#34 8/19/64

Memorandum 64-59

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Division 3--General Provisions)

Attached to this Memorandum are:

Division 3 of the Evidence Code (redrafted)

Commission Comments to Division 3 (We will not prepare the Comments on Sections 403 to 406 until after the September meeting. Moreover, we agree with many of the suggested revisions in the Comments that were contained on material handed into the staff at the August meeting, but time did not permit us to revise the Comments. Hence, the attached Comments are provided for your consideration in reviewing the statute.)

Exhibit I (pink page) (Extract from letter from office of District Attorney of Alameda County)

Exhibit II (green pages) (Copy of Article by Professor Davis in American Bar Association Journal)

Exhibit III (buff pages) (Letter from Judge Patton)

We will also refer in this memorandum to the suggestions of our research consultant and to comments from the Committee of the Conference of California Judges and from Mr. Powers.

There are a number of policy questions presented by Division 3 that have not previously been determined by the Commission. In accordance with the direction of the Commission, the staff has resolved some of these policy questions in preparing the division for the printer. We will have galley proofs of this division for the September meeting; the galley proofs will read the same as the attached mimeographed material.

The following is a section by section discussion of Division 3. Please read the attached Commission Comment when you study each section. You will note that the Comments are not completely accurate since they were prepared for the previous version of Division 3 and time did not permit revising them in time for the September meeting.

Section 300.

This section was revised at the June meeting to read as set out in the statute, except that we deleted the words "in which evidence is introduced" which formerly followed the words "conducted by a court." A commissioner suggested these words were unnecessary and we agree.

Does the Commission Comment to Section 300 reflect Commission intent?

Section 310.

Section 310 is based on C.C.P. Section 2102. Section 2102 is discussed on pages 204-206 of Professor Degnan's research study. We have compiled it in substantially the form he recommends, except that we deleted "and all discussions of law are to be addressed to him" following the word "judge" in what is now the first sentence of Section 310.

Section 311.

This section has been revised in accordance with instructions given at the August meeting. We recommend approval of this section in the form it is contained in the Evidence Code. Note we have added "to be determined in the manner provided in Division 4 (commencing with Section 450)" at the end of subdivision (a).

Section 312.

Subdivision (a) of Section 312 restates the substance of C.C.P. Section 2101. We believe we have carried out the research consultant's recommendation that Section 2101 be compiled in the Evidence Code as is. See Research Study at pages 203-204. In what is now subdivision (a) we deleted "and all evidence thereon is to be addressed to the jury" following "jury."

Subdivision (b) of Section 312 is based on the following language from C.C.P. Sections 1847 and 2061:

2061. The jury, subject to the control of the court, in the

cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

1847. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

We have included the qualification "except as provided by rule of law" in Section 312, in order to recognize that statutes or judicial decisions may qualify the rules expressed in subdivisions (a) and (b).

Sections 320 and 321.

These sections reflect the substance of the Commission's determination of this matter at the June meeting. We deleted "sound" before "discretion" in Section 320.

Section 350.

Section 350 is the same as the first sentence of RURE 7(3).

Section 351.

Section 351 is the same as the second sentence of RURE 7(3), except that the "except clause" has been inserted at the beginning of the sentence.

Section 352.

Section 352 is based on RURE 45. The Commission previously approved a significant revision in RURE 45: The word "fact" was substituted for "risk". This change may affect the weight to be given to the comments discussed below, since those comments were directed to RURE 45 which contained the word "risk".

The Special Committee of the Conference of California Judges made the

following comment on this section:

> The Committee is of the opinion that the proposed Rule is capable of being construed to grant the judge wider discretion than would be acceptable to the Bar. Since most of said Rule's purposes can be accomplished in pretrial and under other existing statutes and since proposed Rule 45 is so controversial that it might endanger acceptance of the whole proposed revision of the law of evidence, we recommend the reconsideration or deletion of Rule 45.

Contrary to view of the Judges, the Senate Subcommittee on the Rules of Evidence found Rule 45 to be a desirable rule. The subcommittee considered Rule 45 to be a desirable limitation on the admission of hearsay evidence in certain cases where evidence would meet the requirements of a hearsay exception.

Section 352 is a basic provision in the scheme devised by the Uniform Rules and approved by the Commission. It is a necessary companion provision to Section 351 ("all relevant evidence is admissible").

It remains to be seen if Section 352 "is so controversial that it might endanger acceptance of the whole proposed revision of the law of evidence." The staff suspects that such recommendations as impeaching your own witness will prove to be much more controversial than Section 352 which we believe states existing law.

Exhibit I is an extract from a letter from the office of the District Attorney of Alameda County concerning RURE 45. The letter objects to Revised Rule 45. We have, the staff believes, eliminated much of the basis of his objection by changing the word "risk" in Revised Rule 45 to "fact" in Section 352.

The staff of the Judicial Council recommended approval of Section 352 of the Evidence Code.

Sections 353 and 354.

Sections 353 and 354 are exactly the same as RURE 4 and 5, except that we have substituted "that the error or errors complained of resulted in miscarriage of justice" for the language contained in the RURE 4 "probably had a substantial influence in bringing about the verdict or finding" and the substantially similar language in RURE 5.

This change is based on a suggestion of the Committee of the Conference of California Judges. The Committee believes that subdivision (b) of Section 353 should read:

> (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of has resulted in a miscarriage of justice.

The Committee comments: "The Committee believes that said subdivision (b) should be drafted to contain substantially the language of Section 4-1/2 of Article VI of the California Constitution. Whether the error had a substantial influence in bringing about the verdict or finding is one of the questions the court no doubt would wish to consider in determining whether there had been a miscarriage of justice."

The Committee of the Conference of California Judges also recommends the similar change the staff made in Section 454 for the same reason.

Mr. Powers also suggested this revision. In a letter dated July 29, 1964, he states:

> Sections 353 and 354 of the proposed Code of Evidence use language, it is submitted, which is contrary to the case law of California. I refer specifically to Section (b) of Section 353 and the first paragraph of 354 where the language used "probably had a substantial influence in bringing about the verdict or findings" is not in accord with People v. Watson, 46 Cal.2d 818, 836. It is submitted the more accurate language should be that it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error."

We believe that it is better to state the test in the language of the Constitution rather than in the language used in People v. Watson. For an analysis of People v. Watson, see Witkin, California Procedure 1961 Supplement, at pages 156-157 where Witkin states:

> The "double negative" or possible prejudice test (e.g., "we cannot say that the error was not prejudicial, or that the jury would not have reached a different verdict") was recently abandoned in the landmark case of People v. Watson (1956) 46 C.2d 818, 836, 299 P.2d 243. The court revived the earlier rule requiring an affirmative showing of error, but stated the requirement in the less rigid form of "reasonable probability":
>
> "[I]t appears that the test generally applicable may be stated as follows: That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. Phrasing the test in this language avoids any complexity which may be said to result from the language employed in the double negative approach, and such phrasing seems to coincide with the affirmative language used in the constitutional provision. We are of the view, however, that the test as above stated does not constitute a departure from the tests heretofore applied, but is merely a crystallization in affirmative form of the guiding principle which the courts have sought to enunciate in phrasing the test in other language. For example, the application of the double negative approach, as stated in some of the recent decisions, presupposes that a reversal will result only when there exists, in the opinion of the court, at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error has affected the result. But the fact that there exists at least such an equal balance of reasonable probabilities necessarily means that the court is of the opinion 'that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' Thus, it appears that the tests, as variously stated, are not fundamentally different but, on the contrary, are essentially the same. Nevertheless, the test, as stated in any of the several ways, must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated."
>
> Although the major battles concerning reversible error have been waged in criminal cases, the constitutional doctrine applies equally to civil and criminal cases (see text, §99), and the test should be, and doubtless will be, the same. Hence the theory of the cases set forth in the text, p. 2281, may not be followed in future decisions.

This is indicated in Murphy v. Atchison etc. Ry. (1958) 162 C.A.2d 818, 329 P.2d 75, where decedent was killed at a railway intersection and the trial judge erroneously refused to instruct on the presumption of due care. The court, quoting the Watson case, found no reversible

error, because it is not reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (162 C.A.2d 823.)

Section 355.

This section is exactly the same as RURE 6.

Section 390.

This section is exactly the same as C.C.P. Section 1854 except that we have substituted "an adverse party;" for "the other; when a letter is read, the answer may be given;". The research consultant discussed Section 1854 on pages 196-199. He states that the section functions as a rule of evidence and serves as an independent ground for receipt of matter that otherwise would be incompetent. He suggests the existing language be retained. We have followed his suggestion with a slight modification of the existing language and compiled the Section in the Evidence Code in substantially the same language as is found in C.C.P. Section 1854. The consultant suggests that the section might be included in the portion of the Evidence Code dealing with cross-examination. However, the section also makes rebuttal evidence admissible and we believe it is better to classify it in the General Provisions Division of the Evidence Code. Sly v. Abbott, 264 Pac. 507, 89 Cal. App. 209 (1928) (Plaintiff having first offered evidence of conference, defendant could offer evidence of entire conversation thereafter).

Section 391.

Section 391 is exactly the same as C.C.P. Section 1954 except as noted below. There are a great number of annotations to this section and, although its language is not entirely clear, we have not attempted to revise it. Professor Degnan discusses Section 1954 on pages 199-201 of the research study and sees no need to change its wording. We changed "jury" to "trier of fact" and deleted the word "sound" before "discretion of the judge."

We have included the last sentence, although it seems to be a specific application of Section 352. However, it does not require, as does Section 352, that the probative value of the evidence is substantially outweighed by its cumulative or prejudicial effect. In short, we believe it undesirable to omit the last sentence, for it might suggest that we intend to change the substance of the law by so doing.

We suggest the approval of Section 391 as set out in the Evidence Code. Although the section is merely a specific application of Section 351 which makes all relevant evidence admissible, Section 391 will make it clear that we are making no change in the existing law concerning the admissibility of an object in evidence.

Sections 400-406.

Except for a few insignificant changes made in the interest of consistency, these sections are exactly the same as RURE 8 with one exception: We have added subdivision (d) to Section 402. Subdivision (d) is exactly the same as the second sentence of RURE 1(8). At its June meeting, the Commission determined that the provision now included in subdivision (d) of Section 402 should be removed from the RURE 1(8) definition and be compiled in a pertinent portion of the General Provisions Division of the Evidence Code. We believe that it is properly placed in Section 402 which is the general section on the procedure for determining the existence of a preliminary fact upon which depends the admissibility of evidence.

The Committee of the Conference of California Judges makes several

suggestions concerning Sections 400-406. First, the Committee believes that the definition of "proffered evidence," in Section 401 is too restrictive. "Proffered evidence has long been used by the legal profession to refer to any evidence offered for admission and it is not dependent upon the existence or nonexistence of a preliminary fact." We recommend that . . . [Section 401] be amended to read as follows:

> 401. As used in this article, "proffered evidence" means any evidence offered for admission in evidence.

The staff believes that the definition now contained in Section 401 is better when its purpose is considered. The definition applies only in Article 2 relating to preliminary determinations on admissibility of evidence. The distinction between the "proffered evidence" and the evidence offered to establish the existence or nonexistence of a preliminary fact is clearer, the staff believes, if Sections 400 and 401 are retained in their present form.

The Committee of the Conference of California Judges also suggests that the second sentence of subdivision (b) of Section 402 be revised to read: "On the admissibility of other evidence <u>of similar character</u>, the judge may hear and determine the question out of the presence or hearing of the jury." We fail to see the reason for restricting the discretionary power of the judge given by this sentence to evidence similar to a confession of a criminal defendant. Perhaps an additional sentence should be added before the last sentence of subdivision (b), to read: "On the admissibility of other evidence of similar character, the judge <u>shall</u> hear and determine the question out of the presence or hearing of the jury unless otherwise requested by the party against whom the evidence is offered."

The Committee believes that subdivision (b) of Section 403 should be "eliminated upon the same grounds as stated in the last sentence of our comment

with respect to Rule 19." With respect to Rule 19, the Committee stated:

> The Committee believes that the last sentence of Rule 19 of the Uniform Rules of Evidence should be eliminated because the question of personal knowledge, experience, training or education should be established before the witness is permitted to give any testimony. The difficulty of erasing from the minds of the jury that which they have already heard is well known. If evidence is received and the jury is later instructed to disregard it, it is difficult for the jury to heed the court's admonition to disregard such testimony. Conversely, we can conceive of no particular difficulty in requiring, as a prerequisite, proof of personal knowledge prior to the giving of relevant or material testimony. Since the judge determines the qualification of a witness there is no necessity for including in subdivision (2) the phrase, "if he finds that no trier of fact could reasonably believe . . . "

Subdivision (b) is merely a specific recognition of the authority of the judge to regulate the order of proof. Moreover, the subdivision is based on existing law--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.

Sections 410-411.

These sections conform to the Commission's decisions relating to C.C.P. Section 1844. See the Commission's Comments to these sections.

Sections 430-446.

These sections conform to the Commission's decision relating to C.C.P. Section 2061. In Section 440 we inserted "substance of the" before "instructions" and in Section 446 we revised the second sentence which originally read: "Therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with distrust." The words "it appears" seem to conflict with the first sentence of Section 446.

The Case for Rule 3.

The Commission disapproved URE 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."

Exhibit III is a letter from Judge Patton pointing out the desirability of something equivalent to URE Rule 3. We suggest you read the letter with care. The staff believes that Judge Patton makes a strong case for his position. We note that, unlike Rule 45 which results in the exclusion of relevant evidence, Rule 3 or its equivalent results in the admissibility of evidence. The extent to which such evidence should be considered will be a question of weight and credibility to be resolved by the jury.

Relaxing evidentiary exclusionary rules when judge is trier of fact.

In connection with his discussion of Code of Civil Procedure Section 2103 (pages 206-211), Professor Degnan suggests that the jury-trial rules of evidence should not necessarily apply to the judge or other fact-finders in civil cases. Primarily, the rules of evidence that might be relaxed are those relating to hearsay, although some of the extrinsic policy rules fall into the same classification as do such rules as the opinion rule.

Professor Degnan presents this question: "Is there justification for extending to all such fact-finders (primarily the judge setting without a jury) those rules which are founded in doubts about the sophistication of jurors and in considerations posed by traditional verdict procedures which allow jurors to answer the questions asked of them without giving any explanation of the process by which they arrived at their factual conclusions?" You will recall that Professor Davis presented the same question for Commission consideration some time ago. At that

time the Commission concluded that certainty in determining what evidence is admissible and lack of trust of judges justified applying the same rules to judges when they are fact-finders as apply to jurors.

Professor Degnan suggests that the hearsay rule, at least, not be applied to judges or referees when trying civil cases as the finder of fact. He believes that judges and referees should have the same freedom from the jury oriented and jury dominated rules of exclusion that administrative agencies have enjoyed for nearly a generation. Perhaps, he believes, they should have greater freedom; they should have at least as much.

We suggest that you read pages 206-211 of the research study in connection with this matter.

Also pertinent to the same point is the Article by Professor Davis in the American Bar Association Journal. We attach a copy of this article as Exhibit II.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

LETTER FROM OFFICE OF DISTRICT ATTORNEY OF ALAMEDA COUNTY
(Letter from D. Lowell Jensen, Dpty. Dist. Atty)

California Law
Revision Commission 4. July 1, 1964

Article VI. Rule 45 sets forth a power of the trial judge to exclude evidence for a number of reasons listed therein. Under this rule he can exclude evidence if it has a "risk" of:

". . . undue consumption of time . . ."
". . . undue prejudice . . ."
". . . confusing the issues . . ."
". . . misleading the jury . . ."

(the Commission apprently deletes the URE proposal to include "surprise" although the commentary seems to put that ground right back in.")

Here again the trial judge is given the power, by the exercise of the various value judgments outlined, to exclude otherwise relevant and material evidence. The power contemplated here is a close relative of the power discussed previously in reference to the trial judge deciding credibility. To be sure the power in Rule 45 is a good deal more legitimate in that a good argument can be made that it probably exists already in somewhat the same form. However, it is surely true that there is a great difference between the exercise of a statutorily granted and defined power by a trial judge and his exercise of what may be termed "sovereign power" when deciding the admissibility of evidence which is relevant and material which he decides to exclude under the watchful eye of an appellate court. It seems quite obvious that trial judges would much more frequently find that one of the grounds set forth in Rule 45 does exist. As indicated before, these are all value judgments subject to a tremendous amount of variance from judge to judge. Again, we do not expect abuse but we fear it. If the power is there it is obviously the type of power that should not be encouraged or strengthened by being made specific. The reality of the problem is recognized and it is said, 'Thus, the Uniform Commissioners state that they propose Rule 45 "in the assurance that the results of rare and harmful abuse of discretion will be readily corrected on appeal."' The ready correction is of no avail to the prosecution. When the trial judge exercises his value judgment and keeps out evidence although an abuse of discretion when it is "harmful" to the prosecution there is an acquittal and no appeal. We feel that there is a substantial enough potential harm to adequate prosecution to override any value in restating, if that is so, these notions of law into statutes.

Memo 64-59 EXHIBIT II

An Approach to Rules of Evidence for Nonjury Cases

Since five out of six trials in courts of general jurisdiction are without juries, and 97 per cent of all trials in all tribunals, including administrative, are nonjury, Professor Davis argues that it is time to reshape the law of evidence to fit these proceedings. He contends that it is wrong for our legal system to apply rules of evidence designed for the jury system to nonjury adjudications.

by Kenneth Culp Davis • *Professor of Law at the University of Chicago Law School*

THIS ARTICLE elaborates four simple propositions.

1. Five out of six trials in courts of general jurisdiction are without juries. If trials in lesser courts are added, jury trials may be about 5 per cent of all trials in all courts. If trials before administrative officers and arbitrators are also added, jury trials are probably not more than 3 per cent of all trials in all tribunals.

2. We have no rules of evidence designed for nonjury trials. Our only rules of evidence are designed for jury trials. We need rules of evidence or standards of evidence for the 97 per cent of trials without juries.

3. Although reform of evidence law is long overdue, the reforms proposed by the Model Code of the American Law Institute and by the Uniform Rules of Evidence, both heavily weighted with jury thinking, have failed for want of adoption. A new approach is needed.

4. The new push for evidence reform should be (a) focused primarily on nonjury trials, (b) toward enlarged discretion guided by broad standards and away from precise and rigid refinements, and (c) stimulated by experience with American administrative processes and by court systems in other parts of the world.

The Proportion of Nonjury Trials

Official statistics from federal courts and from sixteen states having more than half the national population provide the basis for an estimate that only one sixth of all trials in courts of general jurisdiction are jury trials and five sixths are without juries. (See the state-by-state list, page 726, *infra*.)

Figures from some of the same sources show that the proportion of nonjury trials is much higher in municipal, police, traffic, and small claims courts. These figures provide the basis for a guess, as distinguished from an estimate, that only about 5 per cent of all trials in all courts are before juries, although statistics are not available to support a close estimate. The number of trials before administrative officers (federal, state and local) and before arbitrators is unknown, and figures are lacking even for a guided guess. A meaningful figure brought out by the Administrative Conference of the United States is that 80,140 proceedings were commenced in federal agencies in one year (involving oral hearings with verbatim transcripts) to determine private rights, privileges or obligations, compared with fewer than 10,000 trials in all federal courts in one year. If jury trials are about 5 per cent of all trials in all courts, the guess seems to be a safe one that jury trials are not more than 3 per cent of all trials in all tribunals, that is, courts of all levels, administrative agencies and arbitrators.

Lack of Evidence Rules for Nonjury Trials

Our evidence system is indeed queer: We have rules of evidence for the 3 per cent of trials that use juries but we have no rules of evidence for the 97 per cent that are without juries.

Today's law of evidence is focused almost entirely on jury trials and almost completely ignores nonjury trials. Thayer regarded our law of evidence as "a product of the jury system".[1] Wigmore asserted his agreement with Sir Henry Maine's statement that "the system of technical rules . . . with . . . which the arbiter of facts . . . has special qualifications for deciding on them".[2] Chief Justice Vanderbilt wrote: "It is well known that the extensive and highly refined rules of evidence have developed largely as methods of controlling juries."[3] The American Bar Association's Committee on Improvements in the Law of Evidence reported in 1938: "The rules of evidence are designed primarily to meet the necessities of trial by jury."[4]

The strongest statement of all, but one that seems fully justified, is that of McCormick: "As rules they are absurdly inappropriate to any tribunal or proceeding where there is no jury."[5]

The only rules of evidence we have are "absurdly inappropriate" for 97 per cent of our trials in all tribunals and for 80 per cent in courts of general jurisdiction!

We sometimes pretend to have rules of evidence designed for nonjury trials, even though we have developed no such rules. For instance, Rule 43(a) of the Federal Rules of Civil Procedure refers to "rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity". One might suppose from this that somewhere some rules of evidence for equity cases could be found. But the supposition would be false. No such rules have ever existed. Wigmore asks: "Where are we to look for those [equity] rules?"[6] And he answers that he has no idea. Professor Moore in his treatise indulges in a delightful bit of understatement: "One who goes to the former federal equity cases expecting to find a body of evidence law which will inform him whether particular evidence is admissible is likely to encounter some difficulty."[7]

The fact is, as most practitioners know, that judges sitting without juries follow or depart from the jury-trial rules as they see fit, and the variations from one judge to another cover all parts of the spectrum. The only principle for nonjury cases is what the Special Committee on Evidence of the Judicial Conference of the United States in a 1962 report called "the general principle that the law of evidence is relaxed in cases tried without a jury".[8]

Not only is our law of evidence geared to the jury system, but so is our legal literature and nearly all our thinking about evidence problems. The courses in evidence in the law schools are devoted almost entirely to jury-trial rules. Many students who have completed the courses know nothing of evidence practices in nonjury cases. Of the two leading casebooks on evidence, one seems to say nothing of nonjury trials and the other devotes only ten pages to them.

Thinking within the legal profession about problems of evidence is so much distorted by the false assumption that all evidence problems pertain to juries that even such a subject as judicial notice is dominated by ideas about judge-jury relationships. Even in jury cases, judicial notice problems arise in pretrial consideration of pleadings, disposition of motions and the like, and arise in post-trial opinion writing and other determinations, as well as appellate consideration of cases. Perhaps two thirds of the occasions for judicial notice even in a jury case have nothing to do with the jury. If jury trials are 3 per cent of all trials, this means only about one per cent of judicial notice questions have any relation to juries. But the judicial notice provisions of the Model Code of Evidence and the Uniform Rules of Evidence are dominated by jury thinking, especially the utterly unsound idea that judicially noticed facts may never be subject to rebuttal.

An amusing incident in New Jersey illustrates how far the usual assumption goes that all evidence problems pertain to juries. The *1963 Report of the New Jersey Supreme Court Committee on Evidence*, a generally admirable study, proposes evidence rules to apply to all courts and also to "formal hearings before administrative agencies and tribunals".[9] The committee rejected a proposal of a commentator (the writer) about judicial notice with the remark that the commentator's "orientation is toward administrative law and nonjury adjudications".[10]

Thinking oriented to 99 per cent of the occasions for judicial notice or official notice was rejected in favor of thinking oriented to one per cent of the occasions! Jury thinking must dominate, even for administrative proceedings! The small incident is significant because the attitude is typical of almost any group in the American legal profession of the present generation.

Need for New Approach To Evidence Reform

Reform of basic evidence law is long overdue. The American Law Institute quickly decided that the present law of evidence was not worth restating, and the remark was made in the introduction to the Model Code that "the law of evidence is now where the law of forms of action and common law pleading was in the early part of the nineteenth century".[11] Professor Morgan explained that the American Law Institute "did not attempt a restatement of the law of evidence because its members were convinced that no restatement could eliminate the obstructions to intelligent investigation which currently accepted doctrines have erected".[12] Wigmore says that "the

1. THAYER, EVIDENCE 508 (1898).
2. 1 WIGMORE, EVIDENCE § 4b (3d ed. 1940). See also, Wigmore, *Administrative Boards and Commissions: Are the Jury-Trial Rules of Evidence in Force for Their Inquiries?* 17 ILL. L. REV. 262 (1922): "Historically, the rules of evidence familiar to Anglo-American lawyers were a direct growth out of trial by jury."
3. Vanderbilt, *The Technique of Proof before Administrative Bodies*, 24 Iowa L. Rev. 464, 467 (1939).
4. 63 A.B.A. REP. 570, 584 (1938).
5. 5 ENCYC. SOC. SCI. 627, 644 (1931).
6. 1 WIGMORE, EVIDENCE 201 (3d ed. 1940).
7. 5 MOORE'S FEDERAL PRACTICE 1328 (1951).
8. REPORT, SPECIAL COMMITTEE ON EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 4 (1962).
9. Page 9, Rule 2(3).
10. Page 40, rejecting the idea that noticed facts should be subject to rebuttal—an idea embodied in Section 7(d) of the Federal Administrative Procedure Act and giving general satisfaction. The New Jersey committee earlier had adopted the more important proposal of the same commentator in its Rule 9(3): "Judicial notice may be taken of any matter which would be of aid in deciding what the law should be."
11. MODEL CODE OF EVIDENCE 5 (1942).
12. Practising Law Institute, SIGNIFICANT DEVELOPMENTS IN THE LAW DURING THE WAR YEARS, EVIDENCE 1 (1946).

rules to a large extent fail of their professed purpose. They serve, not as needful tools for helping the truth at trials, but as game-rules, afterwards, for setting aside the verdict."[13]

For the past twenty years or more the hopes for evidence reform have gone into the Model Code of Evidence and the Uniform Rules of Evidence. But these proposals have been rejected. The Model Code and the Uniform Rules are unsatisfactory in that they rest so heavily on the jury system, and they go much too far in providing precise and rigid requirements. During more than twenty years, they have won only a single adoption—Kansas.

The time has come for a new approach.

Suggested New Approach Escapes Jury Thinking

The most important aspect of a new approach should be escape from the deep-seated habit of allowing all thinking about evidence law to be dominated by the needs of the 3 per cent of trials that involve juries. The thinking should reflect primarily the needs of the 97 per cent of trials that are without juries. We should undertake *for the first time* to prepare a set of rules or standards for nonjury trials. Then the main set of rules or standards can be qualified or modified to fit the peculiar needs of the small minority of cases that are tried before juries.

An outstanding characteristic of the Model Code and the Uniform Rules is their treatment of refinements in precise and rigid detail. This characteristic runs counter to the strong trend of the law during the past half century toward replacing detailed rules with discretion. For instance, the Supreme Court generalized in 1952: "The trend of the law in recent years has been to turn away from rigid rules of incompetence, in favor of admitting testimony and allowing the trier of fact to judge the weight to be given it."[14] A year earlier the Supreme Court had said: "However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything 'logically probative of some matter requiring to be proved.'"[15] The new rules of evidence should go with this trend, not against it.

Precise and rigid rules of evidence should give way to discretion to be exercised under broad legal standards. For instance, instead of a rigid hearsay rule with numerous precise exceptions leaving little or no room for taking into account special circumstances, what is needed is a broad standard that reliable hearsay is admissible and may support a finding, and that in appraising hearsay a tribunal may be influenced by availability or unavailability of the declarant.

When our minds are released from jury thinking, we shall see the obvious soundness of McCormick's observation that "The trustworthiness of hearsay ranges from the highest reliability to utter worthlessness",[16] and we shall see that the hearsay rule and its exceptions fail to fit this basic observation.

When our minds are released from jury thinking, we shall see the merit of building on our valuable experience under the satisfactory provisions of the Administrative Procedure Act that "Any oral or documentary evidence may be received . . ." and that a finding may be supported by "reliable, probative, and substantial evidence" without regard to the question whether the evidence is "competent".[17]

When our minds are released from jury thinking, we shall see that when the only available alternative to giving the hearsay as much weight as it seems to deserve is to decide without evidence, our belief that direct evidence is usually better than hearsay is unhelpful because it is irrelevant.

When our minds are released from jury thinking, we shall see the nonsense of a hearsay rule that operates in the same way irrespective of the reliability or unreliability of the hearsay and irrespective of the availability or unavailability of the declarant. We shall see that even somewhat unreliable hearsay may for some purposes in some circumstances be better than no evidence.

When our minds are released from jury thinking, we shall see that the hearsay rule, which was designed to govern admissibility of evidence before a jury, should not be allowed to govern *evaluation* of evidence by judges or officers, and we shall agree with Judge Learned Hand that the test of sufficient evidence to support a finding should not be jury-trial rules of admissibility but should be "the kind of evidence on which responsible persons are accustomed to rely in serious affairs".[18]

The proposal here made that precise and rigid rules of evidence should give way to discretion to be exercised under broad legal standards does not mean increasing practitioners' difficulties in preparing for trial by reason of lack of definite rules. On the contrary, the proposal is that practitioners should have better advance knowledge than

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13. 1 Wigmore, Evidence § 8c (3d ed. 1940).
14. *On Lee v. United States*, 343 U. S. 747, 757 (1952).
15. *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474, 487 (1951). See other examples of the trend in 2 Davis, Administrative Law Treatise § 14.01 (1958).
16. McCormick, Evidence 627 (1954).
17. The quoted provisions are in Section 7(c), 60 Stat. 237 (1946), 5 U.S.C.A. § 1006(c). Earlier drafts of the bill provided that findings must be supported by "competent" evidence, but the draft that was adopted imposed no requirement that a finding be supported by "competent" evidence. For full discussion of the legislative history on this point, see 2 Davis, Administrative Law Treatise § 14.08 (1958).
18. *National Labor Relations Board v. Remington Rand*, 94 F. 2d 862, 873 (2d Cir. 1938), cert. denied, 304 U. S. 576 (1938).

they now have of the evidence practices that will be followed in the 97 per cent of all trials, in the five sixths of trials in courts of general jurisdiction. Under the present system practitioners have no means of knowing how much the jury-trial rules will be relaxed in nonjury trials. Under the proposal discretionary power of the judge or other presiding officer will not be as large as it is now; it will be confined by broad but meaningful standards.

Evidence Rules Need a Thorough Examination

Anglo-American exclusionary rules of evidence are unique in the world. Lawyers of other lands are unable to understand why relevant evidence that has probative force should be barred from consideration. Our only excuse is that we use juries and don't trust the juries to consider all relevant and probative evidence. But our only excuse does not even purport to reach the 97 per cent of trials without juries.

Our sick body of evidence law will get well sooner if our American evidence doctors will consult with some European evidence doctors.

That the views of European lawyers largely coincide with practices emerging from our American administrative process is not accidental.

APPENDIX

Number of Jury and Non-jury Trials in Sixteen States

The figures do not allow a precise count because categories and counting systems differ from state to state, and some categories are missing or combined with other categories. The most serious infirmities are pointed out in parentheses with respect to eight of the sixteen states in the following tabulation. Estimates based on adding the figures about trials in courts of general jurisdiction are: jury trials, 40,274; nonjury trials, 210,232.

ARIZONA, *Second Report of the Administrative Director of the Supreme Court of Arizona* (1962), superior courts only (half-year figures doubled). Civil cases terminated: after court trial, 663; after jury trial, 32. Criminal cases: jury trials, 46; court trials, 45. Totals: jury trials, 78; court trials, 708.

CALIFORNIA, *Judicial Council of California, Administrative Office of the Courts* (February, 1962), for fiscal year 1960-1961, pages 26, 28, 30. Superior courts, dispositions after trial, contested matters, 35,641. Juries sworn, 6,792. (The report says: "Figures cited for 'juries sworn' are not the equivalent of jury trials. On the one hand a jury may be sworn to try a matter which is settled prior to completion of trial. On the other hand a single jury may try several cases consolidated for trial." Of the juries sworn, 3,381 were "in personal injury, wrongful death and property damage cases", and 2,634 were in criminal cases.)

FLORIDA, *Judicial Council, Sixth Annual Report* (1960). Exhibit VI. cases disposed of in the circuit courts in 1959. Law dispositions: jury trials, 1,371; nonjury trials, 1,069. Criminal dispositions: jury trials, 140; nonjury trials, 234. Totals: jury, 1,510; nonjury, 1,303. (Equity cases apparently are not included. The table shows 2,420 "contested divorces", but does not show the number that went to trial.)

ILLINOIS, printed report by Albert J. Harno, Court Administrator, and John C. Fitzgerald, Deputy Court Administrator for Cook County, pages 5-16, 32, 38-39, for superior and circuit courts (figures for partial year adjusted to annual basis). Civil cases: Cook County, jury, 1,044; nonjury, 18,074. Twenty circuits outside Cook County: jury, 672; nonjury, 10,901. Totals: jury, 1,716; nonjury, 28,975. Criminal cases: jury, 369; nonjury, 1,932. Total: jury, 2,085; nonjury, 30,907.

IOWA, *1961 Annual Report Relating to the Trial Courts of the State of Iowa*, by the Judicial Department Statistician. Civil cases disposed of in district court: tried to jury, 528; tried to court, 1,924. Criminal cases disposed of in district court: tried to jury, 308; tried to court, 191. Totals: tried to jury, 836; tried to court, 2,115.

KANSAS, *Judicial Council Bulletin* (October, 1958), district courts, civil cases, contested trials: to court, 3,852; to jury, 351. (No figures given on jury and nonjury criminal cases.)

MARYLAND, *Administrative Office of the Courts, Annual Report (1961-1962)* pages 32, 33, 36. Circuit courts only. Law cases tried: motor tort, jury, 838; nonjury, 510. Other tort: jury, 184; nonjury, 102. Condemnation: jury, 137; nonjury, 6. Contract: jury, 107; nonjury, 534. Other law: jury, 242; nonjury, 784. "Equity hearings" (here assumed to be nonjury, but not so indicated in the report), 3,194. Criminal cases tried: jury, 480; nonjury, 9,516. Totals: jury, 1,988; nonjury, 14,646. (Not included are 2,901 bastardy and nonsupport cases "tried" in Baltimore; all but six "were tried before the court". Some of the "equity hearings" may not be trials.)

MICHIGAN, *Supreme Court, Office of the Court Administrator, Annual Report and Judicial Statistics for 1961*, page 36. Circuit courts: jury trials, 1,760; nonjury trials, 4,185.

NEW HAMPSHIRE, *Eighth Biennial Report of the Judicial Council* (1960), pages 59, 62. Statistics on work of the superior court, criminal cases: tried by jury, 51; heard by court, 11. Civil cases: jury trials at law, 210; jury trials in other actions, 20; actions at law tried by court, 430. Totals: jury cases, 281; nonjury cases, 441. (In addition, contested marital cases heard, 97; other equity cases heard, 397. Cases "heard" are not necessarily trials but may include many trials.)

NEW JERSEY, *Annual Report of the Administrative Director of the Courts* (1960-1961). Table F, proceedings in superior court, law division, trials and appeals: jury, 958; nonjury, 1,807. Table J, proceedings in the superior court, chancery division, general equity: jury trials, 15; nonjury trials, 966. Table M, proceedings in the superior court, chancery division, matrimonial: (total trials, 6,130); (uncontested trials, 4,698); contested trials, 1,432 (presumably nonjury). Table U, law divisions of superior and county courts, dispositions of indictments and accusations: jury trial, 1,076; nonjury trial, 276. Totals (omitting figures in parentheses): jury trials, 2,049; nonjury trials, 3,881. (These figures are weighted in favor of jury trials because of the lack of separation of county court criminal trials.)

NEW YORK, *Sixth Annual Report of Judicial Conference* (1961), Table 12 (after page 214). Supreme Court, civil cases, summary of dispositions, after trial: verdict of jury, 2,344; decision of court or reserved decision, 7,461. (Table 32 at page 260 shows, for supreme court and county courts, felonies and misdemeanors: 618 convictions by verdict, 290 acquitted by jury. These figures are excluded because (1) the proportion from county courts is not indicated, and (2) the number of nonjury trials are not indicated.)

NORTH CAROLINA, *Annual Report of the Administrative Assistant to the Chief Justice (1961-1962)*. Page 20, civil cases disposed of in superior courts (excluding 4,395 uncontested divorce actions "tried by jury"): jury, 2,388; judge, 4,330. Page 32, criminal cases disposed of in superior courts: jury, 3,386; judge, 12,119. Total civil and criminal: jury, 5,972; judge, 16,449.

TEXAS, *Civil Judicial Council, Judicial Statistics* (for the year 1961, dated May, 1962). Total of all civil suits: tried with a jury, 3,186; tried without a jury,

58,350. Criminal cases: tried with jury, 2,018; tried without jury, 17,918. Total civil and criminal: tried with jury, 5,204; tried without jury, 76,468.

WASHINGTON, letter of March 21, 1963, from Albert C. Bise, Administrator for the Courts, State of Washington. Superior courts only: civil jury, 1,095; civil nonjury, 3,901; criminal jury, 443; criminal nonjury, 161. Totals: jury, 1,544; nonjury, 4,062.

WEST VIRGINIA, Reports of Judicial Council, for two six-months' periods ending June 1, 1962 (figures found by adding figures from each of two reports). Civil cases: tried by jury, 707; heard and determined by court, 7,911. Criminal cases: tried by jury, 554; heard and determined by court, 2,258. Totals: jury, 1,361; court, 8,958. (Not clear whether "heard and determined by court" may include cases not tried.)

WISCONSIN, *Judicial Council, Biennial Report* (1961), page 17. Total contested trials in circuit courts: disposed of after jury trial begun, 752; after nonjury trial began, 1,660. (Of the 752 jury trials, 518 involved auto accidents.) (Not included are 12,894 trials by the court and 278 jury trials in "criminal and ordinance violations", because the bulk may be traffic cases.)

FEDERAL, *Annual Report of the Director of the Administrative Office of the United States Courts* (1961) 162. Civil trials: nonjury, 3,245; jury, 2,911. Criminal trials: nonjury, 982; jury, 2,456. Total trials: jury, 5,367; nonjury, 4,327.

In the foregoing tabulation, the variations from one state to another are large. In New York supreme courts the ratio of nonjury to jury trials is three to one; in Illinois superior and circuit courts and in Texas district courts the ratio is about fifteen to one.

Juries are used much more, of course, in criminal cases than in civil cases, much more in accident cases than in commercial cases, and much more in law than in equity. In California (which may or may not be typical, but for which figures are readily available) 89 per cent of juries sworn are in two categories of cases—"personal injury, wrongful death and property damage" (50 per cent) and criminal cases (39 per cent).

Memo 64-59 EXHIBIT III

CHAMBERS OF
The Superior Court
LOS ANGELES 12, CALIFORNIA
ROBERT H. PATTON, JUDGE

August 10, 1964

California Law Revision Commission
Room 30
Crothers Hall
Stanford, California 94305

Subject: "Uniform Rules of Evidence
Article 1 (General Provisions)
Comment on Tentative Recommendations" -
The Case For Rule 3.

Gentlemen:

In my opinion, your decision to withhold approval of URE Rule 3 (as modified by the suggested revision set forth on page 63 of the "General Provisions Study"*), will reduce, by about 90%, the total time-saving potential inherent in your splendid project for the improvement and modernization of the law of evidence. Rule 3 is the only one of the proposed new rules which was designed specifically to foster the interests of the general taxpayer and to improve the image of our system in the eyes of the public.

The purpose of proposed Rule 3 is to eliminate, or at least to minimize, the enormous waste of courtroom time that is caused by the multitude of picayunish, quibbling objections - directed at matter which is not really controverted - that characterize the average day of trial in the average California case, that interrupt and distort the orderly flow of communication between witness and trier of fact, that contribute to the impression of pettyfogging technicality - which, in the public mind, is the principal weakness of our system - all to no conceivable advantage to the bar, or bench, or to litigants, or to the public.

Rule 3 is the germ and heart of Wigmore's first recommendations for the improvement of the law of evidence, as set forth on pages 249 and 264 of Volume 1 of his Third Edition.

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*The study recommends the adoption of Rule 3 in the following revised form: "If upon the hearing of a civil action or proceeding 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."

Wigmore, before formulating his recommendations, had devoted a lifetime of prodigious effort to his monumental organization, restatement and rationalization of the law of evidence. I believe he is the most frequently cited single non-judicial authority on any subject in the entire field of modern law. No one else in our era is ever going to devote one-half of the effort, to say nothing of the talent, to the study of this subject that Wigmore devoted to it. I think his position is entitled to a little further consideration before he is finally overruled in this state. The full case for Rule 3 cannot be articulated fairly in a brief letter such as this must be. I urge the Commission to review once more Wigmore's chapter on "Faults and Needs of the Rules" before you reach a final determination to withhold any recommendation of this rule, and to consider the feasibility of such modification as you may think it needs, as an alternative to total rejection.*

Your principal objection to URE Rule 3 is expressed in your "Tentative Recommendation", as follows:

> "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."

This objection on your part is one which would, I believe, be supported by a majority of lawyers, but the basis for your objection was eliminated in the draft recommended by the learned authorities who prepared your study, as quoted in the margin of this letter, by language restricting the Rule to civil cases.

I have no quarrel with the general proposition that, so far as practicable, the evidentiary rules should be applied

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*In this connection, Wigmore's specific recommendation was worded as follows: (see page 264 of Vol. 1.)

> "Put in the form of a Code section, this principle might be thus phrased, 'a rule of Evidence need not be enforced if the court, on inquiry made of counsel, or otherwise, finds (a) that there is no bona fide dispute between the parties as to the fact which that offered evidence tends to prove, (b) or that the danger against which the rule aims to safeguard does not exist for the case at hand.'"

alike to civil and to criminal cases, but from the very earliest days distinctions have been made where they are thought advisable. The very fact that you object to this Rule being applied in criminal cases makes a distinction "advisable", to my mind. In the past, the main impediment to any thorough reform of the law of evidence has been an insistence on the part of reformers that reforms be applied alike to civil and criminal trials, for reasons of logical consistency. But, as Holmes remarked, experience rather than logic has been the main factor in the development of the law, and experience shows, I think, that an important percentage of the opposition, among the members of the bar, to changes in the law of evidence is based upon a reluctance to make criminal prosecution any easier than it is. (See Wigmore, page 269, for a recognition of the force of this reluctance.) Prejudiced as I am in favor of reform, I nevertheless am disposed to concede that there is a basic difference, for example, between asking the lawyer for an accused whether or not he really disputes that a certain gun was actually the murder weapon, and asking counsel for the County of Los Angeles whether or not he really contends that a certain aerial photograph is not a true picture of the Marina del Rey area prior to the construction of the harbor.*

With respect to civil cases, you object to Rule 3 upon the ground that "a variety of pretrial devices already in use in California makes Rule 3 largely unnecessary". This is simply not the case in actual practice. I have been on the bench almost five years now, and all of the cases I have handled have been put through the pretrial process. Major documents are, indeed, often stipulated to at pretrial, but these are not the main source of the trouble which Rule 3 is designed to remedy. If the case centers upon a major instrument, such as an employment contract, a promissory note, or a lease, this type of basic document is, as you say, commonly either admitted by the pleadings or expressly stipulated to in the pretrial statement. It is the dozens of little scraps of comparatively minor evidentiary material, which naturally is overlooked at the pretrial conference, which bait the habitual objector and unproductively impede the trial.** No pretrial process yet invented will induce an elderly lady from the Middle West to testify simply that "it was raining". Her natural and

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* which it obviously was, but nobody knew who took the photograph.

** "The abuse consists in the opponent's making objections (from various motives) to trivial bits of evidence, and in making them constantly or frequently, to the annoyance of the witness, the bewilderment of the jury, and the disturbance of the peace of the courtroom." Report of American Bar Association Committee on the "Improvement of the Law of Evidence" -- 1937-38; Wigmore, p. 270.

habitual method of expression is to quote someone, e.g.: "My husband said to me 'we had better get in out of this rain'." The supercilious objection which this harmless quotation invariably provokes (except from the upper 5 per cent of practitioners) disconcerts and embarrasses the witness, breaks the natural flow of her recollection, and interrupts the steady attention of the judge or jury to her narrative. The more innocent and guileless the witness, the greater the harm.

Pretrial cannot alter the normal American speech patterns of witnesses. The most successful and articulate executive or trader, when asked, "What did Mr. Roe say to that?", will invariably answer, "He agreed to it!", because that is the way men habitually talk, and he does not deserve to be yelped at (at our worst) or patronizingly admonished (at our best), on the ground that his response is a "conclusion",* by men who are obviously not his superiors in the use of plain English.

I could multiply examples of senseless invocations of the rules ad infinitum, but my object is to persuade, and not to annoy, the Commission. Permit me one final example. Each year, some four hundred billion dollars worth of American products and services are paid for on the basis of "unauthenticated", un-cross-examined invoices and statements of account, with a minuscule percentage of error. Copies of this sort of paper, declaration, retained by the business which shipped the goods or supplied the services, are readily admitted under the business-record rule. But the originals in the hands of the ultimate customers or users (unless they also keep "business-records") are customarily rejected as "hearsay", unless supported by the sender. In other words, primary tools of our commercial and professional economy are equated, by lawyers and judges, with gossip and rumor, so far as probative value is concerned, although universally given prima facie effect throughout the economic world. This is nonsense; and, if I had any means of carrying my case to the public, I believe you will agree that the opposition would get few votes outside the legal profession.

I realize that no single rule will eliminate entirely the bickering over non-essentials that I have emphasized, and I also recognize that even Rule 3 itself is aimed at "non-controversial" matter rather than at the merely trivial, but Rule 3 is the only rule in the entire body of the URE that aims

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*I have never in my lifetime heard this particular question answered otherwise than in "conclusionary" terms. I have never known the opposing lawyer to fail to object. I have never seen the objection accomplish anything except annoy the witness, and make our system look silly to men whose taxes pay our sala-

at all toward the reduction of the type of unproductive interruption of serious business which is the principal disfiguring feature of our actual trial practice. It is the only proposal that has within it any capacity at all to encourage what the English bench and bar have apparently accomplished through common sense and their system of limiting trial work to a small select class of specialists.

I readily concede that bickering over undisputed material is not apt to be a serious problem in trials conducted by lawyers in the upper 5 per cent of the bar. My remarks are based upon the average trial, conducted by average lawyers.

The average practitioner fears that he may be regarded, by the judge and his opponent, as either indolent or stupid if he does not object to every item that may technically be "hearsay". Few practitioners are so sure of their status with their clients that they are not tempted to score the petty "victory" involved in getting an "objection sustained" on a trivial point. Furthermore, few judges are willing to permit any possible imputation to arise that they are "not familiar with the rules of evidence", and the easiest way to demonstrate a specious "mastery" of the vast complexity of those rules is to summarily strike all quotations, however innocuous and however uncontroversial, (and often, however admissible under exceptions not generally understood) and to strike all paper, however introvertible, which is offered "without proper foundation", although that paper would be given thoughtful consideration by every other man of decision-making power in our economic system, our scientific system, or our governmental system outside the judiciary.

I have reluctantly become convinced that a majority of lawyers and judges actually believe that there is important value in the rules of evidence "as such", i.e., a sort of disciplinary value totally apart from their supposed basic purpose, which was to exclude intrinsically unreliable kinds of evidence in order to assure a "true verdict". Our profession has unconsciously accepted, as being applicable to our business, a principle that the rest of the civilized world applies only to games, i.e., the doctrine that the rules are "there to be enforced", regardless of their purpose, and any criticism on the basis that the taxpayers' time is wasted by objections directed at non-controversial material is honestly resented, not on the basis that the comment is not true, but upon the simple principle of gamesmanship which has taught them from boyhood that "the rules are there to be enforced". As Wigmore notes (page 249, Vol. 1): "No other applied science in the world uses its rules in that way." Our professional predeliction for the enforcement of rules, as such, could be taken advantage of, in the interest of the taxpayers, by incorporating, in the rules themselves,

a recognition of the idea that serious men should interrupt serious business only if they have a point to make which bears upon the merits of the problem under consideration.

I realize that sometimes a program for the reform of the law must make concessions to those satisfied with the status quo, in order to gain acceptance of the program as a whole. I see not the slightest necessity for throwing Rule 3 to the wolves on this account.

I cannot imagine that any appreciable percentage of lawyers would be aroused to support the "right" to make trivial objections.

It is not the type of reformatory proposal that would be apt to annoy any special interests.

Rule 3 has in its favor the recommendation of the greatest authorities on the subject of evidence that Western law has produced. Furthermore, as long ago as 1938, Rule 3 was endorsed (in substance) by a 70-member "Committee of the American Bar Association on the Improvement of the Law of Evidence".*

On page 267, Wigmore cites the following comment of Mr. Henry W. Taft made in 1926:

> "American lawyers were impressed with the fact that no longer are the English courts hampered by antiquated rules of evidence. The trained barristers who try cases rarely make objections or take exceptions. It would not be possible that the wrangling we so frequently see in this country over the admission or exclusion of evidence should occur in the English courts. It would not be tolerated; . . ."

Now, half a century later, American lawyers who have had an opportunity to see the English barristers in action, make the same unhappy comparison. Only those who are ineluctably attached to the game theory of trials find the comparison to be in favor of the American practice. Top ranking members of the American bar have actually followed the English practice without being compelled to do so by rule or informal tradition. On page

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*According to Wigmore, Third Edition, Volume 1, page 264. The A.B.A.'s Committee 1938 report states that Rule 3, in substance, had been approved unanimously ten years before by "the learned professional committee of the Commonwealth Fund".

269 of Vol. 1 of Wigmore, there appears the following advice of Elihu Root, a conservative colossus of the American bar a long generation ago:

> "Elihu Root once said: 'It does not help a case on the merits to be so technical about evidence. On the contrary, it hurts the case with judges and juries, and it ought to do so because there is a fair implication that the lawyer who is so very particular about little points is not very confident in the merits of his case.' 'How common it is', Mr. Root said further, 'to see an unsophisticated witness on the stand trying to tell a true story about some event with which he is familiar, and continually stopped and bewildered by objections based upon distinctions which do not exist in his mind at all, and finally leaving the stand with a feeling that he has been bottled up and not allowed to tell the truth. So far as my observation goes there are about twenty objections to the admission of evidence in a trial in American court to one in an English court.'"

I believe that there is no possibility whatever that in the foreseeable future, the average American trial lawyer will develop the degree of confidence in his own status that would enable him to carry out Mr. Root's suggestion, or to emulate the English barristers' restraint, without affirmative encouragement expressed in the rules themselves.

I earnestly urge you to reconsider your action with respect to URE Rule 3, and to recommend the adoption of its substance, limited to civil actions, but expanded so as to cover not only uncontroverted material, but also trivial "violations" of the rules. I should think that something on the order of the following draft might accomplish all these objectives:

> "Rule 3. Upon the hearing of a civil action or proceeding, exclusionary rules need not be applied (a) to any evidence tending to establish a fact with respect to which there is no bona fide dispute between the parties, or (b) to evidence which fails

to conform to these rules only in minor and inconsequential particulars. This Rule, however, is subject to Rule 45, and to any valid claim of privilege."

Very truly yours,

Robert H. Patton

RHP/B

DIVISION 3. GENERAL PROVISIONS

§ 300. Applicability of code.

Comment. Section 300 expressly makes the provisions of the Evidence Code applicable only to proceedings conducted by California courts. The provisions of the code do not apply in administrative proceedings, legislative hearings or any other proceedings unless some statute so provides.

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 §§ . 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. But, 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. §§ 117 (judge of small claims court may make informal investigation either in or out of court), 956a (Judicial Council may prescribe rules for taking evidence by appellate

court), 988i (similar to § 956a), 1768 (hearing of conciliation proceeding to be conducted informally), 2016(b) (not ground of objection to testimony sought from deponent that such testimony inadmissible at trial, provided reasonably calculated to lead to discovery of admissible evidence); PENAL CODE § 190.1 (on issue of penalty evidence may be presented of circumstances surrounding crime and of defendant's background and history).

§ 310. Questions of law for judge.

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 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, Code of Civil Procedure Section 2101. The rule stated in Section 312 is subject to exceptions to the rule otherwise provided by statute. See, for example, EVIDENCE CODE §§ 310, 311, 457; CORP. CODE § 6602.

§ 320. Order of proof.

Comment. Section 320 restates without substantive change the substance of Code of Civil Procedure Section 2042, which is superseded by Section 320. Under Section 320, as under existing law, the trial judge has wide discretion to determine the order of proof. See CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE DURING TRIAL, Chapter 9 (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); CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE DURING TRIAL 210 (1960).

§ 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). But see Section 353 (general objection insufficient).

§ 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, for example, EVIDENCE CODE §§ 352 (cumulative, unduly prejudicial, etc.), 900-1072 (privileges), 1100-1155 (extrinsic policies), 1200 (hearsay). Other codes also contain provisions that may in some cases result in the exclusion of relevant evidence. See, for example, AGRIC. CODE §§ 2846, 3351; CIV. CODE §§ 79.06, 79.09, 226m, 227; CODE CIV. PROC. § 1747; EDUC. CODE § 14026; FIN. CODE § 8754; FISH & GAME CODE § 7923; GOVT. CODE §§ 15619, 18573, 18934, 18952, 20134, 31532; HEALTH & SAF. CODE §§ 211.5, 410, 656; INS. CODE §§ 855, 735, 10381.5; LABOR CODE § 6319; PENAL CODE § 290, 938.1, 3046, 3107, 11105; PUB. RES. CODE §§ 3234; REV. & TAX. CODE §§ 16563,

19281-19289; UNEMPL. INS. CODE §§ 2714, 1094, 2111; VEHICLE CODE §§ 1808, 16005, 20012, 20013, 20014-20015, 40803-40804, 40832, 40833; WATER CODE § 12516; WELF. & INST. CODE §§ 118, 638, 639, 733.

§ 352. Discretion of judge 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 admissibility] 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] is admissible or not").

§ 353. Effect of erroneous admission of evidence.

Comment. Subdivision (a) of Section 353 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 §§ 700-709 (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.

§ 354. Effect of erroneous exclusion of evidence.

Comment. Section 354, like Section 353, 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.

The provisions of Section 354 that require an offer of proof or other disclosure of the evidence improperly excluded reflect exceptions to this requirement 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, 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).

§ 355. Limited admissibility.

Comment. Section 355 codifies existing 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, 193 Pac. 251 (1920).

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).

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

Comment. Section 390 is the same in substance as, and supersedes, Code of Civil Procedure Section 1854.

§ 391. Object related to fact in issue.

Comment. Section 391 is the same in substance as, and supersedes, Code of Civil Procedure Section 1954.

§ 400. "Preliminary fact" defined.

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" defined.

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. This article 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 (superseded by Evidence Code).

This article contains provisions designed to distinguish between those situations where the judge must be persuaded as to the existence of the preliminary fact upon which admissibility depends and 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. (Section 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. (Section 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).

Section 402 provides that preliminary questions of fact upon which the admissibility of evidence depends are to be determined in accordance with this article. Section 402 then prescribes certain procedures that must be observed in the determination of preliminary fact questions.

The procedures specified in Section 402 change existing California law in certain significant respects.

Confessions and admissions in criminal cases. 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.

Admissibility of evidence regarding existence of preliminary fact. 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 article, 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.

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 106-117 (1956). Where factual determinations are to be made solely by the judge, the right of cross-examination is not uniformly required; 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 (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). See CALIFORNIA CONDEMNATION PRACTICE 208 (Cal. Cont. Ed. Bar 1960) (affidavits used to determine amount of immediate possession deposit in eminent domain case). See also 2 WITKIN, CALIFORNIA PROCEDURE, Proceedings Without Trial, § 10 at 1648 (1954).

There is no apparent reason for insisting on a more strict observation of the rules of evidence on questions to be decided by the judge alone when such questions are raised during trial instead of before or after trial. In ruling on the admissibility of evidence, the judge should be permitted to rely on affidavits and other hearsay that he deems reliable. Accordingly, Section 402 is needed in order to provide assurance that all relevant and competent evidence will be presented to the trier of fact.

Supporting finding. Subdivision (d) codifies 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); 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).

NOTE: COMMENTS TO SECTIONS 403-406 WILL BE WRITTEN AFTER THE COMMISSION HAS APPROVED THE DIVISIONS OF THE EVIDENCE CODE ON HEARSAY EVIDENCE AND WRITINGS. We plan to prepare these Comments sometime after the July Meeting.

§ 410. "Direct evidence" defined.

Comment. Section 410 is based on and supersedes Code of Civil Procedure Section 1831. The language taken from Section 1831 has been slightly revised to make it consistent with the definition of "relevant evidence" in Evidence Code Section 210. Code of Civil Procedure Section 1844, superseded by Evidence Code Section 411, is the only section in Part IV of the Code of Civil Procedure that uses the defined term.

§ 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), 111 (testimony of accomplices); and Civil Code Section 130 provides that divorces cannot be granted on the uncorroborated testimony of the parties.

§ 440. Certain instructions required on proper occasions.

Comment. This section is based on the introductory clause of the second sentence of Code of Civil Procedure Section 2061 (superseded by this chapter of the Evidence Code). Only those instructions formerly set out in Section 2061 have been included in this chapter. All of these instructions will not necessarily be appropriate in a particular case; and, of course, additional instructions not contained in this chapter will be necessary in each case.

§ 441. Power of jury not arbitrary.

Comment. Section 441 is based on and supersedes subdivision 1 of Code of Civil Procedure Section 2061. Section 441 is the same as California Jury Instructions--Civil (B.A.J.I.) No. 1.

§ 442. Not bound by number of witnesses.

Comment. Section 442 is based on and supersedes subdivision 2 of Code of Civil Procedure Section 2061. Section 442 is substantially the same as California Jury Instructions--Civil (B.A.J.I.) No. 24, except that the B.A.J.I. 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.

§ 443. Witness whose testimony is false in part.

Comment. Section 443 restates without substantive change and supersedes subdivision 3 of Code of Civil Procedure Section 2061.

§ 444. Testimony of an accomplice.

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

§ 445. Oral admissions.

Comment. Section 445 restates without substantive change and supersedes the second clause of subdivision 4 of Code of Civil Procedure Section 2061.

§ 466. Burden of proof.

Comment. Section 446 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 in Evidence Code Section 115.

§ 477. Party having power to produce better evidence.

Comment. The first paragraph of Section 447 restates without substantive change and supersedes subdivisions 6 and 7 of Code of Civil Procedure Section 2061. Although the language is not entirely clear, the existing case law under subdivisions 6 and 7 of Section 2061 will continue to govern the construction of Section 447.

The second paragraph of Section 447 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 and supersedes those subdivisions.

DIVISION 3. GENERAL PROVISIONS

CHAPTER 1. APPLICABILITY OF CODE

300. Applicability of code.

300. (a) Except as otherwise provided by statute, this code applies in every proceeding, both criminal and civil, conducted by a court in which evidence is introduced, including proceedings conducted by a court commissioner, referee, or similar officer.

(b) As used in this section, "court" means the Supreme Court, a district court of appeal, superior court, municipal court, or justice court, but does not include a grand jury.

CHAPTER 2. PROVINCE OF JUDGE AND JURY

310. Questions of law for judge.

310. All questions of law (including but not limited to the admissibility of evidence, the construction of statutes and other writings, and other rules of evidence) are to be decided by the judge, and all discussions of law are to be addressed to him. Determination of issues of fact preliminary to the admission of evidence are to be decided by the judge as provided in Article 2 (commencing with Section 400) of Chapter 4.

311. Determination of foreign law.

311. Determination of the law of a foreign country or a governmental subdivision of a foreign country is a question of law to be determined by the judge. If such law is applicable and if the judge is unable to determine it, he may, as the ends of justice require, either (a) apply the law of this State if he can do so consistently with the Constitution of this State and of the United States or (b) dismiss the action without prejudice.

312. Jury as trier of fact.

312. Except as provided by statute, where the trial is by jury all questions of fact are to be decided by the jury, and all evidence thereon is to be addressed to the jury.

CHAPTER 3. ORDER OF PROOF

320. Order of proof.

320. (a) Ordinarily, the order of proof in civil actions should be as provided in Section 607 of the Code of Civil Procedure and in criminal actions as provided in Penal Code Sections 1093 and 1094.

(b) Notwithstanding subdivision (a), the judge in his sound discretion shall regulate the order of proof.

CHAPTER 4. ADMITTING AND EXCLUDING EVIDENCE

Article 1. General Provisions

350. Only relevant evidence admissible.

350. No evidence is admissible except relevant evidence.

351. Admissibility of relevant evidence.

351. Except as otherwise provided by statute, all relevant evidence is admissible.

352. Discretion of judge to exclude evidence.

352. The judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the fact that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury.

353. Effect of erroneous admission of evidence.

353. 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 that was timely 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 the 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.

354. Effect of erroneous exclusion of evidence.

354. 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 the court which passes upon the effect of the error or errors is of the 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:

(a) 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

(b) The rulings of the judge made compliance with subdivision (a) futile; or

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

355. Limited admissibility.

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

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

390. Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

391. Object related to fact in issue.

391. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation, and character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the judge.

Article 2. Preliminary Determinations on Admissibility of Evidence

400. "Preliminary fact" defined.

400. As used in this article, "preliminary fact" means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or nonexistence of a privilege.

401. "Proffered evidence" defined.

401. As used in this article, "proffered evidence" means evidence, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact.

402. Procedure for determining existence of preliminary fact.

402. (a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

(b) On the admissibility of a confession or admission of a defendant in a criminal action, the judge 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.

(c) In determining the existence of a preliminary fact under Section 404 or 405, exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege.

(d) A ruling on the admissibility of evidence implies whatever supporting finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

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

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 judge 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 depends on the existence of the preliminary fact;

(2) The preliminary fact is the personal knowledge of the 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 by a particular person and the disputed preliminary fact is whether that person made the statement or so conducted himself.

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

(c) If the judge admits the proffered evidence under this section:

(1) He may, and on request shall, instruct the jury to determine the existence of the preliminary fact and to disregard the evidence unless the jury finds that the preliminary fact exists.

(2) He shall instruct the jury to disregard the proffered evidence if he subsequently determines that a jury could not reasonably find that the preliminary fact exists.

404. Determination of whether evidence is incriminatory.

404. Whenever the proffered evidence is claimed to be privileged under Article 2 (commencing with Section 940) of Chapter 4 of Division 8, the person claiming the privilege has the burden of showing that the proffered evidence might incriminate him as provided in Section 940; and the proffered evidence is inadmissible unless it clearly appears to the judge that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

405. Determination of preliminary fact in other cases.

405. Except as otherwise provided in Sections 403 and 404:

(a) When the existence of a preliminary fact is disputed, the judge shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The judge shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.

(b) If a preliminary fact is also a fact in issue in the action, the judge shall not inform the jury of his determination of the preliminary fact.

The jury shall make its determination of the fact without regard to the determination made by the judge. If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the judge's determination of the preliminary fact.

406. Evidence affecting weight or credibility.

406. This article does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.

CHAPTER 5. WEIGHT OF EVIDENCE GENERALLY

410. "Direct evidence" defined.

410. As used in this chapter, "direct evidence" means evidence that directly proves a disputed fact that is of consequence to the determination of the action, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.

411. Direct evidence of one witness sufficient.

411. Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.

CHAPTER 6. INSTRUCTING JURY ON EFFECT OF EVIDENCE

440. Certain instructions required on proper occasions.

440. The jury is to be given the instructions specified in this chapter on all proper occasions.

441. Power of jury not arbitrary.

441. It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

442. Not bound by number of witnesses.

442. You are not bound to decide in conformity with the testimony of any number of witnesses against a lesser number or against other evidence which appeals to your mind with more persuasive force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative persuasive force of the evidence.

443. Witness whose testimony is false in part.

443. A witness false in one part of his or her testimony is to be distrusted in others.

444. Testimony of an accomplice.

444. The testimony of an accomplice ought to be viewed with distrust.

445. Oral admissions.

445. Evidence of the oral admissions of a party ought to be viewed with caution.

446. Burden of proof.

446. The judge shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt.

447. Party having power to produce better evidence.

447. Evidence is to be appraised not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict. Therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with distrust.

In determining what inferences to draw from the evidence or facts in the case against a party, you may consider, among other things, the party's failure to explain or to deny such evidence or facts in the case against him by his testimony, or his wilful suppression of evidence relating thereto, if such be the case.