showing of the preliminary fact.

Paragraph (d) is included in subdivision (4) to make clear that when the admissibility of hearsay depends both upon a determination that a particular declarant made the statement and upon a determination that the requisite standards of a hearsay exception have been met, the former determination is to be made upon evidence sufficient to sustain a finding of the preliminary fact.

Rules 67, 67.5, 68, 69--authentication of writings. Under existing law, a writing is admissible upon introduction of evidence sufficient to

sustain a finding of the authenticity of the writing. Verzan v. McGregor, 23 Cal. 339 (1863).

Rule 71--proof of execution of witnessed writings. The only preliminary issue apt to arise is whether a witness actually saw the writing executed. This is merely a specific application of the personal knowledge requirement of Rule 19.

The final paragraph of subdivision (4) restates the provisions of Section 1834 of the Code of Civil Procedure, that the judge may admit evidence that is conditionally relevant subject to the presentation of evidence of the preliminary fact later in the course of the trial.

Subdivision (5)--self-incrimination. Subdivision (5) has been added to Revised Rule 8 to provide a special procedure to be followed by the judge when an objection is made in reliance upon the privilege against self-incrimination.

Subdivision (5) provides that the objecting party has the burden of showing that the testimony sought might incriminate him. He is not required to produce evidence as such; under Rule 24, the judge must consider evidence and, in addition, matters disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations, and all other relevant factors. Nonetheless, it is the objector's burden to present to the judge information of this sort sufficient to indicate that the proffered evidence might incriminate him. Subdivision (5) requires the judge to sustain the claim of privilege unless it clearly appears that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

Subdivision (5) is consistent with existing California law. Under existing law, the party claiming the privilege "has the burden of showing that the testimony which was required might be used in a prosecution to help establish his guilt." Cohen v. Superior Court, 173 Cal. App.2d 61, 68, 343 P.2d 286 (1959). And the court may require the testimony to be given only if "it clearly appears to the court" that the claim of privilege is mistaken and "that the answer(s) cannot possibly have such tendency [to incriminate]." Cohen v. Superior Court, 173 Cal. App.2d 61, 70, 72, 343 P.2d 286 (1959).

AMENDMENTS AND REPEALS

Set forth below are two existing statutes that should be repealed in light of the Commission's tentative recommendation concerning Article I (General Provisions) of the Uniform Rules of Evidence. Only those existing statutes that are clearly superseded by the tentative recommendation are listed. The reason for the suggested repeal is given after each section. References in such reasons to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

Code of Civil Procedure

Section 1823 provides:

> 1823. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

Section 1823 should be repealed. It is superseded by the definition of "evidence" in Rule 1(1).

Section 1824 provides:

> 1824. Proof is the effect of evidence, the establishment of a fact by evidence.

Section 1824 should be repealed. It is superseded by the definition of "proof" in Rule 1(3).

Section 1827 provides:

> 1827. There are four kinds of evidence:
>
> 1. The knowledge of the court;
>
> 2. The testimony of witnesses;
>
> 3. Writings;
>
> 4. Other material objects presented to the senses.

Section 1827 should be repealed. It is superseded by the definition of "evidence" in Rule 1(1).