#34 10/13/64

Memorandum 64-76

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1--Division 3)

Attached are two copies of the revised Comments to Division 3. Mr. Keatinge is responsible for checking these Comments. Please mark any revisions you believe should be made on one copy of the Comments.

Respectfully submitted,

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Executive Secretary

DIVISION 3. GENERAL PROVISIONS

CHAPTER 1. APPLICABILITY OF CODE

§ 300. Applicability of code

Comment. Under Section 300, the provisions of the Evidence Code are applicable to all proceedings conducted by California courts unless these provisions are made inapplicable by statute. Because of the limitations of Section 300, the provisions of the code do not apply in administrative proceedings, legislative hearings, or any other proceedings unless some statute so provides or the agency concerned chooses to apply them.

Because of the provisions of other statutes, the provisions of the Evidence Code are applicable to a certain extent in proceedings other than court proceedings. For example, Government Code Section 11513 provides that a finding in a proceeding conducted under the Administrative Procedure Act may not be based on hearsay evidence unless it would be admissible over objection in a civil action. Penal Code Section 939.6 governs the evidence that a grand jury, in investigating a charge, may receive. Evidence Code Section 910 makes the provisions of the code relating to privileges applicable in all proceedings of every kind in which testimony can be compelled to be given. Other provisions of the Evidence Code also are made applicable to nonjudicial proceedings. E.g., EVIDENCE CODE § 1566. Moreover, an administrative agency may, for reasons of convenience, adopt the rules established by the Evidence Code or some portion of them for use in its proceedings if otherwise authorized by statute to do so. However, in the absence of any such statute or rule, Section 300 provides that the provisions of the Evidence Code apply only in court proceedings.

Section 300 does not affect any other statute relaxing rules of evidence for specified purposes. See, e.g., CODE CIV. PROC. § 117g (judge of small claims court may make informal investigation either in or out of court), § 1768 (hearing of conciliation proceeding to be conducted informally), § 2016(b) (inadmissibility of testimony at trial is not ground for objection to testimony sought from a deponent, provided that such testimony is reasonably calculated to lead to the discovery of admissible evidence); PENAL CODE § 1203 (judge must consider probation officer's investigative report on question of probation); WELF. & INST. CODE § 706 (juvenile court must consider probation officer's social study in determining disposition to be made of ward or dependent child).

CHAPTER 2. PROVINCE OF JUDGE AND JURY

§ 310. Questions of law for court

Comment. Section 310 restates without substantive change and supersedes the first sentence of Code of Civil Procedure Section 2102.

§ 311. Determination of foreign law

Comment. Section 311 restates the substance of and supersedes the last paragraph of Code of Civil Procedure Section 1875.

§ 312. Jury as trier of fact

Comment. Section 312 restates the substance of and supersedes Section 2101 and the first sentence of Section 2061 of the Code of Civil Procedure. The rule stated in Section 312 is subject to such exceptions as are otherwise provided by statute. See, e.g., EVIDENCE CODE §§ 310, 311, 458; CORP. CODE § 6602.

CHAPTER 3. ORDER OF PROOF

§ 320. Power of court to regulate order of proof

Comment. Section 320 restates the substance of and supersedes Code of Civil Procedure Section 2042. Under Section 320, as under existing law, the trial judge has wide discretion to determine the order of proof. See CALIFORNIA CIVIL PROCEDURE DURING TRIAL, Parrish, Order of Proof, 205 (Cal. Cont. Ed. Bar 1960).

Directions of the trial judge which control order of proof should be distinguished from those which actually exclude evidence. Obviously, it is not permissible, through repeated directions of order of proof, to prevent a party from presenting relevant evidence on a disputed fact. Foster v. Keating, 120 Cal. App.2d 435, 261 P.2d 529 (1953); CALIFORNIA CIVIL PROCEDURE DURING TRIAL, Parrish, Order of Proof, 205, 210 (Cal. Cont. Ed. Bar 1960). See also Murry v. Manley, 170 Cal. App.2d 364, 338 P.2d 976 (1959).

CHAPTER 4. ADMITTING AND EXCLUDING EVIDENCE

Article 1. General Provisions

§ 350. Only relevant evidence admissible

Comment. Section 350 states the well-established rule that evidence which is irrelevant must be excluded. CODE CIV. PROC. § 1868 (superseded by Evidence Code).

§ 351. Admissibility of relevant evidence

Comment. Relevant evidence is admissible unless made inadmissible by statute. The Evidence Code contains a number of provisions that exclude relevant evidence either for reasons of public policy or because the evidence is too unreliable to be presented to the trier of fact. See, e.g., EVIDENCE CODE § 352 (cumulative, unduly prejudicial, etc.), §§ 900-1072 (privileges), §§ 1100-1156 (extrinsic policies), § 1200 (hearsay). Other codes also contain provisions that may in some cases result in the exclusion of relevant evidence.

See, e.g., CIVIL CODE §§ 79.06, 79.09, 227; CODE CIV. PROC. § 1747; EDUC. CODE § 14026; FIN. CODE § 8754; FISH & GAME CODE § 7923; GOVT. CODE §§ 15613, 16573, 18934, 18952, 20134, 31532; HEALTH & SAF. CODE §§ 21115, 410; INS. CODE §§ 735, 855, 10381.5; LABOR CODE § 6319; PENAL CODE §§ 290, 938.1, 3046, 3107, 11105; PUB. RES. CODE § 3234; REV. & TAX. CODE §§ 16563, 19282-19289; UNEMPL. INS. CODE §§ 1094, 2111, 2714; VEHICLE CODE §§ 1808, 16005, 20012-20015, 40803, 40804, 40832, 40833; WATER CODE § 12516; WELF. & INST. CODE §§ 118, 827.

§ 352. Discretion of court to exclude evidence

Comment. Section 352 expresses a rule recognized by statute and in several California decisions. CODE CIV. PROC. §§ 1868, 2044 (superseded by Evidence Code); Adkins v. Brett, 184 Cal. 252, 258, 193 Pac. 251, 254 (1920) ("the matter [of excluding prejudicial evidence] is largely one of discretion on the part of the trial judge"); Moody v. Peirano, 4 Cal. App. 411, 418, 88 Pac. 380, 382 (1906)("a wide discretion is left to the trial judge in determining whether [evidence of a collateral nature] is admissible or not"). Section 352 is based on Rule 45 of the Uniform Rules of Evidence.

§ 353. Exclusionary rules not applicable to undisputed matter

Comment. Section 353 permits the trial judge to disregard quibbling, hypertechnical objections when there is no real dispute over the fact sought to be proved. The rule stated in the section is the foremost of Wigmore's recommendations for the improvement of the law of evidence that are contained in Volume 1 of his treatise on evidence. 1 WIGMORE, EVIDENCE § 8a at 248, § 8c at 264 (3d ed. 1940). The language of Section 353 is based on Rule 3 of the Uniform Rules of Evidence.

Section 353 is new to California law, but it is necessary to eliminate the quibbling over nonessentials that so often interrupts the serious business of a trial. Section 353 complements Section 352. With these two sections, the judge is given ample power to expedite the trial process by eliminating inconsequential proof and argument.

§ 354. Effect of erroneous admission of evidence

Comment. Subdivision (a) of Section 354 codifies 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 §§ 700-702 (1958). Subdivision (a) also codifies the related rule that the objection or motion must specify the ground for objection, a general objection being insufficient. WITKIN, CALIFORNIA EVIDENCE §§ 703-709 (1958).

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

Section 354 is based on Rule 4 of the Uniform Rules of Evidence. It is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law. People v. Matteson, 61 Cal.2d ___, 39 Cal. Rptr. 1, 393 P.2d 161 (1964).

§ 355. Effect of erroneous exclusion of evidence

Comment. Section 355, like Section 354, reiterates the requirement of the California Constitution that judgments may not be reversed, nor may new trials be granted, because of an error unless the error is prejudicial. CAL. CONST., Art. VI, § 4 1/2. Section 355 is based on Rule 5 of the Uniform Rules of Evidence.

The provisions of Section 355 that require an offer of proof or other disclosure of the evidence improperly excluded reflect existing California law. WITKIN, CALIFORNIA EVIDENCE § 713 (1958). The exceptions to this requirement that are stated in Section 355 also reflect existing California law. 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, 147 P.2d 604, 609 (1944). An offer of proof is also unnecessary when an objection is improperly sustained to a question on cross-examination. Tossman v. Newman, 37 Cal.2d 522, 525-526, 233 P.2d 1, 3 (1951)("no offer of proof is necessary to obtain a review of rulings on cross-examination"); People v. Jones, 160 Cal. 358, 117 Pac. 176 (1911).

§ 356. Limited admissibility

Comment. Section 356 codifies existing law which requires the court 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, 193 Pac. 251 (1920). Section 356 is based on Rule 6 of the Uniform Rules of Evidence.

Under Section 352, as under existing law, the judge is permitted to exclude such evidence if he deems 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, 193 Pac. 251, 254 (1920); 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, 639-640 (1964).

§ 357. Entire act, declaration, conversation, or writing may be brought out to elucidate part offered

Comment. Section 357 is the same in substance as and supersedes Code of Civil Procedure Section 1854.

Article 2. Preliminary Determinations on Admissibility of Evidence

§ 400. "Preliminary fact"

Comment. "Preliminary fact" is defined to distinguish facts upon which the admissibility of evidence depends from facts sought to be proved by that evidence.

§ 401. "Proffered evidence"

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

§ 402. Procedure for determining existence of preliminary fact

Comment. Evidence Code Section 310 provides that the judge is to decide questions of fact upon which the admissibility of evidence depends. Section 402 prescribes certain procedures that must be observed by the judge in making such preliminary determinations.

Subdivision (a). Subdivision (a) requires the judge to observe the procedures specified in Article 2 (commencing with Section 400) when he is determining disputed factual questions preliminary to the admission or exclusion of evidence. The provisions of Article 2 are designed to distinguish clearly between (a) those situations where the judge must be persuaded of the existence of the preliminary fact upon which admissibility depends and (b) those situations where the judge must admit the evidence upon a prima facie showing of the preliminary fact. Thus, the judge

determines some preliminary fact questions on the basis of all of the evidence presented to him by both parties, resolving any conflicts in that evidence. EVIDENCE CODE § 405. See, e.g., 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, the judge does not always resolve conflicts in the evidence submitted on preliminary fact questions; in some cases, the proffered evidence must be admitted upon a prima facie showing of the preliminary fact. EVIDENCE CODE § 403. See 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 Tel. Co., 163 Cal. 298, 125 Pac. 242 (1912) (agent); People v. Steccone, 36 Cal.2d 234, 223 P.2d 17 (1950)(co-conspirator).

Subdivision (b). Subdivision (b) requires the judge to determine the admissibility of a confession or admission of a criminal defendant 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 251 (1944); People v. Nelson, 90 Cal. App. 27, 31, 265 Pac. 366 (1928).

The existing procedure permits the jury to hear evidence that may be extremely prejudicial. 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 (b) requires the preliminary hearing on admissibility to be conducted out of the presence and hearing of the jury unless the

defendant requests otherwise.

Subdivision (c). Subdivision (c) provides that most exclusionary rules of evidence do not apply during a preliminary hearing held by the judge to determine whether evidence is admissible under Section 404 or 405. However, the privilege rules are applicable, and the judge also may exclude evidence under Section 352 if it is cumulative or of slight probative value. Sections 404 and 405 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. (Section 403, on the other hand, 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 Section 403.)

Under existing California law, which is changed by this subdivision, 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 are made to 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 actually was 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 no longer can be identified, the statement would be excluded under existing law. 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.

Subdivision (d). Subdivision (d) codifies existing law. Wilcox v. Berry, 32 Cal.2d 169, 195 P.2d 414 (1948) (where evidence is properly received, the ground of the court's ruling is immaterial); 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).

§ 403. Determination of preliminary fact where relevancy, personal knowledge, or authenticity is disputed

Comment. As indicated in the Comment to Section 402, the judge does not determine in all instances whether 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, e.g., Reed v. Clark, 47 Cal. 194, 200 (1873). Section 403 covers 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 be persuaded as to the existence of the preliminary fact on the ground that the former situations involve the relevancy of the proffered evidence while the latter situations involve the competency of the evidence that is relevant. Maguire & 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, the term "relevancy" is used in this Comment to characterize those preliminary fact questions to be decided by the judge under Section 403.

Subdivision (a). When evidence is admissible if relevant, and its relevancy depends on the existence of some preliminary fact, the judge is required by subdivision (a) 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 to decide 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 decided by the jury.

For example, if the question of A's title to land is in issue, A may seek to prove his title by a deed from former owner O. Evidence Code Section 1401 requires that the deed be authenticated, and the judge, under Evidence Code Section 403, must rule on the question of authentication. If A introduces evidence sufficient to sustain a finding of the genuineness of the deed, the judge is required to admit it. If the rule were otherwise and the judge, on the basis of the adverse party's evidence, were permitted to decide that the deed was spurious and not admissible, the judge would be resolving the basic factual issue in the case and A would be deprived of a jury finding on the issue, even though he is entitled to a jury decision and even though he has introduced evidence sufficient 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, for example, 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. Thus, if P seeks to fasten liability upon D, evidence as to any action of A is inadmissible because irrelevant unless, for example, 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 only a prima facie showing of agency. 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, 19 (1950).

Because it is not always clear when a preliminary question is one of relevancy, subdivision (a) specifies certain preliminary fact questions that should be decided by the judge under this section. In some instances, Evidence Code sections state expressly that admissibility depends on "evidence sufficient to sustain a finding" in order to make clear that the preliminary fact determination is to be made pursuant to Section 403. See, e.g., EVIDENCE CODE §§ 1222, 1223, 1400, 1419. Illustrative of the preliminary fact questions that should be decided under Section 403 are:

Section 702--Requirement of personal knowledge. A prima facie showing of a witness' personal knowledge is sufficient. This seems to be consistent with the existing California practice. See, e.g., People v. Avery, 35 Cal.2d 487, 492, 218 P.2d 527, 530 (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). See also Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701, 711-713 (1964).

Section 788--Conviction for a crime when offered to attack credibility. In this situation, the preliminary fact issue to be decided under Section 403 is whether the person convicted was actually the witness. This involves the relevancy of the evidence (since, 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, thus, to prevent a contest on that issue before the jury. The existing law is uncertain in this regard; however, it seems likely that prima facie evidence identifying the witness as 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, 637 (1953)(relying on presumption of identity of person from identity of name). Section 403 does not affect the special procedural rule provided in Section 788 that requires the proponent of the evidence to make the preliminary showing out of the presence and hearing of the jury. See Section 788 and the Comment thereto.

Section 800--Requirement that lay opinion be based on personal perception. The requirement specified in Section 800 is merely a specific application of the personal knowledge requirement in Section 702. See this Comment, supra.

Section 1220--Admissions of a party. With respect to an admission, existing California law apparently requires only a prima facie showing that the party made the alleged statement. See Eastman v. Means, 75 Cal. App. 537, 242 Pac. 1089 (1925). This analysis seems sound. Obviously, an admission of liability by X is irrelevant to a determination of D's liability. The relevancy of an admission depends on the fact that a party made the statement.

Sections 1221-1222--Authorized and adoptive admissions. The admissibility of both authorized admissions (by an agent of a party) and adoptive admissions involves 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 (1916) (authorized admission); Southers v. Savage, 191 Cal. App.2d 100, 12 Cal. Rptr. 470 (1961)(adoptive admission).

Section 1223--Admission of co-conspirator. The admission of a co-conspirator is another form of an authorized admission. Hence, the proffered evidence is admissible upon merely a prima facie showing of the conspiracy. Existing law is in accord. People v. Robinson, 43 Cal.2d 132, 137, 271 P.2d 865, 868 (1954).

Sections 1225-1227--Admission of third person whose liability, breach of duty, or right is in issue. The preliminary showing required in regard to this class of admissions should be 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. Existing law is in accord. See Langley v. Zurich General Acc. & Liab. Ins. Co., 219 Cal. 101, 25 P.2d 418 (1933). Although Section 1227 is new to California law, the same principles should be applicable.

Sections 1235-1238--Previous statements of witnesses. Prior inconsistent statements, prior consistent statements made before bias arose, and recorded

memory are dealt with in Sections 1235-1238. In each case, the evidence is relevant and probative if the witnesses to the statements are credible. The credibility of the witnesses testifying to these statements should be decided finally by the jury. Hence, the evidence is admitted upon prima facie evidence of the preliminary fact. Few California cases discuss the nature of the foundational showing required in this situation. However, the practice seems to be consistent with Section 403, 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, 738 (1901)("Whether the [prior inconsistent] 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, 371 (1958)(two prior consistent statements held admissible because the "jury could properly infer . . . the motive to fabricate did arise after the making of the two statements"); People v. Zammora, 66 Cal. App.2d 166, 224, 152 P.2d 180, 209-210 (1944)(recorded memory).

Sections 1200-1341--Identity of hearsay 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 as to 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 is 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 any exception to the hearsay rule or, despite its relevancy, 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 is 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 is not given voluntarily.

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

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. Paragraph (4) is included in subdivision (a) to make this clear.

Sections 1400-1402--Authentication of writings. Under existing California law, an otherwise competent writing is admissible upon the introduction of evidence sufficient to sustain a finding of the authenticity of the writing. Verzan v. McGregor, 23 Cal. 339 (1863). Section 403 retains this existing law.

Sections 1410-1421--Means of authenticating writings. Sections 1410-1421 merely state several ways in which the requirements of Sections 1400-1402 may be met. Hence, to the extent that Sections 1410-1421 specify facts that may be shown to authenticate writings, the same principles apply: In each case, the judge must decide whether the evidence offered is sufficient to sustain a finding of the authenticity of the proffered writing and admit the writing if there is such evidence. Care should be exercised, however, to distinguish those cases where the disputed preliminary fact is the qualification of a witness to give an opinion concerning the authenticity of a writing (EVIDENCE CODE §§ 1416, 1417) or the authenticity of an exemplar with which the proffered writing is to be compared (EVIDENCE CODE §§ 1417, 1418); the judge is required to determine such questions under the provisions of Section 405.

Subdivision (b). Subdivision (b) restates the provisions of Section 1834 of the Code of Civil Procedure, which permits the judge to receive evidence that is conditionally relevant subject to the presentation of evidence of the preliminary fact later in the course of the trial.

Subdivision (c). Subdivision (c) relates to the instructions to be given the jury when evidence is admitted whose relevancy depends on the existence of a preliminary fact. When such evidence is admitted, the jury is required to make the ultimate determination of the existence of the preliminary fact. Unless the jury is persuaded that the preliminary fact exists, it is not permitted to consider the evidence.

For example, if P offers evidence of his negotiations with A in his contract action against D, the judge must admit the evidence if there is other evidence sufficient to sustain a finding that A was D's agent. If the jury is not persuaded that A was in fact D's agent, then it is not permitted

to consider the evidence of the negotiations with A in determining D's liability.

Frequently, the jury's duty to disregard conditionally relevant evidence when it is not persuaded of the existence of the preliminary fact on which relevancy is conditioned is so clear that an instruction to this effect is unnecessary. For example, if the disputed preliminary fact is the authenticity of a deed, it hardly seems necessary to instruct the jury to disregard the deed if it should find that the deed is not genuine. No rational jury could find the deed to be not genuine and, yet, to be still effective to transfer title from the purported grantor.

At times, however, it is not quite so clear that conditionally relevant evidence should be disregarded unless the preliminary fact is found to exist. In such cases, the jury should be appropriately instructed. For example, the theory upon which agent's and co-conspirator's statements are admissible is that the party is vicariously responsible for the acts and statements of agents and co-conspirators within the scope of the agency or conspiracy. Yet, it is not always clear that statements made by a purported agent or co-conspirator should be disregarded if not made in furtherance of the agency or conspiracy. Hence, the jury should be instructed to disregard such statements unless it is persuaded that the statements were made within the scope of the agency or conspiracy. People v. Geiger, 49 Cal. 643, 649 (1875); People v. Talbott, 65 Cal. App.2d 654, 663, 151 P.2d 317, 322 (1944). Subdivision (c), therefore, permits the judge in any case to instruct the jury to disregard conditionally relevant evidence unless it is persuaded as to the existence of the preliminary fact, and, further, subdivision (c) requires the judge to give such an instruction whenever he is requested by a party to do so.

§ 404. Determination of whether proffered evidence is incriminatory

Comment. Section 404 provides a special procedure to be followed by the judge when an objection is made in reliance upon the privilege against self-incrimination. Under Section 404, the objecting party has the burden of showing that the testimony sought might incriminate him. However, the party is not required to produce evidence as such. In addition to considering evidence, the judge must consider the 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. See Cohen v. Superior Court, 173 Cal. App.2d 61, 70, 343 P.2d 286, 290 (1959). Nonetheless, the burden is on the objector to present to the judge information of this sort sufficient to indicate that the proffered evidence might incriminate him. Section 404 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.

Section 404 is consistent with existing California law: The party claiming the privilege "has the burden of showing that the testimony which was being required might be used in a prosecution to help establish his guilt"; the court may require testimony to be given only if it clearly appears to the court that the claim of privilege is mistaken and that any answer "cannot possibly" have a tendency to incriminate the witness. Cohen v. Superior Court, 173 Cal. App.2d 61, 68, 70-72, 343 P.2d 286, 290, 291-292 (1959)(italics in original).

§ 405. Determination of preliminary fact in other cases

Comment. Section 405 requires the judge to determine the existence or nonexistence of disputed preliminary facts except in certain situations

covered by Sections 403 and 404. Under Section 405, 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 of law under which the question arises. For example, Section 1200 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 Section 1240, 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 Section 970, 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 of law 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 of law under which the question arises.

Section 405 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")(superseded by EVIDENCE CODE § 310).

Examples of preliminary fact issues to be decided under Section 405

Illustrative of the preliminary fact issues to be decided under Section 405 are the following:

Section 701--Disqualification of a witness for lack of mental capacity. Under existing law, as under this code, the party objecting to a proffered witness has the burden of proving the witness' lack of capacity. People v. Craig, 111 Cal. 460, 469, 44 Pac. 186, 188 (1896); People v. Tyree, 21 Cal. App. 701, 706, 132 Pac. 784, 786 (1913)(disapproved on other grounds in People v. McCaughan, 49 Cal.2d 409, 420, 317 P.2d 974, 981 (1957).

Section 720--Qualifications of an expert witness. Under Section 720, as under existing law, 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. Fairbank v. Hughson, 58 Cal. 314 (1881); Eble v. Peluso, 80 Cal. App.2d 154, 181 P.2d 680 (1947).

Section 788--Conviction for a crime when offered to attack credibility. If the disputed preliminary fact is whether a pardon or some similar relief has been granted to a witness convicted for a crime, the judge's determination is made under Section 405. Cf. Comment to Section 403.

Section 870--Opinion evidence on sanity. Whether a witness is sufficiently acquainted with a person whose sanity is in question to be qualified to express an opinion on the matter involves, in effect, the expertise of the witness on that limited subject. The witness' qualifications to express such an opinion, therefore, are to be determined by the judge under Section 405 just as the qualifications of other experts are decided by the judge. See the discussion of Section 720 in this Comment, supra. Under existing law, too, determination of whether a witness is an "intimate acquaintance" is a question addressed to the court. Estate of Budan, 156 Cal. 230, 104 Pac. 442 (1909).

Sections 900-1072--Privileges. Under this code, 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, 387, 373 P.2d 448, 451 (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, 117, 354 P.2d 637, 645 (1960). 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. See Agnew v. Superior Court, 156 Cal. App.2d 838, 840, 320 P.2d 158, 160 (1958); Abbott v. Superior Court, 78 Cal. App.2d 19, 21, 177 P.2d 317, 318 (1947)(suggesting that a prima facie showing by the proponent is sufficient where the issue is whether a communication between attorney and client was made in contemplation of crime).

Sections 1152-1154--Admissions made during compromise negotiations. With respect to admissions 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. This code places the burden on the objecting party to satisfy the judge that the admission occurred during such negotiations.

Sections 1200-1341--Hearsay evidence. 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 to have made it? The second question relates to the existence of those circumstances that make the hearsay sufficiently trustworthy to be received in evidence--e.g., was the declaration spontaneous, the confession voluntary, the business record trustworthy? Under this code,

questions relating to the authenticity of the proffered declaration are decided under Section 403. See the Comment to Section 403. But other preliminary fact questions are decided under Section 405.

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 this issue. People v. Keelin, 136 Cal. App.2d 860, 873, 289 P.2d 520, 528 (1955); People v. Pollock, 31 Cal. App.2d 747, 753-754, 89 P.2d 128, 131 (1939). Under this code, the proponent of a hearsay declaration has the burden of proof on the unavailability of the declarant as a witness under Section 1291 or 1310; but, the party objecting to the evidence has the burden of proving under Section 240(b) that the unavailability of the declarant was procured by the proponent to prevent the declarant from testifying. Under this code, too, the proponent of a declaration offered under Section 1224 has the burden of persuading the judge that the statement was made by an agent; for the statement is admissible only on the theory that the fact of agency supplies the requisite indicia of trustworthiness. On the other hand, a declaration offered under Section 1222 is admissible if the proponent produces evidence sufficient to sustain a finding that the party authorized the statement to be made; for the statement is admissible--not because it is trustworthy--but merely because the party against whom it is offered made the declaration by means of an agent.

Section 1416--Opinion evidence on handwriting. Whether a witness is sufficiently acquainted with the handwriting of a person to give an opinion whether a questioned writing is in that person's handwriting involves, in effect, the expertise of the witness on the limited subject of the supposed writer's handwriting. The witness' qualifications to express such an opinion,

therefore, are to be determined by the judge under Section 405 just as the qualifications of other experts are decided by the judge. See the discussion of Section 720 in this Comment, supra.

Section 1417--Comparison of writing with exemplar. Under Section 1417, as under existing law, the judge must be satisfied that a writing is genuine before he is authorized to admit it for comparison with other writings whose authenticity is in dispute. People v. Creegan, 121 Cal. 554, 53 Pac. 1082 (1898); Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61 (1889).

Sections 1500-1510--Best evidence rule. Under Section 405, 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. Cotton v. Hudson, 42 Cal. App.2d 812, 110 P.2d 70 (1941).

Section 1550--Photographic copy of writing. Section 1550 is merely a special exception to the best evidence rule; hence, Section 405 governs the determination of any disputed preliminary fact under Section 1550 just as it governs the determination of disputed preliminary facts under Sections 1500-1510. See the discussion of Sections 1500-1510 in this Comment, supra.

Spontaneous statements, dying declarations, and confessions

Section 405 is generally consistent with existing California law regarding the matters previously discussed in this Comment. 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 Section 405. 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 that the condition of admissibility has been satisfied. People v. Baldwin, 42 Cal.2d 858, 866-867, 270 P.2d 1028, 1033-1034 (1954) (confession--see the court's instruction, id. at 866, 270 P.2d at 1033); People v. Gonzales, 24 Cal.2d 870, 876-877, 151 P.2d 251, 254 (1944) (confession); People v. Singh, 182 Cal. 457, 476, 188 Pac. 987, 995 (1920) (dying declaration); People v. Keelin, 136 Cal. App.2d 860, 871, 289 P.2d 520, 527 (1955) (spontaneous declaration).

Under Section 405, the judge's rulings on these questions are final; the jury does not have an opportunity to determine the issue. This elimination of a "second crack" is desirable. The existing rule is a temptation to the weak judge to avoid difficult decisions by shifting the responsibility to the jury. The existing rule operates under complex instructions that require jurors 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. See, e.g., CALJIC (2d ed. 1958) Nos. 29-A (Rev.), 29-A.1, 330. 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 intelligently on the admissibility question. Section 405 does not, however, prevent the presentation of evidence to the jury that is relevant to the reliability of the hearsay statement. See EVIDENCE CODE § 406.

Section 405 deals only with the admission of evidence at the trial level. Hence, the finality of the judge's rulings on the admissibility of confessions has 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, 763, 354 P.2d 231, 235 (1960); People v. Baldwin, 42 Cal.2d 858, 867, 270 P.2d 1028, 1033-1034 (1954).

§ 406. Evidence affecting weight or credibility

Comment. Other sections in this article provide that the judge determines whether proffered evidence is admissible, i.e., whether it may be considered by the trier of fact. Section 406 simply makes it clear that the judge's decision on a question of admissibility does not preclude the parties from introducing before the trier of fact evidence relevant to weight and credibility.

CHAPTER 5. WEIGHT OF EVIDENCE GENERALLY

§ 410. "Direct evidence"

Comment. Section 410 is based on and supersedes Code of Civil Procedure Section 1831.

§ 411. Direct evidence of one witness sufficient

Comment. Section 411 is based on and supersedes Code of Civil Procedure Section 1844. The phrase "except where additional evidence is required by statute" has been substituted for the phrase "except perjury and treason" in Section 1844 because the "perjury and treason" exception to Section 1844 is too limited: Corroboration is required by Section 20 of Article I of the California Constitution (treason) and by Penal Code Sections 653f (solicitation to commit felonies), 1103a (perjury), 1108 (abortion and prostitution cases), 1110 (obtaining property by oral false pretenses), and 1111 (testimony of

accomplices); in addition, Civil Code Section 130 provides that divorces cannot be granted on the uncorroborated testimony of the parties.

CHAPTER 6. INSTRUCTING JURY ON EFFECT OF EVIDENCE

Article 1. Instructions on Burden of Proof

§ 430. Instructions on burden of proof

Comment. Section 430 supersedes subdivision 5 of Code of Civil Procedure Section 2061. The language taken from subdivision 5 of Section 2061 has been revised to conform to Division 5 (commencing with Section 500) of the Evidence Code and to the definition of "burden of proof" in Evidence Code Section 115.

Article 2. Other Instructions

§ 440. Power of jury not arbitrary.

Comment. Section 440 is based on and supersedes subdivision 1 of Code of Civil Procedure Section 2061. Section 440 is the same as California Jury Instructions, Civil (BAJI) No. 1.

§ 441. Not bound by number of witnesses

Comment. Section 441 is based on and supersedes subdivision 2 of Code of Civil Procedure Section 2061. Section 441 is substantially the same as California Jury Instructions, Civil (BAJI) No. 24; however, the BAJI instruction has been revised to eliminate the suggestion that the jury may decide against declarations "which do not produce conviction in their minds" and to eliminate language indicating that a presumption is evidence. These changes are necessary to conform to revisions made in the substantive rules of evidence. See Division 5 (commencing with Section 500) and the Comments to

the sections in that division.

§ 442. Witness whose testimony is false in part

Comment. Section 442 restates without substantive change and supersedes subdivision 3 of Code of Civil Procedure Section 2061.

§ 443. Testimony of an accomplice

Comment. Section 443 restates without substantive change and supersedes the first clause of subdivision 4 of Code of Civil Procedure Section 2061.

§ 444. Oral admissions

Comment. Section 444 restates without substantive change and supersedes the second clause of subdivision 4 of Code of Civil Procedure Section 2061.

§ 445. Party having power to produce better evidence

Comment. The first paragraph of the instruction in Section 445 restates without substantive change and supersedes subdivisions 6 and 7 of Code of Civil Procedure Section 2061.

The second paragraph of the instruction in Section 445, taken together with the first paragraph, restates in substance the meaning that has been given to the presumptions appearing in subdivisions 5 and 6 of Code of Civil Procedure Section 1963.

Evidence Code Section 913 provides that "no presumption shall arise with respect to the exercise of [a] privilege, and the trier of fact may not draw any inference therefrom," and the trial judge is required to give such an instruction if he is requested to do so. However, there is no inconsistency between Section 913 and Section 445. Section 913 deals only with the

inferences that may be drawn from the exercise of a privilege; it does not purport to deal with the inferences that may be drawn from the evidence in the case. Section 445, on the other hand, deals with the inferences to be drawn from the evidence in the case; the fact that a privilege has been relied on is irrelevant to the application of Section 445. Cf. People v. Adamson, 27 Cal.2d 478, 165 P.2d 3 (1946).