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# ALL POWER TO THE JURY—CALIFORNIA'S DEMOCRATIC EVIDENCE CODE

by Otto M. Kaus\*

In another article in this issue, my friend Ken Graham claims that the California Evidence Code is establishment oriented. I will not argue the point whether, taken as a whole, the Code's predominant appeal is to our social, political and economic aristocracy. I do maintain, however, that if it is an exercise in democracy to deprive judges of some of their traditional powers and to place those powers into the hands of lay juries, Professor Graham is at least partly wrong.

## I

The admissibility of evidence often depends on some preliminary fact being found true. Frequently the finding must be based on conflicting evidence. The orthodox rule with respect to the allocation of such fact finding functions between court and jury was stated by Morgan: "[w]here the relevancy of *A* depends upon the existence of *B*, the existence of *B* should normally be for the jury; where the competency of *A* depends upon the existence of *B*, the existence of *B* should always be for the judge."<sup>1</sup> In other words, if the evidence is relevant, but its competency under a technical rule of admissibility depends on proof of some other fact—such as the legality of an arrest, the loss of a letter, criminal purpose in seeking legal advice or the unavailability of a hearsay declarant—the existence or nonexistence of that fact is determined, with finality, by the court. While there are times when reasonable men may differ whether a particular preliminary fact determines relevance or competency,<sup>2</sup> in the vast majority of situations the orthodox rule, if understood, is easily applied. The California Evidence

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<sup>1</sup> Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 169 (1929); see also Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1927).

Competency, as that term is used in this article, does not mean personal knowledge or ability to relate. It is used as the antonym of "incompetency": inadmissibility under a technical rule of evidence (e.g. hearsay or privilege).

<sup>2</sup> See note 40 *infra*.

Code has made a commendable and nearly successful effort to structure California law along orthodox lines.<sup>3</sup> The conversion was long overdue. No California opinion of which I am aware had enunciated a general principle, orthodox or heretical, that could be applied to newly encountered situations with any assurance. Thus pre-Code case law had entrusted the preliminary fact finding function in cases of confessions,<sup>4</sup> dying declarations,<sup>5</sup> and spontaneous statements<sup>6</sup> to both the court and the jury. On the other hand the job of finding the foundational facts, which the proponent of co-conspirators' statements has to prove, was entrusted entirely to the jury;<sup>7</sup> it was immaterial that the court was satisfied that the foundational evidence was a bag of lies. All it could do was to instruct the jury that it should not consider the co-conspirators' statements if it, in turn, found the foundation to be wanting.<sup>8</sup>

<sup>3</sup> This is largely contained in §§ 400-06 of the Code. Henceforth all statutory references, unless otherwise noted, are to the Evidence Code.

<sup>4</sup> *People v. Gonzales*, 24 Cal. 2d 870, 876-77, 151 P.2d 251, 254-55 (1944).

<sup>5</sup> *People v. Singh*, 182 Cal. 457, 476, 188 P. 987, 995 (1920).

<sup>6</sup> *People v. Keelin*, 136 Cal. App. 2d 860, 871-72, 289 P.2d 520, 527-28 (1955).

<sup>7</sup> *People v. Steccone*, 36 Cal. 2d 234, 238, 223 P.2d 17, 20 (1950). The only function performed by the court was the determination whether there is evidence sufficient to support a finding that the foundational facts exist; in other words, whether the proponent has made out a prima facie case.

<sup>8</sup> Giving such an instruction correctly can be quite tricky. Suppose the defendant is on trial for conspiracy and statements of alleged co-conspirators have been provisionally admitted. The court must then, in effect, tell the jury that it may only consider the statements against the defendant if it has first determined that he is guilty of the crime charged. Of course, I assume that the preliminary determination can be made on a preponderance of the evidence, while the final one is governed by the reasonable doubt standard. Asking a lay jury to walk so fine a line is, by itself, a good reason for not entrusting the job to it in the first place. In *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), which was a conspiracy prosecution under the Smith Act, the trial judge really did instruct that co-conspirators' statements could only be considered if the jury was first convinced beyond a reasonable doubt that the defendants were parties to the conspiracy. The appellate court, speaking through Judge Learned Hand, correctly observed that this instruction gave the defendants more than they had a right to ask for. It also correctly noted that:

[T]he better doctrine is that the judge is always to decide, as concededly he generally must; any issues of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent. Indeed, it is a practical impossibility for laymen, and for that matter for most judges, to keep their minds in the isolated compartments that this requires. *Id.* at 231.

In *Dennis* the defendants had asked that the matter of the admissibility of the statements be left to the jury. The court therefore did not have to discuss a problem which inevitably arises when it permits a jury to disregard evidence: did the court actually do its job of fact finding, or did it pass the buck?

For reasons which I do not understand the California Law Revision Commission retained at least one of the former heresies<sup>9</sup> and came up with a few of its own.

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

The purpose of this article is to demonstrate that the Commission's departures from the orthodox rule are not supported by its own reasoning and authorities.<sup>10</sup> Further, I shall suggest an argument why one of the departures may be unconstitutional in criminal cases.

## II

The Commission's heresies relate entirely to foundational facts which make some hearsay<sup>11</sup> admissible. They are contained in section 403

<sup>9</sup> I refer to § 1223, which did not change prior case law with respect to co-conspirators' statements. That section reads as follows:

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

- (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
- (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and
- (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

Section 1223(a) is based on former CAL. CODE CIV. PROC. § 1848 and § 1223(b) is essentially a restatement of former CAL. CODE CIV. PROC. § 1870(6) as interpreted by case law. It is to be noted that the wording of the section precludes application of the rule of *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917) that the wrongful nature of the conspiracy may be proved by the statements themselves. For a comprehensive discussion of this exception to the hearsay rule, see *Levie, Hearsay and Conspiracy*, 52 MICH. L. REV. 1159 (1954).

<sup>10</sup> No particular effort will be made to justify the wisdom of the orthodox rule. I have nothing to add to the compelling arguments made by Morgan and Maguire. See note 1 *supra*.

<sup>11</sup> As a personal confession, I feel bound to declare that I am not particularly starry-eyed about the hearsay rule and am delighted that, in *California v. Green*, 399 U.S. 149 (1970), the Supreme Court refused to give it constitutional status. What is so

(a)(4) which, in situations where the admissibility of the hearsay depends on the identity of the speaker, makes the jury the judge of the issue.<sup>12</sup> They can also be found in section 1222 which forces the judge to let the jury hear an authorized admission on a mere prima facie showing of authority to speak and, of course, in section 1223, relating to admissibility of co-conspirators' statements.

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great about a rule which provoked one English jurist to the following answer to an argument that certain hearsay was particularly reliable: "The question seems to me based on the fallacy, that, whatever is morally convincing, and whatever reasonable beings would form their judgments and act upon, may be submitted to the jury." *Wright v. Tatham*, 7 Eng. Rep. 559, 566 (H.L. 1838) (Coleridge, J.). Nevertheless, as long as we are going to have a hearsay rule and justify it by the need to protect unsophisticated juries from unreliable gossip, it seems counterproductive to admit the gossip and let the jury hear it, unless the court has made a prior determination based on all the available evidence—not just a prima facie case—that the gossip is of the kind that a jury may hear. Constitutional arguments aside, this is particularly true with respect to co-conspirators' declarations. The orthodox rule is, of course, that the court determines with finality whether the necessary foundation has been laid. If its finding is negative, the jury will never hear the statements. If it is affirmative, they are admitted and stay admitted. In *People v. Brawley*, 1 Cal. 3d 277, 290-91, 461 P.2d 361, 368-69, 82 Cal. Rptr. 161, 168-69 (1969), our Supreme Court said that the "California procedure contains more safeguards for a defendant than the . . . [orthodox] procedure" because the jury is given an opportunity to reject the statements. With all respect, I submit that the advantage is illusory. There will be cases where the court and jury reach different results on the preliminary facts. It seems safe to assume that a court would more often exclude the confession than the jury because, first, the court does not necessarily have to hear the statements before ruling on their admissibility and, second, even if it does, it is supposedly better able to lay them aside when considering the foundational facts. Turning to the cases where the court and the jury reach the same result, we find that where it is exclusion, under the orthodox practice the jury will never have heard the statement. If the result is inclusion in the body of evidence, the supposed safeguard will not have been utilized by the jury. The "safeguard" thus benefits the party against whom the statements are offered only in the rare case where the jury finds against the foundational facts, but the court would not have done so. Against this speculative advantage, two factors must be balanced: 1) that the instruction to disregard the statements may, as a matter of mental gymnastics, be impossible to obey, and 2) that such cases are surely fewer than those where the court favors exclusion and the jury does not.

<sup>12</sup> Section 403 provides:

- (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:
  - (1) The relevance of the proffered evidence depends on the existence of the preliminary fact;
  - (2) The preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony;
  - (3) The preliminary fact is the authenticity of a writing; or
  - (4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.
- (b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial.

The Commission's "brief" for its position is found largely in its comments to sections 403 and 405.<sup>13</sup> Its stated reasons and cited authorities for departing from orthodoxy are pitifully weak.

The comment to section 403 first states that "eminent legal authorities sometimes differ over whether a particular fact question is one of relevancy<sup>14</sup> or competency."<sup>15</sup> The Commission then refers, as an example, to a disagreement between Wigmore and Morgan. On inspection, that disagreement turns out to be a scholarly difference of opinion on the question of whether admissions are received as an exception to the hearsay rule—Morgan<sup>16</sup>—or as not being hearsay in the first place—Wigmore.<sup>17</sup> It is not explained what that particular dispute has

- (c) If the court admits the proffered evidence under this section, the court:
- (1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.
  - (2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.

<sup>13</sup> For the procedure by which the Commission's statements were "adopted" by the Legislature, see the background material at XXXV preceding § 1 of CAL. EVID. CODE (West 1968) and the introduction at viii preceding § 1 of CAL. EVID. CODE (Deering 1966). Because the comments to § 403 and § 405 were changed in immaterial particulars during the passage of the Code through the Legislature, they now appear as "Legislative Committee" comments.

<sup>14</sup> It is nit-picking at its worst, but one cannot help but wonder why in the text of the Code the word is "relevance", while in the comment it is "relevancy".

<sup>15</sup> Actually the Morgan-Wigmore dispute appears only in the reference to Wigmore. The Morgan reference is to E. MORGAN, BASIC PROBLEMS OF EVIDENCE 244 (1957), where, with respect to admissions, he states the orthodox rule which the Commission rejects:

If a personal admission is an exception to the rule against hearsay, its admissibility depends upon the identity of the declarant. If the statement was made by the party against whom it is offered, it is admissible, otherwise not. Hence by the orthodox rule, if there is a dispute in the evidence whether the offered statement was made by the party or by another, the judge should determine the dispute as a preliminary matter.

<sup>16</sup> On the question I am considering, there is no essential difference between Wigmore's and Morgan's views:

In more recent times, however, a heterodox practice has appeared, in places, of leaving some questions of admissibility to the jury. No doubt the judge, after admitting evidence, leaves to the jury to give it what weight they think fit, for they are the triers of the credibility and persuasive sufficiency of all evidence which is admitted for their consideration. But to hand the evidence to them, to be rejected or accepted according to some legal definition, and not according to its intrinsic value to their minds, is to commit a grave blunder. It is an error of policy (as well as a deviation from orthodox principle) for several reasons; in the first place, it is a needless abdication of the judicial function—of which humility we have already too much; furthermore, it adds another to the exceptions to the general rules; and finally, it cumbers the jury with legal definitions and offers an additional opportunity for quibbling over the tenor of the instructions.

9 J. WIGMORE, EVIDENCE § 2550, at 502-03 (3d ed. 1940) (footnote omitted).

<sup>17</sup> Such an argument could be used to do away with the hearsay rule altogether for the reason that for decades the favorite indoor sport of evidence teachers has been the

to do with the preliminary fact problem.

Turning to hearsay, the comment to section 403 correctly declares that, on occasion, the very relevance of a hearsay statement depends on the identity of the declarant.<sup>18</sup> The comment then proceeds to note that, relevance aside, other preliminary facts must be proved to qualify hearsay statements under the various exceptions. It is correctly noted that as far as some of these exceptions are concerned—for example inconsistent statements of a witness<sup>19</sup> and admissions—admissibility depends on the identity of the declarant. Then, however, comes a non sequitur. Having just stated that with respect to such statements admissibility depends on identity, the comment confuses identity with relevance:

Since the only preliminary fact to be determined in regard to these declarations involves *the relevancy* of the evidence, they should be admitted upon the introduction of evidence sufficient to sustain a finding of the preliminary fact.<sup>20</sup>

This is nonsense. On D's trial for the murder of V, the statement, "D murdered V" is relevant whoever made it.<sup>21</sup> The Commission's assertion is irreconcilable with an observation found later in the comment

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writing of articles which explain to the profession that other evidence teachers do not know how to define hearsay. See, e.g., Cross, *The Scope of the Rule Against Hearsay*, 72 L. Q. REV. 91 (1956); McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930); Morgan, *Some Suggestions for Defining and Classifying Hearsay*, 86 U. PA. L. REV. 258 (1938); Rucker, *The Twilight Zone of Hearsay*, 9 VAND. L. REV. 453 (1956); Wheaton, *What is Hearsay?*, 46 IOWA L. REV. 210 (1961).

<sup>18</sup> The comment posits the following example:

[I]f the issue is the state of mind of X, a person's statement as to his state of mind has no tendency to prove X's state of mind unless the declarant was X. Relevancy depends on the fact that X made the statement. Accordingly, if otherwise competent, a hearsay statement is admitted upon evidence sufficient to sustain a finding that the claimed declarant made the statement. CAL. EVID. CODE § 403, comment at 37 (West 1968).

<sup>19</sup> Inconsistent statements of a witness, under § 1235, are admissible on the merits and not just for impeachment. See *California v. Green*, 399 U.S. 149 (1970).

<sup>20</sup> CAL. EVID. CODE § 403, comment at 37 (West 1968) (emphasis added).

<sup>21</sup> Maguire, in his delightful book entitled EVIDENCE—COMMON SENSE AND COMMON LAW (1947), poses the following problem:

By the way, how should a trial judge operating along traditional lines handle a case of objections for *both* incompetency *and* irrelevancy? An anonymous memorandum, "I killed Cock Robin", is offered in the trial for murder of that notorious victim. The assertion is incompetent hearsay, and also irrelevant, unless authorship by the defendant makes it his admission. Should the trial judge admit the memorandum if there is enough evidence of such authorship to warrant a favorable finding to this effect, or should he exclude it unless he himself finds such authorship? *Id.* at 224-25.

I must differ that the proffered evidence presents a problem of incompetency *and* irrelevance. Surely at the trial for the murder of Cock Robin, a confession is relevant whoever made it. The only difference between "D killed V" and "I killed V" is that different factual conclusions are drawn by the jury if the declarant is someone other than

with respect to prior inconsistent and consistent statements, admissible on the merits under sections 1235 and 1236: "Moreover, the only preliminary fact subject to dispute insofar as alleged inconsistent statements are concerned is the identity of the declarant."<sup>22</sup> This later observation, as the first one quoted, is entirely correct. A declarant's statement, inconsistent or consistent with a witness' testimony, though relevant, is inadmissible under the hearsay rule unless the declarant happens to be the witness. Unfortunately, at this point the authors of the comment had already persuaded themselves that identity and relevance present the same issue.<sup>23</sup> Therefore the comment proceeds il-

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D. In this connection it should be pointed out that only a problem of relevance is presented where the dispute is whether the signature on a confession is that of D or whether it is a deliberate forgery; no rational trier of fact would find a deliberately forged confession probative of the facts asserted therein. It should not even be necessary to instruct the jury not to base a guilty verdict on a confession which it finds to have been written and signed by the arresting officer.

I cannot resist noting, at this point, that the Commission has, quite unnecessarily I believe, created a potential source for wholesale reversals, not yet fully appreciated by the Bar. Section 403(c)(1) commands the court to instruct the jury, if requested, to disregard evidence if the jury finds that necessary preliminary facts do not exist. Where the relevancy of evidence depends on proof of some fact, the court's instructions on the substantive law should make such instructions quite unnecessary. If, in a will contest, the jury has been properly instructed on testamentary capacity, what purpose does it serve to tell it to disregard a claim of being the Queen of Sheba, unless it came from the mouth of the testatrix? See note 18 *supra*.

<sup>22</sup> CAL. EVID. CODE § 403, comment at 38 (West 1968).

<sup>23</sup> Obviously, whoever drafted § 403 either loved redundancy or did not believe the comment. If issues with respect to the identity of the declarants are only issues of relevance under another name, § 403(a)(1), which hands such issues to the jury, was unnecessary in view of § 403(a)(4), which covers relevance.

I have a strong hunch that the reason for the identity-relevancy confusion is that § 403(a)(3) states specifically that questions concerning the authentication of writings are for the jury. This subsection, too, is redundant. I cannot imagine a situation in which the evidence which authenticates a writing will not also affect its relevance, which, of course, may be very different from what the initial proponent of the writing had expected. Therefore, preliminary facts which affect authenticity are already covered by § 403(a)(1). But if the writer of a note blaming D's chauffeur for a collision with P happens to be a bystander and not D, the writing, though still relevant, is inadmissible under the hearsay rule. The Commission may have reasoned that since it is generally the jury which must find whether the proponent of a writing has authenticated it, it must be permitted to determine authorship on a mere *prima facie* showing that the author is a person whose hearsay is admissible. From that premise it may then have been argued that there should be no difference between written and oral hearsay. I agree that the two deserve identical treatment, but disagree with the premise. The fact that the jury generally determines authenticity simply does not support the proposition that it has any function with respect to a writing which the court, on all the evidence affecting authorship, finds inadmissible under the hearsay rule. Take the following hypothetical: D is accused of shooting A and B. B was only slightly wounded and was never in fear of death. A dies later, but the evidence on whether he was ever under a "sense of im-



logically: "Hence, evidence is admitted under these sections upon the introduction of evidence sufficient to sustain a finding of the preliminary fact."<sup>24</sup>

When it got around to the comment to section 405, the Commission discovered an additional rationale for its deviations. It writes:

When hearsay evidence is offered, two preliminary fact questions may be raised. The first question relates to the authenticity of the proffered declaration—was the statement actually made by the person alleged to have made it? The second question relates to the existence of those circumstances that make the hearsay sufficiently trustworthy to be received in evidence—*e. g.*, was the declaration spontaneous, the confession voluntary, the business record trustworthy? Under this code, questions relating to the authenticity of the proffered declaration are decided under Section 403. See the Comment to Section 403. But other preliminary fact questions are decided under Section 405.<sup>25</sup>

Two observations are in order here. First, the new rationale does not cover all the departures from orthodoxy. When a jury determines whether an agent had authority to speak, whether a party could hear and react to an accusation or whether a declarant spoke in furtherance of a conspiracy of which he and a party were members, it determines questions that have nothing to do with authenticity of the statement. Second, it is wishful thinking to believe that all fact determinations which are to be made by the court relate to circumstances that make the hearsay trustworthy. There are exceptions to the hearsay rule which depend either on a professed inability of a witness to remember relevant evidence<sup>26</sup> or the unavailability of the declarant.<sup>27</sup> A declarant is unavailable as a witness if he asserts a privilege not to testify.<sup>28</sup> What is so trustworthy about an unsworn statement of a declarant who claims the

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mediately impending death" is in conflict. Either A or B—another conflict—orally accused D of the attack. Is it seriously suggested that while the question of A's state of mind is for the court, the identity of the speaker is for the jury? What is the essential difference between the two preliminary facts? If the answer is that A's state of mind determines the trustworthiness of the accusation, but the identity of the speaker determines its admissibility under the hearsay rule, have we not gotten off the track somewhere if we entrust the determination of the former to the court and of the latter to the jury?

<sup>24</sup> CAL. EVID. CODE § 403, comment at 38 (West 1968).

<sup>25</sup> *Id.* § 405, comment at 43.

<sup>26</sup> *Id.* § 1237 (past recollection recorded).

<sup>27</sup> *E.g., Id.* § 1230 (declarations against interest), § 1251 (statement of declarant's previously existing mental or physical state), § 1291 (former testimony offered against party to former proceeding), § 1292 (former testimony offered against person not a party to former proceeding).

<sup>28</sup> *Id.* § 240.

Fifth Amendment? Further, unless one happens to believe that co-conspirators' declarations in furtherance of some criminal scheme are particularly trustworthy, the justification for that exception to the hearsay rule is found in the law of agency and partnership.<sup>29</sup>

So much for the reasons given in the comments. The authorities on which the Commission relies are no stronger. To claim that they support the Commission is to display a sanguinity which, if necessary to a position, would find support for *Brown v. Board of Education* in *Dred Scott v. Sanford*.

### III

I now turn to those authorities. For the proposition that identity equals relevance, the Commission cites *Eastman v. Means*.<sup>30</sup> That was an appeal from a case tried to the court, without a jury, on which it was contended that a telephone conversation allegedly held between respondent's father and appellant had been improperly admitted. The father had called appellant's residence. The person who answered the telephone "was addressed by the name of appellant"<sup>31</sup> and apparently did not deny his identity. The court held that "this testimony was sufficient *prima facie* to prove the identity of appellant with the person addressed and was properly admitted."<sup>32</sup> Manifestly the stray use of the words "prima facie" in an appeal from a court trial cannot be considered a holding that in a jury trial the identity of the person who answered the telephone should have been submitted to the jury. In any case, the court noted that appellant had admitted the conversations when testifying in his own behalf.

It is on this slender reed that the Commission rests its claim that identity questions are for the jury. Its next leap into heresy concerns adoptive and authorized admissions.

Turning first to adoptive admissions, it is to be noted that to the extent that the Code stands for the proposition that the jury determines whether the foundation for such admissions has been laid, support can only be found in the comment to section 403, not in the text. Obviously it does not present a question of identity under section 403 (a)(4) whether the party who failed to react to an accusation was conscious or asleep. Nor is there anything in the words of section

<sup>29</sup> For the various rationales on which the admissibility of co-conspirators' statements is justified, see *Hearsay and Conspiracy*, *supra* note 9, at 1161-67.

<sup>30</sup> 75 Cal. App. 537, 242 P. 1089 (1925).

<sup>31</sup> *Id.* at 538, 242 P. at 1090.

<sup>32</sup> *Id.* (citation omitted).

1222, which states the rule of admissibility, that gives support to the statement in the comment to section 403 that "adoptive admissions are admitted upon the introduction of evidence sufficient to sustain a finding of the foundational fact."<sup>33</sup> The case cited by the Commission is *Southers v. Savage*.<sup>34</sup> In *Southers* the plaintiff's position was that he was a passenger in an automobile driven by one McGuire which had been sideswiped by Savage. Savage's position was that it was he who had been sideswiped by McGuire. Evidence was offered that shortly after the accident McGuire, in *Southers*' presence, admitted that he had sideswiped Savage. *Southers* did not comment. There was a conflict in the evidence with respect to whether *Southers* was or was not conscious at the time McGuire spoke. The appellate court held that the trial court had properly left the determination of *Southers*' condition to the jury and that, in any event, the conversation was admissible as a spontaneous statement<sup>35</sup> under the doctrine of *Showalter v. Western Pacific Railroad Company*.<sup>36</sup>

It must be admitted that the court's language in *Southers* supports the Commission. The case is, of course, weakened by the mention of an alternative ground for admissibility. One can only wonder why the Commission, which did not feel itself bound by *People v. Gonzales*,<sup>37</sup> *People v. Singh*<sup>38</sup> and *People v. Keelin*,<sup>39</sup> threw analysis to the winds when confronted with *Southers*.<sup>40</sup>

<sup>33</sup> CAL. EVID. CODE § 403, comment at 38 (West 1968). With respect to adoptive admissions, the Commission's answer to the accusation that the Code's text does not justify the comment would probably be a claim that the admissibility of such admissions presents only a question of relevance. I would have to differ for the reasons already stated. The offer of a policeman's detailed accusation against a suspect offers no problem of relevance in a trial against the same suspect for having committed the crime of which he had been accused. Even if it is conceded that the suspect was asleep, the evidence of the officer's statement is still relevant hearsay. If the suspect is shown to be conscious and able to deny the charge then, *Miranda v. Arizona*, 384 U.S. 436 (1966) aside, he becomes the declarant and the hearsay is admissible.

<sup>34</sup> 191 Cal. App. 2d 100, 12 Cal. Rptr. 470 (1961).

<sup>35</sup> *Id.* at 105, 12 Cal. Rptr. at 473.

<sup>36</sup> 16 Cal. 2d 460, 468, 106 P.2d 895, 900 (1940).

<sup>37</sup> 24 Cal. 2d 870, 151 P.2d 251 (1944) (entrusting preliminary fact finding function in cases of confessions to court and jury).

<sup>38</sup> 182 Cal. 457, 188 P. 995 (1920) (entrusting preliminary fact finding function in cases of dying declarations to court and jury).

<sup>39</sup> 136 Cal. App. 2d 860, 289 P.2d 520 (1955) (entrusting preliminary fact finding function in cases of spontaneous statements to court and jury).

<sup>40</sup> Finally, one wonders whether *Southers* was not impliedly overruled by *People v. Briggs*, 58 Cal. 2d 385, 408, 374 P.2d 257, 272, 24 Cal. Rptr. 417, 432 (1962), where the California Supreme Court said:

But where there is some doubt as to whether the defendant was in a position to hear the statements, understand them, or make reply, the question of whether his

Turning to authorized admissions, the Commission felt that *Sample v. Round Mountain Citrus Farm Company*<sup>41</sup> supported its theory, embodied in section 1222 of the Evidence Code, that a mere prima facie case of authority to speak, even though disputed, makes the admissibility of authorized admissions a jury question. Like *Eastman*, *Sample* was an appeal from a court trial and the case is therefore, by its very nature, impotent as a source of law applicable in jury trials. Furthermore, even a cursory reading of the case demonstrates that the court was not concerned so much with the admissibility of the admission of the particular agent, but with the substantive question whether the defendant was responsible for that agent's negligence in permitting a fire to spread. Since the attack on the judgment was on the ground of insufficiency of evidence—no question of admissibility of evidence was even raised—the court's statement that certain evidence "sufficed to make a prima facie showing of the existence of the relation of principal and agent"<sup>42</sup> cannot conceivably support a rule which puts the question of admissibility into the hands of the jury.

This same confusion is apparently responsible for the retention, in section 1223, of the rule of *People v. Steccone*,<sup>43</sup> relating to co-conspirators' statements.<sup>44</sup> After correctly noting that, in a suit by P against D on a contract made by D's alleged agent A, the question of agency must be left to the jury and, therefore, all evidence of negotiations by A must be received on a mere prima facie showing of agency, the comment to section 403 goes on: "The same rule is applicable when a person is charged with criminal responsibility for the acts of another

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failure to respond gave rise to an inference of acquiescence or guilty conscience is a matter for the trial court to determine before admitting the testimony [citing 19 CAL. JUR. 2d, *Evidence*, § 401 at 143 (1953); *People v. Davis*, 43 Cal. 2d 661, 670, 276 P.2d 801, 805-06 (1954); *People v. Yeager*, 194 Cal. 452, 487, 229 P. 40, 55 (1924)].

However, the authorities cited by the court in *Briggs* make it doubtful that the court intended its statement to be as broadly interpreted as it sounds. See also *People v. Polk*, 61 Cal. 2d 217, 231, 390 P.2d 641, 649, 37 Cal. Rptr. 753, 761 (1964). It is indeed difficult to determine just what preliminary facts, necessary before an adoptive admission can be heard, are for the court. It is enough for present purposes to point out that the bold statement in the comment to § 403, that all are for the jury, is incorrect and not supported by the language of the Code. See note 33 *supra*.

<sup>41</sup> 29 Cal. App. 547, 156 P. 983 (1916).

<sup>42</sup> *Id.* at 549, 156 P. at 984.

<sup>43</sup> 36 Cal. 2d 234, 223 P.2d 17 (1950).

<sup>44</sup> The part of § 1223 that retains prior law which makes co-conspirators' statements conditionally admissible after mere prima facie proof is particularly surprising since Professor Chadbourne, the Commission's consultant, specifically recommended change. 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 301, 490 n.32 (1962).

because they are conspirators."<sup>45</sup> That is, of course, true as a matter of substantive law. A conspirator is liable for co-conspirators' crimes committed in carrying out the common purpose.<sup>46</sup> Unquestionably where the People seek to fasten such a crime on the defendant on trial, they are entitled to offer such evidence on mere prima facie proof of conspiracy. That, however, is not what we are talking about and certainly is not what the comment to the Evidence Code should be talking about. We are not interested in co-conspirators' acts<sup>47</sup> which make a party substantively liable for a crime<sup>48</sup> or the price of a bomb, but his statements, which are otherwise inadmissible hearsay, from which the jury is invited to infer some other fact.

*Langley v. Zurich General Accident & Liability Insurance Company*<sup>49</sup> is cited for the proposition that the identity of a hearsay declarant under sections 1224 through 1227 is for the jury. No question of identity was involved in the case. The only problem discussed was whether an admission by an insured with respect to jurisdiction over his person, on which a judgment against the insured depended, was admissible against the insurer in a suit on the judgment. The court held that the statement was admissible, relying on former section 1851 of the Code of Civil Procedure, the predecessor of section 1224. Section 1851 read as follows: "And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties."<sup>50</sup> Obviously whoever drafted section 1851 did not for one moment consider the problem of a dispute with respect to the identity of the declarant.

*Schneider v. Market Street Railway Company*<sup>51</sup> is supposed to sup-

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<sup>45</sup> CAL. EVID. CODE § 403, comment at 36 (West 1968) (citation omitted).

<sup>46</sup> *People v. Kauffman*, 152 Cal. 331, 335, 92 P. 861, 863 (1907).

<sup>47</sup> Many cases, including former § 1870(6) of the Code of Civil Procedure, say that it is not only the declaration but also the acts of a co-conspirator which are admissible only after proof of the conspiracy. This is an obvious overstatement. Where a co-conspirator's acts—as distinguished from his statements—are offered, no preliminary proof of conspiracy is required as far as the hearsay rule is concerned. Unless the co-conspirator intends his conduct to be a substitute for words, the conduct is not hearsay. Since conspirators traditionally do not conspire in public, in most cases the only evidence available to prove the conspiracy will be the conspirators' conduct.

<sup>48</sup> For example, D is being tried for soliciting the murder of V (CAL. PEN. CODE § 653f (West 1957)). It is the prosecution's theory that A, who actually did the soliciting, did so as the agent of D. Undoubtedly a mere prima facie case of agency will suffice to make the words of solicitation admissible.

<sup>49</sup> 219 Cal. 101, 104, 25 P.2d 418, 419 (1933).

<sup>50</sup> Enacted 1872, amended, ch. 383, § 217, [1873-74] Am. Code 380 (repealed ch. 299, § 48, [1965] Cal. Stat. 1350).

<sup>51</sup> 134 Cal. 482, 66 P. 734 (1901).

port the proposition that questions of identity with respect to the maker of a statement inconsistent with a witness' testimony are for the jury. The defendant's motorman had testified that he could not tell whether his car had come in contact with the deceased. He was impeached by testimony given by one Glassman and one Hubbell to the effect that he had said that he did strike the deceased. There was no question that if the statement was made, it was made by Meley, the motorman. Nevertheless the court, out of the blue as it were, said: "Whether the statements made to Glassman and Hubbell were made by Meley, or by some other man, was a question for the jury."<sup>52</sup> An obvious dictum.

Finally the Commission finds comfort in *People v. Neely*<sup>53</sup> for its belief that preliminary facts with respect to the admissibility of prior consistent statements are for the jury. In that case, the appellant Golland claimed that the trial court had improperly admitted two confessions by Neely which implicated Golland and which had been made shortly after Neely's arrest. Neely had been the People's witness at the trial. He himself had pleaded guilty and was awaiting sentence. Cross-examination had strongly suggested improper influence and "recent fabrication". The admissibility of the confessions was contested on the ground that the motive to fabricate had been as strong at the time the confessions were made as it was at the trial. Holding the confessions admissible the court said:

In the present case the jury could properly infer from the questions asked and the testimony given during the cross-examination of Neely that owing to the promises of the district attorney, the motive to fabricate did arise after the making of the two statements.<sup>54</sup>

Again the Commission raises a dictum to the status of law. The complaint in *Neely* had not been that the time when the motive to fabricate arose had been submitted to the wrong trier of fact—rather, the point made was that the evidence of a recent motivation was insufficient as a matter of law.

#### IV

Having proved, at least to my own satisfaction, that the Commission's authorities do not support it, where do we go from here? If the people of California want to have a system in which the jury,<sup>55</sup> before

<sup>52</sup> *Id.* at 492, 66 P. at 738.

<sup>53</sup> 163 Cal. App. 2d 289, 312, 329 P.2d 357, 370 (1958).

<sup>54</sup> *Id.*, 329 P.2d at 371.

<sup>55</sup> Or, perhaps, only each individual juror. Does the jury take votes on whether it will consider certain evidence? In criminal cases must it be unanimous? What hap-

weighing the evidence, may have to determine whether a statement inconsistent with a party's trial position was made by him or someone else, whether a truck driver who admitted liability had authority to speak, whether a defendant was dazed or conscious while accusations were being hurled at him, or whether a statement was or was not made by one for whose "liability, obligation or duty" a party is responsible, that is, after all, their business. It ceases, however, to be solely a matter of state concern if the application of such a system violates a federal constitutional right.

The only case of which I am aware in which the constitutionality of one of our heretic practices has been called into question was *People v. Brawley*.<sup>56</sup> While it is a fine point whether it did so by a holding or by mere dictum, unquestionably the court there said that it saw nothing unconstitutional about the practice now enshrined in section 1223. However the line of reasoning I want to suggest was not advanced by counsel, whose attack was directed at section 1223 itself, rather than at the judge versus jury problem which is the subject of this article.

Before developing the constitutional argument for what it is worth, I must point to an awkward snag which developed a few short months ago, long after the argument came to mind. Its central point is that the submission of co-conspirators' statements on a mere prima facie showing of the foundational facts violates the rule of *Jackson v. Denno*.<sup>57</sup> *Jackson* of course, arose in the field of confessions and is based on the premise that the introduction of an involuntary confession deprives the defendant of due process of law. While that principle is as valid today as it was then, it is the confrontation clause by which the rule against hearsay gets its foot into the constitutional door. The United States Supreme Court's recent opinion in *Dutton v. Evans*<sup>58</sup> stands at least for the proposition that under certain circumstances there is no constitutional objection to Georgia's exception to the hearsay rule concerning the use of co-conspirators' statements, which is far more liberal as to admissibility than California's or the one generally enforced by federal courts. Yet the upholding of the conviction in *Evans* was based on several factors quite peculiar to that particular prosecution and it seems a reasonable assumption that if none of those factors in

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pens when the jury returns to the courtroom and the foreman announces that it stands six to six on whether a minor company executive who had an accident during a business trip and talked too much about it, had authority to speak?

<sup>56</sup> 1 Cal. 3d 277, 461 P.2d 361, 82 Cal. Rptr. 161 (1969).

<sup>57</sup> 378 U.S. 368 (1964).

<sup>58</sup> 400 U.S. 74 (1970).

*Evans* appear in such a future case, at least one Justice would switch sides<sup>59</sup> and the Supreme Court would hold that, absent proof of the traditionally required foundation, a defendant's confrontation rights have been violated.<sup>60</sup> If I am wrong, what follows is an exercise in nostalgia.

In *Brawley* the question of the proper procedure in admitting co-conspirators' declarations was raised by the court itself. After opening briefs were filed the clerk of the court addressed a letter to the parties which, at the court's request, posed several questions relating to co-conspirators' statements. The second question read as follows:

In the light of cases such as *Bruton v. United States*, does the California procedure relating to the receipt of evidence of an asserted conspirator's extrajudicial declarations in furtherance of the conspiracy violate the federal constitutional right of confrontation of another asserted conspirator? Assuming that it does violate that right, what procedure should be employed in a retrial of the case?<sup>61</sup>

Counsel for the codefendant Baker—who was the party aggrieved by the admission of three statements by Brawley to one Glaze—did not interpret the question as inviting a discussion of the rule of *People v. Steccone*.<sup>62</sup> In his response he made the bold claim that under the rule of *People v. Aranda*,<sup>63</sup> nothing less than a severance was required. In other words he not only claimed that a co-conspirator's statement was admissible only against the declarant, but went further and suggested that even a limiting instruction would not suffice.<sup>64</sup>

It is thus apparent that in *Brawley* the California Supreme Court was never really asked to nullify the rule of *People v. Steccone*.<sup>65</sup>

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<sup>59</sup> *Evans* is a plurality opinion. There were four dissenters. Justice Harlan agreed with the result reached by the majority, but for reasons very much his own.

<sup>60</sup> *Evans*, of course, has nothing to do with the problem of preliminary fact finding. It only deals with the constitutionally permissible outline of the hearsay exception itself.

<sup>61</sup> Letter from the clerk of the Supreme Court of California to the attorneys of record, December 23, 1968.

<sup>62</sup> 36 Cal. 2d 234, 234 P.2d 17 (1950). See note 7 *supra* and accompanying text.

<sup>63</sup> 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965).

<sup>64</sup> In answer to another question posed by the court, counsel did seem to concede that if the co-conspirator, whose statement is admitted, testifies in his own behalf and makes himself subject to cross-examination with respect to the statement, it may be received.

<sup>65</sup> In *People v. Brawley*, 1 Cal. 3d 277, 461 P.2d 361, 82 Cal. Rptr. 161 (1969), the court could have done so without the need to declare § 1223 partly unconstitutional. The trial had taken place before the Code went into effect and the applicable statute [CAL. CODE CIV. PROC. § 1870(6)] read as follows:

FACTS WHICH MAY BE PROVED ON TRIAL



## V

In *Stein v. New York*,<sup>66</sup> the Supreme Court had approved the New York practice under which the voluntariness of a confession was determined by the jury if the evidence presented a "fair question of fact" on the issue of voluntariness.<sup>67</sup> Under that practice the jury was later instructed to disregard the confession if it found it to be coerced. What the jury actually did never became known, since it only returned a general verdict on the question of guilt. The New York practice came again under attack in *Jackson v. Denno*.<sup>68</sup> This time a bare majority of the court declared it unconstitutional. The reasons it gave were these: 1) Because of the general verdict, a reviewing court was unable to determine whether the jury received or rejected the confession;<sup>69</sup> 2) There was no "assurance that the confessions did not serve as makeweights in a compromise verdict, some jurors accepting the confessions to overcome lingering doubt of guilt, others rejecting them but finding their doubts satisfied by other evidence, and yet others or perhaps all never reaching a separate and definite conclusion as to the confessions but returning an unanalytical and impressionistic verdict based on all they had heard";<sup>70</sup> 3) Since the jury is given both the evidence which bears on the issue of coercion and the evidence on the question of guilt, it may possibly find the confession to have been voluntary because true;<sup>71</sup> 4) Even if it finds the confession to have been involuntary, and thereafter theoretically disregards it, it may nevertheless subconsciously resolve doubts on the question of guilt by resorting to the confession.<sup>72</sup>

It seems plain that a reasonable argument can be made that some of these considerations apply to California's procedure with respect to co-conspirators' statements.

Let us first consider a criminal trial where the charged crime is

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In conformity with the preceding provision, evidence may be given upon a trial of the following facts:

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6. After proof of conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy.

Nothing in that statute compels a rule that it is the jury rather than the court, which determines the sufficiency of the preliminary proof.

<sup>66</sup> 346 U.S. 156 (1953).

<sup>67</sup> *Id.* at 172.

<sup>68</sup> 378 U.S. 368 (1964).

<sup>69</sup> *Id.* at 379.

<sup>70</sup> *Id.* at 380, *citing* *Stein v. New York*, 346 U.S. 156, 177-78 (1953).

<sup>71</sup> 378 U.S. at 381.

<sup>72</sup> *Id.* at 388-89.

conspiracy. When the jury retires to deliberate it has heard non-hearsay evidence pro and con on the existence of the conspiracy. Since we must assume that the People made out a prima facie case on that point, the court was of necessity forced to permit the jurors to hear co-conspirators' statements provided they were made in furtherance of and during the conspiracy. These statements themselves must be relevant on the question whether there was a conspiracy, or the People would not have offered them. Theoretically the jury is now supposed to forget about the statements and look over the rest of the evidence to determine whether the statements should remain forgotten. Can we really assume, however, that it is capable of performing that task, any more than we can assume that a jury can forget the confession of one defendant which the court has very properly declared to be inadmissible against the other?<sup>73</sup> In *Brawley, Bruton* was distinguished on the basis that co-conspirators' statements are a recognized exception to the hearsay rule. Of course, I fully agree and hope not to be misunderstood to suggest otherwise. My point is rather that we may be using an unconstitutional procedure in determining whether the prerequisites to making co-conspirators' statements admissible have been met. Just as a New York jury could improperly consider other evidence of guilt on the question of the voluntariness of a confession, so may a California jury be suspected of considering the co-conspirators' statements on the preliminary question whether there was a conspiracy.<sup>74</sup> Just as under the condemned New York procedure, the general verdict tells us nothing. We have no way of determining whether the jury reached its ultimate finding of guilt by a bootstrap operation, in which it first, subconsciously perhaps, considered the statements themselves in determining their admissibility and then used them openly to determine guilt.

<sup>73</sup> *Bruton v. United States*, 391 U.S. 123 (1968), which overruled *Delli Paoli v. United States*, 353 U.S. 232 (1957), forbids joint trial in such situations.

<sup>74</sup> In a conspiracy case it is difficult to carry the analogy to the New York confession practice much further. If the jury rejects the co-conspirators' declarations, one would suppose that in most cases the reason for the rejection is a failure to find the preliminary fact of conspiracy to have been proved. At that point the defendant should be acquitted. It is, however, conceivable that the jury may reject the evidence because it finds that the declarant, as distinguished from the defendant, was not a member of the conspiracy, that the statement was made after the conspiracy's termination or that it was not in furtherance thereof. The theoretically rejected statement may nevertheless be highly probative of the defendant's participation in the conspiracy and may, just as the theoretically rejected confession, help to resolve "lingering doubts about the sufficiency of the other evidence." *Jackson v. Denno*, 378 U.S. 368, 388 (1964). If the basic charge is not conspiracy, the analogy is much closer. There, even if the jury rejects a finding of conspiracy, and therefore, in theory, the statements, its task is not finished and the statements not forgotten.

It is thus entirely possible that in fact a defendant will be convicted on nothing but inadmissible hearsay.

The matter is not much different if we posit a trial where the substantive charge is not conspiracy. Indeed, *Brawley* was such a case. Brawley and his codefendant Baker were charged with and convicted of the robbery-murder of a taxi driver. The statements involved were made by Brawley to a fellow sailor, whom he informed of his and Baker's plan to go "AWOL" and to commit robbery and murder. Independent evidence was as follows:<sup>75</sup> 1) The day before the murder Brawley and Baker were seen talking together; 2) A few hours before the commission of the crime Brawley took a knife and wire from his locker, handed the wire to Baker who said, "We won't need this now"; 3) Brawley also took gloves from his locker. Both he and Baker put the gloves under their clothing; 4) Shortly thereafter the two were seen heading toward a bus stop; 5) They were arrested together in Illinois, at which time Baker was in possession of the victim's wallet; 6) A knife which had been in Brawley's possession was found near the victim; 7) The cause of the victim's death was multiple stab wounds; 8) Brawley's finger and shoe prints were found at the scene of the crime.

All this, was, of course, strong circumstantial evidence that Brawley and Baker were both criminally responsible for the victim's death. It was also strong evidence that they had committed the crime pursuant to a preconceived plan—a conspiracy. Yet it is easy to imagine a much weaker case because of the absence of some of the enumerated items. Assume that the only physical clue at the scene of the crime is Brawley's fingerprint. Assume further, that the only evidence—apart from Brawley's statements—against Baker is the business with the knife, the wire and the gloves, which preceded the murder by several hours, and proof that he and Brawley headed toward a bus stop soon thereafter. Although the case against Baker would then be an extremely weak one as far as the substantive crimes charged are concerned, most courts would probably feel compelled to hold that a prima facie case of conspiracy had been shown. Instead of receiving the benefit of a court's immediate and conclusive ruling with respect to the existence of a conspiracy—a ruling which might easily be in Baker's favor—under section 1223 Brawley's statements have to be received in evidence. The danger that the jury will consider them on the preliminary question of the existence of a conspiracy is just as great as it was in the case where the very crime charged is conspiracy. Only this

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<sup>75</sup> 1 Cal. 3d at 284-85, 461 P.2d at 363-64, 82 Cal. Rptr. at 163-64.

time, after the question of the admissibility of the evidence is settled against the defendant, the verdict will be murder and robbery.

## VI

This point having been made, the question remains whether it is of any importance. In all honesty I must admit to doubts on that score, at least in a case where the defendants are actually charged with conspiracy. The reason lies in the nature of that crime. In most cases the prosecution must establish its case from scraps of evidence concerning the activities of the alleged conspirators, from which an inference of the existence of the conspiracy arises. Naturally the defense may have evidence that there never was any conspiracy. If the court must rule with finality on the foundational facts before the prosecution is permitted to offer co-conspirators' statements, it would of necessity have to hear the evidence from both sides and, in effect, try the case twice. Apparently in self-defense against such a prospect, there developed the rule that the court may, in its discretion, reverse the order of proof and admit co-conspirators' statements before receiving *any* independent proof of the conspiracy.<sup>76</sup> It would, of course, make no sense to go only half way and force the prosecution to prove at least a *prima facie* case before the first co-conspirator's statement is admitted; the court would still not have all the evidence on which to base its ruling. Therefore, even if the ultimate ruling on the admissibility of the statements were reposed in the court, where it belongs, before that ruling is made the jury will inevitably have heard the statements. In such a case the only difference between the California procedure and the orthodox rule is that, at the conclusion of the trial, the jury will be told that it must forget the statements, rather than that it may do so.<sup>77</sup>

Yet this only proves that, for reasons rooted in the substantive law, practical considerations sometimes may wipe out the benefits of the orthodox rule.<sup>78</sup> That there are occasions when a useful tool does not work is no justification for discarding it altogether.

<sup>76</sup> See, e.g., *People v. Morales*, 263 Cal. App. 2d 368, 69 Cal. Rptr. 402 (1968).

<sup>77</sup> There is nothing inconsistent about the court's finding, on all the evidence, that no conspiracy was established but nevertheless giving the case to the jury because, in the court's view, a *prima facie* case has been made out.

<sup>78</sup> The best known exposition of the manner in which the substantive nature of conspiracy impinges upon procedural safeguards, is Justice Jackson's concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453 (1949):

When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so

## VII

Admittedly, to desire structure for structure's sake is childish. If a particular departure from orthodoxy is commanded by sound policy, one should give it a try. However I find no cogent reasons for any of the Commission's innovations, or for the error it retained in section 1223.

Undoubtedly a better sounding argument can be made for the Code's idiosyncrasies than is contained in the comments to sections 403 and 405. A plausible claim can be put forward that, in certain situations, particularly where the preliminary fact is also a substantive issue, the application of the orthodox rule deprives a litigant of the right to trial by jury. I should like to have an opportunity to answer such an assertion, example by example, if it is made. Suffice it for the present that such an argument invariably puts the cart before the horse. The proponent first determines—for insufficient reasons such as those expressed in the Code's comments—that certain preliminary facts should be for the jury, and then defines the right of trial by jury to encompass the erroneously expanded jury functions. Surely, the Founding Fathers did not propose the Sixth and Seventh Amendments with the inspirations of the Law Revision Commission in mind.

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sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumenthal v. United States*, 332 U.S. 539, 559 [1947], all practicing lawyers know to be unmitigated fiction. See *Skidmore v. Baltimore & Ohio R. Co.*, 167 F.2d 54 [2d Cir. 1948].