#63 4/7/72

Memorandum 72-29

Subject: Study 63 - Evidence Code

Attached to this memorandum are copies of (1) Justice Kaus' article critical of certain provisions of the Evidence Code that permit jury determination of foundational facts, (2) the draft statute embodying his suggested changes that we distributed for comment, and (3) the letters we have received commenting on the proposals.

Of the 14 responses received, eight approve the suggested changes without qualification. See Exhibits VII-X and XII-XV. Five other responses give qualified endorsement to the proposals. See Exhibits I (no need to change § 403(c)(1)), III (§ 403(c)(1) should be clarified; § 1223 should define "furtherance of the objective"), V (burdens of proof should be specified in §§ 1222 and 1223), VI (judge should rule on all admissibility questions), and XI (§ 1223 should provide defendant an election to determine whether the evidence should go to the jury). Finally, one comment is "opposed" to the revisions. See Exhibit IV (evidence should not be admissible subject to later foundational proof since an instruction to the jury to disregard evidence it has already heard is pointless).

Should the Commission determine to recommend enactment of the proposed changes, the staff notes that most of the objections thus far received are rather easily resolved. They are either drafting problems, or suggestions that the Commission undertake revisions substantially beyond the scope of the limited area under present consideration. In this connection, it should be pointed out that the one letter "personally

opposed" to the suggested changes desires fundamental alterations of the "order of proof" concept for fear the jury will be prejudiced by evidence that it should not have heard; the suggested changes are designed to achieve precisely this result while not going as far as the letter would wish.

Respectfully submitted,

Nathaniel Sterling
Legal Counsel

Memorandum 72-29

EXHIBIT I

STANFORD LAW SCHOOL
STANFORD, CALIFORNIA 94305

February 23, 1972

California Law Revision Commission
School of Law
Stanford University

Dear Sirs:

I have received your letter dated February 15, 1972. With respect to his criticisms of Sections 1222 and 1223, Justice Kaus is, in my opinion, clearly correct. I confess that I had always assumed that the two aberrations he pointed out were in the Code because they were seen as extremely useful by plaintiff's attorneys and prosecutors and that when the plaintiff's attorneys and prosecutors could essentially agree on an issue, their political power was sufficient to compel a policy decision in their favor. Certainly, it is impossible to justify the two sections aforementioned in any other terms.

With respect to your revisions of Section 403, however, I do not understand why you have made them. Specifically it seemed to me that the old section (c) 1 was perfectly correct.

No real change is necessary in Section 403 so far as I am concerned except perhaps to eliminate (a) 4 (which is either redundant or incomprehensible) since but for the explicit declarations of 1222 and 1223 everybody would have thought that they were controlled by Section 405 of the Evidence Code rather than 403 anyway.

I hope this brief note is sufficiently detailed for you. If it is not, I will be happy to write more.

I'm taking the liberty of enclosing a copy of this letter to Judge Kaus.

Yours very truly,

John Kaplan
Professor of Law

JK/lcg

Memorandum 72-29 EXHIBIT II

Court of Appeal
State of California
Second Appellate District
State Building, Los Angeles 90012

Otto M. Kaus
Presiding Justice
Division Five

March 1, 1972

Professor John Kaplan
Stanford Law School
Stanford, California 94305

Dear Professor Kaplan:

Thank you for the copy of your February 23 letter to the Law Revision Commission and welcome aboard - I think. Please permit these comments:

1. I am, of course, delighted that you agree with me with respect to sections 1222 and 1223. I personally have never claimed that the heresies contained in those sections were lobbied through by plaintiffs' attorneys or prosecutors. Rather, I suspect, that they are the result of an erroneous concept of the meaning of the right to trial by jury. As far as section 1223 is concerned, it is of course solidly based on prior California law. (People v. Staccone, 36 Cal.2d 234, 238.)

2. Re section 403, (c) 1: There is nothing wrong with the section, it is merely an unnecessary potential for error to the extent that it forces the court to instruct the jury on its function when requested. Please see footnote 21 of my article in 4 Loyola 233. Take a simple respondeat superior case: if the jury is properly instructed on the substantive law, what conceivable purpose does it serve to tell it to disregard the evidence of the servant's negligence, unless it first finds that he acted in the course and scope of his employment?

3. Re section 403, (a) 4: While we seem to agree that the section should be eliminated, I do not think that it is either redundant or incomprehensible particularly when read with the comment. It

Court of Appeal
State of California
Second Appellate District
State Building, Los Angeles 90012

Otto M. Kaus
Presiding Justice
Division Five

clearly states that where the admissibility of evidence depends on the identity of a declarant, the jury must determine who did the declaring. Hypo: Two men are found shot by bullets from the same gun, A mortally to his knowledge, B not so serious. One of them says: "It was Bennie the Meatball." Conflict whether it was A or B. Section 403 (a) 4 leaves the resolution of the conflict to the jury which will inevitably hear the declaration even though it ultimately finds that it was B who spoke. Assuming that the hearsay rule is worth having, leaving the resolution of the identity of the speaker to the jury thwarts its purpose, since the jury will hear the statement, even if it is ultimately found incompetent.

The fact questions that come under 403 (a) 4 are different than those referred to on 1222 and 1223, which go to authority, rather than identity.

I am still very much hoping to meet you personally other than as a speaker on a distant rostrum.

Sincerely,

Otto M. Kaus

OMK/gvf
cc: John H. DeMoully
Executive Secretary
California Law Revision Commission

EXHIBIT III

Superior Court of the State of California
County of Orange
Santa Ana, California

March 14, 1972

Chambers of
HERBERT S. HERLANDS
Judge of Superior Court

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

Dear Professor DeMoully:

Regarding your letter of February 15, 1972, containing proposed revisions of Sections 403 which are required to make Section 403 conform to the proposed revisions of Sections 1222 and 1223.

As I understand the proposed revisions, there will still be instances in which the jury will be permitted to decide whether the preliminary fact exists. What troubles me, therefore, is the proposed deletion of Subparagraph (e)(1), relating to instructing the jury in those instances in which a jury would decide whether the preliminary fact existed and hence whether the proferred evidence should be considered. If we are still to have any questions of preliminary fact that are not finally decided by the judge but are finally decided by a jury, we should not only keep Subparagraph (e)(1), but should clarify it, for, in criminal trials, the problem arises whether the jury shall be instructed to disregard the proferred evidence unless the jury finds by a preponderance of the evidence that the preliminary fact does exist.

As far as revisions to Section 1223 are concerned, I don't think that trial Judges are often faced in conspiracy cases with the problem of submitting to the jury declarations of alleged conspirators when the trial Judge believes the foundational facts are a "pack of lies." I think that, as suggested by the recent case of Dutton v. Evans, 91 S. Ct. 210 (1971) the problem confronting the trial Judge revolves around the language in Section 1223(a) that refers to "furtherance of the objective" of the conspiracy. If Section 1223 is to be touched, I think trial Judges would welcome clarification of the words I have quoted.

Superior Court of the State of California
County of Orange

Please give my regards to Professor Howard R. Williams, who served with me on the Columbia Law Review from 1938 to 1940.

Sincerely,

Herbert S. Herlands
Judge of the Superior Court

HSH:pr

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March 8, 1972

California Law Revision Commission
Stanford School of Law
Palo Alto, California 94305

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

Gentlemen:

Just a short note to tell you that I am personally opposed to the revisions suggested primarily with respect to the fact that the Court may alter the order of proof and thereafter instrust a jury to disregard it. I also object to allowing the Court the unfettered discretion to alter the order of proof with respect to proof of conspiracy and admission of otherwise inadmissible statements.

First of all, the Supreme Court of this State laid to rest the proposition that the jury could follow the instructions of a judge to disregard incriminating evidence as "unmitigated fiction". People v. Aranda, 63 C2d 518 (1965).

Secondly, it is also "unmitigated fiction" that the judge exercises any discretion whatsoever in varying the order of proof and merely allow statements in subject to their being stricken upon request of the prosecution. Discretion of the judge should be limited to varying the order of proof where the prosecution can demonstrate a particularized need for a variance of the order of proof in the particular case ... and it should be specifically stated in the evidence code that "convenience" on the part of the prosecution or its witnesses is not such a particularized need.

Thank you for considering these suggestions.

Very truly yours,

BURTON MARKS

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WILLIAM W. DAVIS
BEN A. SCHUCK, III
MELODIE McLENNAN

GEORGE W. DRYER
1881-1959
RAYMOND R. HAILS
1889-1959

March 6, 1972

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

Dear Mr. DeMoully:

I have considered the complaint voiced by Justice Kaus, as contained in your Letter of Transmittal dated February 15, 1972, and have reviewed his suggestions for curing the situation. I fully endorse his position that juries should not be allowed to consider (and appellate courts should not be bound by) hearsay evidence, the preliminary foundational evidence for which has not been proved by at least the preponderance of the evidence. It seems to me that before statements by third persons should be admitted against a party, and therefore lodged almost irretrievably in the jurors' minds, someone somewhat more sophisticated than the average juror in sifting truth from lies should pass preliminarily on the existence of foundational facts of the type here involved.

I am, however, somewhat bothered by the unqualified use of the term "satisfies", in the proposed legislation. While the concept of being satisfied may, standing alone, mean being satisfied only to the extent of a preponderance of the evidence, I think that the section should not leave the matter open to any question. Accordingly, I would revise subdivision (b) of Section 1222, as follows:

> "The evidence is (1) offered after admission of evidence concerning such authority, which evidence satisfies the court that such authority has been proved by a preponderance of the evidence, or (2) admitted by the Court in its discretion as to the order of proof, subject to the admission of evidence which so satisfies the court."

I have the same comment concerning subdivision (c) of Section 1223, which I would revise as follows:

> "The evidence is (1) offered after admission of evidence concerning such authority, which evidence satisfies the court that each of the facts specified in subdivisions (a) and (b) has been proved by a preponderance of the evidence, or (2) admitted by the court in its discretion as to the order of proof, subject to the admission of evidence which so satisfies the court."

The above language would also tend to make it clear that all parties have the right to introduce evidence concerning the foundational facts prior to any determination by the court as to whether or not it is satisfied as to their existence.

Very truly yours,

Jack T. Swafford

Jack T. Swafford
of
BURRIS, LAGERLOF, SWIFT & SENECAL

JTS:pk

Memorandum 72-29 EXHIBIT VI

UNIVERSITY OF CALIFORNIA, LOS ANGELES

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

February 23, 1972

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

Gentlemen:

Justice Kaus is certainly a persistent advocate. I believe that this is the third time your organization has requested comments on this proposal. You will pardon me if I simply recapitulate what I have said in past comments.

(1) I would favor giving the judge the power to make all rulings on the admissibility of evidence. Having two separate regimes for adjudicating the admissibility of evidence causes more confusion than it is worth in terms of practical consequences or doctrinal purity.

(2) It follows from this that I do not think that there is any sensible way in which one can determine which questions should be processed under one regime and which under the other, absent some empirical study as to how these questions are resolved in practice.

(3) I continue to be amazed and amused by the fact that the Commission is more troubled by the possibility that the Evidence Code is "unorthodox" than the fact that it is unfair to specific classes of litigants or that it is unduly expensive.

Very truly yours,

Kenneth W. Graham, Jr.
Professor of Law

KWG:lk

Memorandum 72-29

EXHIBIT VII

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MARC H. MONHEIMER
BRUCE M. COWAN
ANDRE L. de BAUBIGNY
MICHAEL R. MARRON
E. LEWIS REID
JOHN W. SHEEHY, JR.
JAMES T. FOUSEKIS
ROBERT E. MERRITT, JR.
FRED B. WEIL
RICHARD G. HILDRETH
GEORGE H. GNOSS, JR.
JAMES E. REED
RAY E. McDEVITT
DOUGLAS R. CUNNINGHAM
WILLIAM A. RESNECK
JOHN C. LADD
RICHARD J. FRICK

COUNSEL
JOHN J. GOLDBERG
B. J. FEIGENBAUM
ADRIAN A. KRAGEN

February 29, 1972

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

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

Gentlemen:

In reply to your letter of February 15, 1972, I wish to advise I am in agreement with the amendments recommended by Justice Kaus. I regret my delay in replying but was out of town until several days ago.

Very truly yours,

Neil E. Falconer

Neil E. Falconer

NEF:vb

Memorandum 72-29 EXHIBIT VIII

SHEPPARD, MULLIN, RICHTER & HAMPTON
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STEPHEN C. TAYLOR
JOHN D. HUSSEY
THOMAS R. SHEPPARD
JOHN A. STURGEON
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PAUL M. REITLER
PIERCE T. SELWOOD
THOMAS C. WATERMAN

RICHARD L. LOTTS
JOSEPH G. GORMAN, JR.
WILLIAM M. BURKE
PRENTICE L. O'LEARY
MICHAEL W. RING
CHARLES E. McCORMICK
DAVID J. REBER
DAVID S. BRADSHAW
ROBERT JOE HULL
TERENCE M. MURPHY
FRANK P. MORSE
JOEL R. OHLGREN
ALLAN I. GROSSMAN
STEPHEN I. AHLQUIST
FINLEY L. TAYLOR
EDWARD J. THOMAS

JAMES C. SHEPPARD
(1898-1964)

February 24, 1972

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

Attention: Mr. John H. DeMoully
Executive Secretary

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

Gentlemen:

I would approve of the suggestions made by Justice Otto M. Kaus in his law review article. Justice Kaus highlights what has been an anomaly as to the Court vs. Jury in preliminary fact determination. His suggestions, in substance, put the burden of preliminary fact determination on the court, where it should be.

I believe that this was the aim of the Evidence Code when it was passed, but it fell short in this area that Justice Kaus has highlighted and I think his suggestions are well made.

Very truly yours,

George R. Richter, Jr.

GRR:sv

Memorandum 72-29

EXHIBIT IX

LAW OFFICES OF
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AREA CODE 415

TELEX 34743
CABLE ADDRESS "EVANS"

February 24, 1972

Revision of Evidence Code
Sections 403, 1222 and 1223

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

Dear Mr. DeMoully:

I have discussed with several of my partners your letter of February 15, 1972, on the above subject. We believe that Justice Kaus' suggestion is excellent, and we approve of the amendments to implement his suggestion.

Yours very truly,

Fredrick H. Hawkins

Memorandum 72-29

EXHIBIT X

LAW OFFICES OF
JOHN WYNNE HERRON
HERRON & WINN BUILDING
345 GROVE STREET - CIVIC CENTER
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415) 863-2500

February 21, 1972

California Law Revision Commission
Stanford, California 94305
Attention: John H. DeMoully, Executive Secretary

Dear Mr. DeMoully:

I have your letter dated February 15, 1972 and have carefully reviewed the letter and its enclosures.

In my opinion, the proposed amendments by Justice Otto M. Kaus are metitorious and should be enacted into law.

May I thank you for soliciting my views on the matter.

Very truly yours,

LAW OFFICES OF JOHN WYNNE HERRON

BY: John Wynne Herron
JOHN WYNNE HERRON

JWH:ce

Memorandum 72-29

EXHIBIT XI

SILBER & KIPPERMAN
ATTORNEYS AT LAW
802 MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94133

MICHAEL D. SILBER
STEVEN M. KIPPERMAN

TELEPHONE: (415) 788-8970

February 23, 1972

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

RE: EVIDENCE CODE § 403, 1222 & 1223

Dear Sirs:

With respect to making all preliminary fact determinations the responsibility of the judge, without review by the jury, I would submit but one observation. While it is appealing conceptually and symmetrically to make the changes suggested, I do believe that in a criminal prosecution, a defendant ought to have the election as to whether he desires those facts to be submitted to the jury. Of course, an entirely separate question is if such an election were provided the standard of proof by which the jury would be required to make its determination of admissibility. Proof beyond a reasonable doubt might not necessarily be considered for preliminary facts of admissibility.

Very truly yours,

STEVEN M. KIPPERMAN

SMK:CD

Memorandum 72-29 EXHIBIT XII

J. H. PETRY
ATTORNEY AT LAW
374 COURT STREET
SAN BERNARDINO, CALIFORNIA 92401
AREA CODE 714
TURNER 9-9545

February 18, 1972

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

Re: Evidence Code Sections

Gentlemen:

I have examined the proposed changes. In my opinion all amendments to the Evidence Code should tend toward simplification. The present phraseology requires much speculation and judicial imterpretation; however I have no objection to the amendments proposed by Justice Kaus although I think they do not effect the simplicity for which I hope.

Very truly yours,

J. H. Petry

JHP:ja

Memorandum 72-29 EXHIBIT XIII

CHAMBERS OF
The Superior Court
SANTA CRUZ, CALIFORNIA

DEPARTMENT TWO
CHARLES S. FRANICH
JUDGE

February 29, 1972

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

Dear Mr. DeMoully:

In reference to your letter of February 15th and the recommendations of Justice Kaus, I am of the opinion that these recommendations should be adopted. I believe they would simplify matters and avoid the confusion that exists today.

In respect to your condemnation practice questionnaire, I'm afraid that I can be of no particular assistance.

Very truly yours,

Charles S. Franich
Judge of Superior Court

CSF:gn
Enc.

Memorandum 72-29 EXHIBIT XIV

Duke University
DURHAM
NORTH CAROLINA

SCHOOL OF LAW
OFFICE OF THE DEAN

POSTAL CODE 27706
TELEPHONE 919-684-2834

March 7, 1972

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

Dear John:

I submitted the changes suggested by Justice Otto M. Kaus to Professor Frank T. Read of the Duke Law School. He has just informed me by memorandum that he is in strong agreement with the suggestions and believes that California would be well advised to adopt Justice Kaus's proposed amendments. I will rely on his expert opinion and join in this recommendation.

How are things going? I still miss the very interesting discussions that took place in the Commission. Give my regards to the entire staff and the members of the Commission.

Sincerely,

Joseph T. Sneed
Dean

JTS:joc

Memorandum 72-29

EXHIBIT XV

OFFICE OF
CITY ATTORNEY
CITY HALL
LOS ANGELES 12, CALIFORNIA

ROGER ARNEBERGH
CITY ATTORNEY

March 30, 1972

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

Dear Mr. DeMoully:

By letter dated February 15, 1972, you request my views concerning the desirability of making certain revisions in Evidence Code Sections 403, 1222 and 1223.

I have reviewed the proposed amendments as well as the law review article by Justice Otto M. Kaus, 4 Loyola U. of L.A. L. Rev. 233, and I concur in his recommendation that the judge should determine by a preponderance of the evidence that the preliminary fact exists prior to the evidence being admitted. Therefore, I support the proposed amendments to the Evidence Code.

Sincerely yours,

ROGER ARNEBERGH
City Attorney

STATE OF CALIFORNIA

RONALD REAGAN, Governor

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW—STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305
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JOHN N. McLAURIN
THOMAS E. STANTON, JR.
HOWARD R. WILLIAMS
GEORGE H. MURPHY
Ex Officio

February 15, 1972

LETTER OF TRANSMITTAL

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

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

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

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

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

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

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

[Emphasis added; footnotes omitted.]

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

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

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

Sincerely,

John H. DeMoully
Executive Secretary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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