

3105

37.14

John Bennett
474-2413

a description of the property sufficient for identification, authorizes or employs the agent or broker named in it to sell the property, and expresses with reasonable certainty the amount of the commission or compensation to be paid the agent or broker, the agreement of authorization or employment is not unenforceable for failure to state a consideration;

(9) an agreement to establish a trust;

(10) a subsequent or new promise to pay a debt discharged in bankruptcy;

(11) a conveyance or assignment of a trust in personal property;

(12) an agreement to pay compensation for services rendered in negotiating a loan, effecting the procurement of a business opportunity, or the purchase and sale of a business, its good will, inventory, fixtures, or an interest in it, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest, other than an agreement to pay compensation to an auctioneer or an attorney at law.

b. No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning the property may be created, transferred, or declared, otherwise than by operation of law, or by a conveyance or other instrument in writing subscribed by the party creating, transferring, or declaring it or by his agent under written authority and executed with the formalities that are required by law. This subsection does not affect the power of a testator in the disposition of his real property by will, nor prevent a trust's arising or being extinguished by implication or operation of law, nor affect the power of a court to compel specific performance of an agreement in relation to the property.

Sec. 3.12. Exceptions to Statute of Frauds. A contract, promise, or agreement which is subject to Sec. 3.11, which does not satisfy the requirements of that section, but which is otherwise valid is enforceable if either

(1) there has been full performance on one side accepted by the other in accordance with the contract; or

(2) there is a memorandum which would satisfy the requirements of Sec. 3.11

except for error or omission in the recital of past events; or

(3) there is a memorandum which would satisfy the requirements of Sec. 3.11 except for error or omission which could be corrected by reformation if it occurred in a formal contract; or

(4) the party against whom enforcement is sought admits, voluntarily or involuntarily, in his pleadings or at any other stage of this or any other action or proceeding the making of an agreement; or

(5) it is a contract of employment for a period not exceeding one year from the commencement of work under its terms.

Sec. 3.13. Representations as to Credit, Skill, or Character of a Third Person. No evidence is admissible to charge a person upon a representation as to the credit, skill, or character of a third person unless the representation or some memorandum of it is in writing, and either subscribed by or in the handwriting of the party to be charged.

Sec. 3.14. Rules for Construing Real Estate Descriptions. The following are the rules for construing the descriptive part of a conveyance of real property when the construction is doubtful and there are no other sufficient circumstances to determine it:

(1) where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false does not frustrate the conveyance, but it is to be construed by those particulars if they constitute a sufficient description to ascertain its application;

(2) when permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount;

(3) between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both;

(4) when a road or stream of water not navigable is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or bed of the stream is held under another title;

(5) when tidewater is the boundary, the rights of the grantor to low-water mark are included in the conveyance;

(6) when the description refers to a map and that reference is inconsistent with other particulars, it controls them if it appears that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars.

Sec. 3.15. Conclusive Evidence of Adverse Possession. The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more is conclusively presumed to give title to the property except as against the state or the United States.

Sec. 3.16. Sale or Transfer of Personal Property. Every sale or assignment of personal property unless accompanied by the immediate delivery and the actual and continued change of possession of the thing sold or assigned is presumed prima facie to be a fraud against the creditors of the vendor or assignor, and subsequent purchasers in good faith and for a valuable consideration during the time the property remains in the possession of the vendor or assignor, except that retention of possession in good faith and current course of trade by a merchant seller for a commercially reasonable time after a sale or identification is not fraudulent, and nothing contained herein shall supersede the provisions of the Uniform Commercial Code.

Sec. 3.17. Evidence of Publication. Evidence of the publication of a document or notice required by law to be published in a newspaper may be given by the affidavit of the printer of the newspaper or his foreman or business manager, annexed to a copy of the document or notice, specifying the times when and the paper in which the publication was made.

~~**Sec. 3.18. Adultery Confession in Divorce.**~~ In an action for divorce on the ground of adultery, a confession of adultery is not alone sufficient to justify a judgment of divorce.

Sec. 3.19. Right to Receipt upon Payment or Delivery. Any person who pays money or delivers an instrument or property is entitled to a receipt for it from the person to whom the payment or delivery is made, and may demand a proper signa-

ture to the receipt as a condition of the payment or delivery.

Sec. 3.20. Objections to Tender. The person to whom a tender is made shall at the time specify any objection he may have to the money, instrument, or property, or he waives it. If the objection is to the amount of money, the terms of the instrument, or the amount or kind of property, he shall specify the amount, terms, or kind which he requires, or is precluded from objecting later. This section shall not be construed to modify or change in any manner corresponding provisions of the Uniform Commercial Code.

Sec. 3.21. Disposition of Tax Information. Any information in the possession of the Department of Revenue which discloses the particulars of the business or affairs of a taxpayer or other person is not a matter of public record, except for purposes of investigation and law enforcement. The information shall be kept confidential except when its production is required in an official investigation or court proceeding. These restrictions do not prohibit the publication of statistics presented in a manner that prevents the identification of particular reports and items, or prohibit the publication of tax lists showing the names of taxpayers who are delinquent and relevant information which may assist in the collection of delinquent taxes.

Sec. 3.22. Inspection and Copies of Public Records. Unless specifically provided otherwise the books, records, papers, files, accounts, writings, and transactions of all agencies and departments are public records and are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of costs a certified copy of the public record.

Sec. 3.23. Inspection and Copying of Public Records. Every person has a right to inspect any public writing or record in the state, including public writings and records in recorders' offices except (1) records of vital statistics and adoption proceedings which shall be treated in the manner required by Ch. 118, SLA 1960; (2) records pertaining to juveniles; (3) medical and related public health records; (4) records required to be kept confidential by any federal law or regulation or by state law. Every public officer having

Alaska Legislative Council
P.O. Box 2199, Juneau, Alaska

TABLE OF COMPARATIVE SECTIONS
CODES OF CIVIL AND CRIMINAL PROCEDURE

ACLA 1949	Alaska Statutes or Civil Rules
55-1-1	Rule 2
2	17
3	6(a)
55-2-1	09.10.010
2	030
3	040
4	050
5	Deleted
6	09.10.060
7	070
8	080
9	090
10	100
11	110
12	120
13	020 & Rule 3
14	130
15	140
16	150
17	160
18	170
19	180
20	190
21	200
22	210
23	220
24	230
25	240
55-3-1	Rule 17(a)
2	09.65.060
3	Rule 17(a)
4	09.60.020 & Rule 17(b)
5	Rule 2 & 17(a)
6	Deleted
7	Rule 17(b)
8	09.15.010
9	020
10	030
11	Rule 19(a) & 20(a)
12	09.65.050 & Rule 25
13	Rule 25(a)
14	14 & 24
15	19, 20, 22
16	19 & 23
17	19
18	24
55-4-1	3 & 4
2	09.45.790
3	Rule 4(a), (b) & 12(a)
4	4(b)
5	4(c), (f)
6	4(d)
7	4(d)
8	4(e)
9	4(e)
10	4(e)
11	55(e) & 60(b)
12	4(a), (e)

58-3-8	09.20.140
9	Rule 45
10	09.20.120
11	Rule 45
12	45
13	09.20.130 & Rule 26
58-4-1	Rule 28 & 30(f)
2	5(f) & 77(e)
3	Deleted
4	09.25.070
5	Rule 5(e)
11	26
12	26 & 27
13	26 & 27
21	28
22	28
23	28 & 31
24	28
25	28
26	28 & 30
27	28
31	26 & 30
32	26 & 30
33	30(f)
34	30(f)
35	26(e) & 32(c)
36	26 & 32
37	26
38	27(c)
39	Deleted
40	Deleted
51	Rule 43
52	09.20.180
53	Rule 43(g)
54	43(i)
55	43
56	43
57	43(g)
58	43(g)
59	43(g)
60	43(g)
61	43(g)
62	43(g)
63	43(g)
64	43(g)
58-5-1	51
58-6-1	43(g)
2	43(g)
3	43(h)
4	43(h)
5	43(h)
6	43(h)
11	45 & Rules of Administration 9
12	43(h)
13	43(h)
14	09.20.150
15	160
16	170
58-7-1	09.25.080
2	090
3	040
4	Rule 43(i)
5	09.55.120
6	09.25.050

1 be corrected by reformation if it occurred in a formal contract;
2 or

3 (4) the party against whom enforcement is sought ad-
4 mits, voluntarily or involuntarily, in his pleadings or at any
5 other stage of this or any other action or proceeding, the making
6 of an agreement; or

7 (5) it is a contract of employment for a period not
8 exceeding one year from the commencement of work under its terms.

9 Sec. 3.14. REPRESENTATIONS AS TO CREDIT, SKILL OR CHARACTER
10 OF A THIRD PERSON. No evidence is admissible to charge a person
11 upon a representation as to the credit, skill, or character of a
12 third person, unless the representation, or some memorandum of it,
13 is in writing, and either subscribed by or in the handwriting of
14 the party to be charged.

15 Sec. 3.15. CREATION OR TRANSFER OF INTEREST IN REAL PROPERTY.
16 No estate or interest in real property, other than a lease for a
17 term not exceeding one year, nor any trust or power concerning the
18 property, may be created, transferred, or declared, otherwise than
19 by operation of law, or by a conveyance or other instrument in
20 writing, subscribed by the party creating, transferring, or de-
21 claring it or by his agent under written authority, and executed
22 with the formalities that are required by law. This section does
23 not affect the power of a testator in the disposition of his real
24 property by will, nor prevent a trust arising or being extinguished
25 by implication or operation of law, nor affect the power of a
26 court to compel specific performance of an agreement in relation
27 to the property.

28 Sec. 3.16. RULES FOR CONSTRUING REAL ESTATE DESCRIPTIONS.
29 The following are the rules for construing the descriptive part of

1 a conveyance of real property, when the construction is doubtful
2 and there are no other sufficient circumstances to determine it:

3 (1) Where there are certain definite and ascertained
4 particulars in the description, the addition of others which are
5 indefinite, unknown, or false, does not frustrate the conveyance,
6 but it is to be construed by those particulars if they constitute
7 a sufficient description to ascertain its application;

8 (2) When permanent and visible or ascertained bound-
9 aries or monuments are inconsistent with the measurement, either
10 of lines, angles, or surfaces, the boundaries or monuments are
11 paramount;

12 (3) Between different measurements which are inconsis-
13 tent with each other, that of angles is paramount to that of sur-
14 faces, and that of lines paramount to both;

15 (4) When a road, or stream of water not navigable, is
16 the boundary, the rights of the grantor to the middle of the road
17 or the thread of the stream are included in the conveyance, except
18 where the road or bed of the stream is held under another title;

19 (5) When tidewater is the boundary, the rights of the
20 grantor to low-water mark are included in the conveyance;

21 (6) When the description refers to a map, and that
22 reference is inconsistent with other particulars, it controls them
23 if it appears that the parties acted with reference to the map;
24 otherwise the map is subordinate to other definite and ascertained
25 particulars.

26 Sec. 3.17. CONCLUSIVE EVIDENCE OF ADVERSE POSSESSION. The
27 ~~uninterrupted adverse notorious possession of real property under~~
28 color and claim of title for seven years or more is conclusively
29 presumed to give title to the property, except as against the

1 is in writing, and either subscribed by or in the handwriting of
2 the party to be charged.

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29 otherwise the map is subordinate to other definite and ascertained

ALASKA LEGISLATIVE COUNCIL
Box 2199 Juneau, Alaska

STAFF MEMORANDUM

November 1960

Subject: Revised Code of Civil Actions and Proceedings
To: Members of the Legislative Council

As part of the statute revision program, the Legislative Council directed that the codes of civil and criminal procedure be substantively revised and legislation be prepared for introduction in the 1961 legislative session. The purpose of the revision is primarily to extract those procedural provisions in the statutes and to rearrange and revise in a limited manner the substantive material which remains. This type of revision has been found necessary in New Jersey, Michigan, and Maryland, and other states which have placed the rule making power in the supreme court. The revision will help avoid conflicts and uncertainties in the newly promulgated rules and the statutory provisions, and will attempt a more rational separation in the subject matter to be covered by court rule or statute.

This memorandum presents the second draft of the revision of the Code of Civil Procedure, which includes Titles 55, 56, 57, and 58, ACLA 1949. The first draft of the revised code was prepared by the law firm of John Bohn, Benicia, California. The firm is particularly well qualified for this revision since it was engaged previously in work on court rules promulgated by the Alaska Supreme Court.

The first draft was duplicated and circulated to interested parties including the Department of Law and members of the Supreme Court. The second draft was prepared after an extensive review by the staff of the Legislative Council with suggestions from the Department of Law. Due to the size of the project and the numerous problems which have arisen, the second draft is presented only to reflect a stage in the revision project and not as the final proposal. A number of the more serious questions will be raised in the introduction to each article and in the comments made to each section.

For purposes of determining the disposition made of each section in the present Code of Civil Procedure as amended and supplemented, a table of sections is included as Appendix I to the memorandum. The table reflects (a) the specific sections of ACLA or session laws included in the revision, (b) whether all or a part of the material in each section has been deleted in the revision because the provision has been covered by a specifically cited Alaska court rule, (c) whether the material is a matter of procedure but as yet has not been covered by a court rule as it has by specifically cited court rules in other states, (d) whether the material has become obsolete because of statehood or other reasons, and (e) the new section number in the proposed revised Code of Civil Actions and Proceedings which is based on the section being revised.

The material has been rearranged for placement under two general titles. The first title, "General Provisions," includes the material that might be applicable to any civil action. The second title, "Special Civil Actions," includes over 20 articles, each containing material pertinent to a particular type of civil action.

OUTLINE OF REVISED CODE OF CIVIL ACTIONS AND PROCEEDINGS:

TITLE I. GENERAL PROVISIONS

Art. I Parties
Art. II Jury
Art. III Witnesses and Evidence
Art. IV Judgments
Art. V Limitations of Actions
Art. VI Miscellaneous

TITLE II. SPECIAL CIVIL ACTIONS

Art. VII Adverse Claims
Art. VIII Attachment
Art. IX Change of Name
Art. X Civil Arrest
Art. XI Contempt
Art. XII Declaration of Death
Art. XIII Divorce and Annulment
Art. XIV Eminent Domain
Art. XV Escheat
Art. XVI Execution
Art. XVII Fines
Art. XVIII Foreclosure
Art. XIX Injunction
Art. XX Lewd Houses
Art. XXI Nuisances
Art. XXII Partition
Art. XXIII Receivers
Art. XXIV Recovery of Personal Property
Art. XXV Recovery of Real Property
Art. XXVI Tort Claims
Art. XXVII Trespass
Art. XXVIII Usurpation
Art. XXIX Waste

For an Act entitled: "An Act to codify and revise the law relating to civil actions and proceedings; to provide a comprehensive code of civil actions and proceedings; and to provide for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

~~TITLE I. GENERAL PROVISIONS~~

Article I. Parties

(Sec. 55-7-37) and if the regular panel is exhausted because of challenges and other reasons in respect to a particular case (Sec. 55-7-38).

Sec. 2.09. IMPANELING THE TRIAL JURY. When a civil case which is to be tried by a jury is called for trial, the clerk shall draw from the trial jury box containing the names of those on the jury panel a number of names or numbers sufficient to name a jury of 12 unless the court directs alternate jurors to also be selected or unless the parties stipulate that the jury shall consist of less than 12. The prospective jurors shall be examined, challenged, and sworn as provided by rules of the supreme court. (Sec. 55-7-41)

COMMENT:

If impaneling is understood as including the examination, challenging, and manner of swearing trial jurors, the subject is generally covered by court rule in Michigan (Proposed Michigan Court Rules, Rule 50.11); Iowa (Iowa Rules of Civil Procedure, Rule 187); Maryland (Maryland Rules of Procedure, Rule 543); and New Jersey (New Jersey Revised Court Rules, Rule 4:48). The subject is covered in part by Alaska Rules of Civil Procedure, Rules 47 and 48, Alaska Rules of Criminal Procedure, Rule 24, and Alaska Rules Governing the Administration of All Courts, Rules 20 and 21. See also, Federal Rules of Civil Procedure, Rule 47, and New Jersey Revised Court Rules, Rule 4:48, which like the Alaska rule provides for the court control or supervision of the examination of all jurors and for the manner of impaneling, examination and challenging of alternate jurors. Rule 48, Alaska Rules of Civil Procedure, provides for the use of jurors of less than twelve.

The purpose of the last sentence is not to enlarge but to recognize the rule making power of the supreme court.

Article III. Witnesses and Evidence

COMMENT:

The material included in this article is based primarily on Title 58, "Evidence," ACLA 1949. The field of evidence presents one of the most difficult problems in identifying and separating matters of substance and procedure. There is general agreement that most rules of evidence are matters of procedure. See Green, "To What Extent May Courts Under Rule Making Power Prescribe Rules of Evidence?" 26 ADAJ 482 (1940). A number of rules of evidence are included in most court rules of civil procedure. Wigmore cites numerous instances in which the Federal Rules of Civil Procedure include matters of

evidence. 1 Wigmore, "Evidence," Sec. 6c. This includes the taking of depositions (Rules 26-32), the use of discovery devices (Rules 33-37), the form and admissibility of evidence (Rule 43(a)), and proof of an official record (Rule 44(a)). The Alaska Rules of Civil Procedure are based on the Federal Rules and similar matters of evidence are presently included in the Alaska rules. The question therefore is "What provisions regarding evidence are to be considered within the scope of the powers of the supreme court to promulgate rules of procedure?"

Although the staff has depended upon the approach used in New Jersey and Michigan to separate substance from procedure in other articles of the code the revision of evidence has not been accomplished in these states. For a review of the problems which confronted the court in New Jersey regarding the problem of rules of evidence and the revision of their statutory law on evidence see Alaska Legislative Council Staff Memorandum "The Coordination of Legislative Bill Drafting and Statutory Revision with Judicial Rule Making in Alaska," July 1960, pages 23-24. (Later cited as "Staff Revision Memorandum") In the revision program that has been undertaken in Michigan the topic of evidence has not been completed although recommendations are expected at a later date. See Committee Comments to Chapter 16, "Evidence," Proposed Michigan Revised Judicature Act. Increased interest is being shown in providing rules of evidence for federal courts and proposing solutions to the problem of substance and procedure in evidence. See Degman, "The Feasibility of Rules of Evidence in Federal Courts," 24 FRD 341 (1960); and Estes, "The Need for Uniform Rules of Evidence in Federal Courts," 24 FRD 331 (1960).

Although New Jersey and Michigan have made no specific proposals regarding the separation of the subject of evidence into procedure and substance, serious attention has been given to this matter by several authorities in the field of procedure and at least six jurisdictions have specifically placed the power to make rules of evidence in the court. See Institute of Judicial Administration, "Rule Making Power of Court," (1958) at 17-21; Riedl, "To What extent May Court Under the Rule Making Power Prescribe Rules of Evidence?" 26 ABAJ 601 (1940); Joiner and Miller, "Rules of Practice and Procedure: A Study of Judicial Rule Making," 55 Mich. L. Rev. 623 (1957); Levine and Amsterdam, "Legislative Control Over Judicial Rule Making: A Problem in Construction and Revision," 107 U. Pa. L. Rev. 1 (1958).

The approach used in the present revision is the one suggested in the "Staff Revision Memorandum" of July, 1960 and involves a balancing of several considerations to determine whether a particular provision is procedure or substance. The first consideration recognizes the purpose of the constitutional provision placing rule making power in the supreme court. The purpose was to take advantage of the expertise and judgment of the court in determining how to promote the simple, just, prompt, adequate, and inexpensive processing of litigation, which was recognized as a subject of complexity and detail. The fact should be kept in mind that permitting a rule of evidence to be considered as procedure in Alaska only permits the court initially to promulgate the rule and is subject to review and change by a two-thirds vote of the legislature. Therefore, the first consideration in determining whether a provision

regarding evidence is a matter of procedure will be to determine whether the primary purpose of the provision is to promote simplicity, promptness, justice, or economy in securing an accurate picture of the facts in court. The rules of evidence relating to the manner in which evidence may be obtained by deposition or by the tools of discovery, the use of the subpoena, the conduct of the examination and cross examination of witnesses, the competency of witnesses, and judicial notice, are among those topics in evidence that are considered to be procedure because the primary purpose of these rules is to promote a prompt, just, simple, adequate, and inexpensive trial.

The second consideration involved in distinguishing matters of substance and procedure in evidence recognizes that in the past the legislature has found that to effectively establish a new substantive policy it has been necessary to prescribe special provisions relating to court proceedings. This has proven to be effective in only a limited number of instances, but the purpose of these provisions are directed primarily toward establishing a public policy rather than manifesting an interest in judicial procedure per se. In many of these instances these are matters which are necessary or so intimately related to substantive provisions to require their inclusion, and these provisions should be continued to be treated as substance because of their mixed character and despite their procedural aspects. The provisions that proof in a judicial proceeding will shift under certain designated circumstances or that presumptions will arise with the proof of certain facts or that require the corroboration of more than one witness or that require that certain agreements be evidenced in writing, are considered matters of substance because they are primarily concerned with the expression of a public policy rather than being primarily concerned with judicial procedure.

Another consideration has been an interest in maintaining a comprehensive and well integrated body of evidence law. The subject of evidence has traditionally included rules regarding the admissibility of evidence and privileged communications. It is true that these rules involve policy considerations other than those involved in the prompt, just, and inexpensive disposition of litigation. In fact, these rules involve considerations touching both substantive policies and policies involved in processing litigation. This was of course also true with presumptions and the shifting of burdens of proof. In the interest of promoting a uniform body of evidence, the privileges of witnesses and admissibility of evidence is considered a matter of procedure.

The approach that has been described offers no true rule which one can mechanically use to quickly solve any question which might arise in the future. The approach suggested involves, in each particular instance, an exercise of judgment in balancing the considerations suggested and possibly other considerations which have been overlooked or will arise in the future. The use of this pragmatic approach means that in many particular instances the balancing of these considerations becomes rather delicate and the interest in certainty is often involved. This also means that the approach taken in a specific instance does not preclude the possibility of any other approach being reasonable.

declared, otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring it or by his agent under written authority, and executed with the formalities that are required by law. This section does not affect the power of a testator in the disposition of his real property by will, nor prevent a trust arising or being extinguished by implication or operation of law, nor affect the power of a court to compel specific performance of an agreement in relation to the property. (Secs. 58-2-4 and 58-2-5)

Sec. 3.16. RULES FOR CONSTRUING REAL ESTATE DESCRIPTIONS. The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

(1) Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by those particulars if they constitute a sufficient description to ascertain its application;

(2) When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount;

~~(3) Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both;~~

(4) When a road, or stream of water not navigable, ~~is the boundary, the rights of the grantor to the middle of the~~ road or the thread of the stream are included in the conveyance, except where the road or bed of the stream is held under another title;

(5) When tidewater is the boundary, the rights of the grantor to low-water mark are included in the conveyance;

(6) When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appears that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars. (Sec. 58-7-3)

Sec. 3.17. CONCLUSIVE EVIDENCE OF ADVERSE POSSESSION. The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more is conclusively presumed to give title to the property, except as against the state or the United States. (Sec. 58-7-6)

COMMENT:

The use of the conclusive presumption is undoubtedly touching in the general area of procedure, but the substantive policy considerations seem to dominate. Therefore, the section has been retained as a substantive provision.

Sec. 3.18. SALE OR TRANSFER OF PERSONAL PROPERTY. Every sale or assignment of personal property, unless accompanied by the immediate delivery and the actual and continued change of possession of the thing sold or assigned, is presumed prima facie to be a fraud against the creditors of the vendor or assignor, and subsequent purchasers in good faith and for a valuable consideration, during the time the property remains in the possession of the vendor or assignor. (Sec. 58-2-1)

Sec. 3.19. EVIDENCE OF PUBLICATION. Evidence of the publication of a document or notice required by law, or by an order of a court or a judge, to be published in a newspaper, may be given by the affidavit of the printer of the newspaper or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when, and the paper in which, the

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ALASKA LEGISLATIVE COUNCIL
Box 2199 Juneau, Alaska

MEMORANDUM

February 17, 1961

Subject: Revised Code of Civil Actions and Proceedings

To: Members of the Legislature

As part of the statute revision program, the Legislative Council directed that the codes of civil and criminal procedure be substantively revised and legislation be prepared for introduction in the 1961 legislative session. The purpose of the revision is primarily to extract those procedural provisions in the statutes and to rearrange and revise in a limited manner the substantive material which remains. This type of revision has been found necessary in New Jersey, Michigan, and Maryland, and other states which have placed the rule making power in the supreme court. The revision will help avoid conflicts and uncertainties in the newly promulgated rules and the statutory provisions, and will attempt a more rational separation in the subject matter to be covered by court rule or statute.

The first draft of the revised code was prepared by the law firm of John Bohn, Benicia, California. The firm is particularly well qualified for this revision since it was engaged previously in work on court rules promulgated by the Alaska Supreme Court.

The first draft was duplicated and circulated to interested parties including the Department of Law and members of the Supreme Court. The second draft was prepared after an extensive review by the staff of the Legislative Council with suggestions from the Department of Law. Senate Bill No. 105 represents the third and final draft.

For purposes of determining the disposition made of each section in the present Code of Civil Procedure as amended and supplemented, a table of sections is included as Appendix I to the memorandum. The table reflects (a) the specific sections of ACLA or session laws included in the revision, (b) whether all or a part of the material in each section has been deleted in the revision because the provision has been covered by a specifically cited Alaska court rule, (c) whether the material is a matter of procedure but as yet has not been covered by a court rule as it has by specifically cited court rules in other states, (d) whether the material has become obsolete because of statehood or other reasons, and (e) the new section number in the proposed revised Code of Civil Actions and Proceedings which is based on the section being revised.

Sec. 2.09 (55-7-41)

If impaneling is understood as including the examination, challenging, and manner of swearing trial jurors, the subject is generally covered by court rule in Michigan (Proposed Michigan Court Rules, Rule 50.11); Iowa (Iowa Rules of Civil Procedure, Rule 187); Maryland (Maryland Rules of Procedure, Rule 543); and New Jersey (New Jersey Revised Court Rules, Rule 4:48). The subject is covered in part by Alaska Rules of Civil Procedure, Rules 47 and 48, Alaska Rules of Criminal Procedure, Rule 24, and Alaska Rules Governing the Administration of All Courts, Rules 20 and 21. See also, Federal Rules of Civil Procedure, Rule 47, and New Jersey Revised Court Rules, Rule 4:48, which like the Alaska rule provides for the court control or supervision of the examination of all jurors and for the manner of impaneling, examination and challenging of alternate jurors.

The purpose of the last sentence is not to enlarge but to recognize the rule making power of the supreme court.

Sec. 2.10. (Sec. 1, Ch. 87, SLA 1957)

This section is in accordance with the last sentence of Sec. 16, Art. I, Constitution of the State of Alaska, which states that "The legislature may make provision for a verdict by not less than three-fourths of the jury and, in courts not of record, may provide for a jury of not less than six or more than twelve."

Article III. Witnesses and Evidence

The material included in this article is based primarily on Title 58, "Evidence," ACLA 1949. The field of evidence presents one of the most difficult problems in identifying and separating matters of substance and procedure. There is general agreement that most rules of evidence are matters of procedure. See Green, "To What Extent May Courts Under Rule Making Power Prescribe Rules of Evidence?" 26 ABAJ 482 (1940). A number of rules of evidence are included in most court rules of civil procedure. Wigmore cites numerous instances in which ~~the Federal Rules of Civil Procedure include matters of~~ evidence. ¹ Wigmore, "Evidence," Sec. 6c. This includes the taking of depositions (Rules 26-32), the use of discovery devices (Rules 33-37), the form and admissibility of evidence (Rule 43(a)), and proof of an official record (Rule 44(a)). The Alaska Rules of Civil Procedure are based on the Federal Rules and similar matters of evidence are presently included ~~in the Alaska rules.~~ The question therefore is "What provisions regarding evidence are to be considered within the scope of the powers of the supreme court to promulgate rules of procedure?"

Although the staff has depended upon the approach used in New Jersey and Michigan to separate substance from procedure in other articles of the code the revision of evidence has not been accomplished in these states. For a review of the problems which confronted the court in New Jersey regarding the problem of rules of evidence and the revision of their statutory law on evidence see Alaska Legislative Council Staff Memorandum "The Coordination of Legislative Bill Drafting and Statutory Revision with Judicial Rule Making in Alaska," July 1960, pages 23-24. (Later cited as "Staff Revision Memorandum") In the revision program that has been undertaken in Michigan the topic of evidence has not been completed although recommendations are expected at a later date. See Committee Comments to Chapter 16, "Evidence," Proposed Michigan Revised Judicature Act. Increased interest is being shown in providing rules of evidence for federal courts and proposing solutions to the problem of substance and procedure in evidence. See Degman, "The Feasibility of Rules of Evidence in Federal Courts," 24 FRD 341 (1960); and Estes, "The Need for Uniform Rules of Evidence in Federal Courts," 24 FRD 331 (1960).

Although New Jersey and Michigan have made no specific proposals regarding the separation of the subject of evidence into procedure and substance, serious attention has been given to this matter by several authorities in the field of procedure and at least six jurisdictions have specifically placed the power to make rules of evidence in the court. See Institute of Judicial Administration, "Rule Making Power of Court," (1958) - at 17-21; Riedl, "To What extent May Court Under the Rule Making Power Prescribe Rules of Evidence?" 26 ABAJ 601 (1940); Joiner and Miller, "Rules of Practice and Procedure: A Study of Judicial Rule Making," 55 Mich. L. Rev. 623 (1957); Levine and Amsterdam, "Legislative Control Over Judicial Rule Making: A Problem in Construction and Revision," 107 U. Pa. L. Rev. 1 (1958).

The approach used in the present revision is the one suggested in the "Staff Revision Memorandum" of July, 1960 and involves a balancing of several considerations to determine whether a particular provision is procedure or substance. The first consideration recognizes the purpose of the constitutional provision placing rule making power in the supreme court. ~~The purpose was to take advantage of the expertise and judgment of the court in determining how to promote the simple, just, prompt, adequate, and inexpensive processing of litigation, which was recognized as a subject of complexity and detail. The fact should be kept in mind that permitting a rule of evidence to be considered as procedure in Alaska only permits the court initially to promulgate the rule and is subject to review~~ and change by a two-thirds vote of the legislature. Therefore, the first consideration in determining whether a provision

regarding evidence is a matter of procedure will be to determine whether the primary purpose of the provision is to promote simplicity, promptness, justice, or economy in securing an accurate picture of the facts in court. The rules of evidence relating to the manner in which evidence may be obtained by deposition or by the tools of discovery, the use of the subpoena, the conduct of the examination and cross examination of witnesses, the competency of witnesses, and judicial notice, are among those topics in evidence that are considered to be procedure because the primary purpose of these rules is to promote a prompt, just, simple, adequate, and inexpensive trial.

The second consideration involved in distinguishing matters of substance and procedure in evidence recognizes that in the past the legislature has found that to effectively establish a new substantive policy it has been necessary to prescribe special provisions relating to court proceedings. This has proven to be effective in only a limited number of instances, but the purpose of these provisions are directed primarily toward establishing a public policy rather than manifesting an interest in judicial procedure per se. In many of these instances these are matters which are necessary or so intimately related to substantive provisions to require their inclusion, and these provisions should be continued to be treated as substance because of their mixed character and despite their procedural aspects. The provisions that proof in a judicial proceeding will shift under certain designated circumstances or that presumptions will arise with the proof of certain facts or that require the corroboration of more than one witness or that require that certain agreements be evidenced in writing, are considered matters of substance because they are primarily concerned with the expression of a public policy rather than being primarily concerned with judicial procedure.

Another consideration has been an interest in maintaining a comprehensive and well integrated body of evidence law. The subject of evidence has traditionally included rules regarding the admissibility of evidence and privileged communications. It is true that these rules involve policy considerations other than those involved in the prompt, just, and inexpensive disposition of litigation. In fact, these rules involve considerations touching both substantive policies and policies involved in processing litigation. This was of course also true with presumptions and the shifting of burdens of proof. In the interest of promoting a uniform body of evidence, the privileges of witnesses and admissibility of evidence is considered a matter of procedure.

The approach that has been described offers no true rule which one can mechanically use to quickly solve any question which might arise in the future. The approach suggested in-

volves, in each particular instance, an exercise of judgment in balancing the considerations suggested and possibly other considerations which have been overlooked or will arise in the future. The use of this pragmatic approach means that in many particular instances the balancing of these considerations becomes rather delicate and the interest in certainty is often involved. This also means that the approach taken in a specific instance does not preclude the possibility of any other approach being reasonable.

Sec. 3.01 (58-3-5)

The service of a subpoena is a matter of procedure covered by court rule (see Alaska Rules of Civil Procedure, Rule 45). Therefore most sections regarding subpoenas have been deleted. However, it is uncertain as to whether a peace officer would have authority to break into a building or vessel to serve the subpoena under court rule. Therefore the section is retained.

Sec. 3.02 (58-3-10)

Subpoenas generally are covered by rule of the supreme court (see Alaska Rules of Civil Procedure, Rule 45). However, this section creates a cause of action for the party who suffers from a witness who disobeys a subpoena, and it is therefore considered as substantive and retained.

Sec. 3.03 (58-3-8)

A person is in contempt of court if he is in attendance before the court on a subpoena and fails to testify (see Alaska Rules of Civil Procedure, Rule 45(a) and 45(f)). This section extends the power of the court over any person present in court.

Sec. 3.04 (58-6-14)

This is a substantive provision which exonerates a witness from civil arrest in the designated instances.

Sec. 3.07 (58-4-53)

This provision authorizes the court to employ interpreters when necessary.

Sec. 3.08 (58-4-52)

This section simply recognizes the court's authority to supervise the court room during trial, and specifically authorizes the court to remove witnesses if the interest of justice requires:

Sec. 3.09 (58-9-1 and 58-9-2)

This general authorization for the administration of oaths will be moved to the appropriate title in the bulk formal revision. The addition of Coast Guard commanders is based on Sec. 58-9-2. As for taking of testimony, see Rule 29(a), Rules of Civil Procedure.

Sec. 3.10 (58-1-11)

Under the present law sealed instruments are "abolished" yet recognized (*Conklin v. Grigsby*, 9 A 378 (1938)), and the statutory period of limitation is extended to 10 years (Sec. 55-2-3). See also Corbin on Contracts, Sec. 252. Since the meaning of this section is uncertain, no substantive change is made.

Sec. 3.11 (58-2-2 and 58-2-6)

Although the statute of frauds is concerned with procedure in a limited extent, the provisions are primarily based on other substantive policy considerations and are included as matters of substance. Subsec. (13) of the proposed section is added from Sec. 58-2-6. Subsecs. 2 and 3 of Sec. 58-2-2 are the subject of separate succeeding sections. The last paragraph of the proposed section is based on Subsec. 4 of Sec. 58-2-2.

Sec. 3.17 (58-7-6)

The use of the conclusive presumption is undoubtedly touching in the general area of procedure, but the substantive policy considerations seem to dominate. Therefore, the section has been retained as a substantive provision.

Sec. 3.19 (58-4-5)

The subject of publication of notice is covered in some states by court rule. Proposed Michigan Court Rules, Rule 10.6; New Jersey Revised Court Rules, Rule 4:4-5. But it is considered as a matter of substance for purposes of this revision.

Sec. 3.20 (58-7-5)

The public policy expressed in this section is apparently directed toward supporting the legislative purpose found in the divorce statutes. The purpose is to assure that a false confession may not be used by a husband or wife as an attempt to avoid the divorce statutes by collusion.

The material has been rearranged for placement under two general titles. The first title, "General Provisions," includes the material that might be applicable to any civil action. The second title, "Special Civil Actions," includes over 20 articles, each containing material pertinent to a particular type of civil action.

OUTLINE OF REVISED CODE OF CIVIL ACTIONS AND PROCEEDINGS:

TITLE I. GENERAL PROVISIONS

- Art. I Limitations of Actions
- Art. II Jury
- Art. III Witnesses and Evidence
- Art. IV Judgments
- Art. V Miscellaneous

TITLE II. SPECIAL CIVIL ACTIONS

- Art. VI Adverse Claims
- Art. VII Attachment
- Art. VIII Change of Name
- Art. IX Civil Arrest
- Art. X Contempt
- Art. XI Declaration of Death
- Art. XII Divorce and Annulment
- Art. XIII Eminent Domain
- Art. XIV Escheat
- Art. XV Execution
- Art. XVI Fines
- Art. XVII Forcible Entry and Detainer
- Art. XVIII Foreclosure
- Art. XIX Injunction
- Art. XX Lewd Houses
- Art. XXI Nuisances
- Art. XXII Partition
- Art. XXIII Receivers
- Art. XXIV Recovery of Personal Property
- Art. XXV Recovery of Real Property
- Art. XXVI Tort Claims
- ~~Art. XXVII Trespass~~
- Art. XXVIII Usurpation
- Art. XXIX Waste
- Art. XXX Miscellaneous

The following are our comments on each article generally, and on some of the individual sections therein.

TABLES OF SECTIONS

SENATE BILL NO. 105

Unless indicated otherwise, the rule numbers in the column entitled "ALASKA RULE NO." refer to the Alaska Rules of Civil Procedure.

CtAd	Alaska Rules Governing the Administration of all Courts
Sup	Rules of the Supreme Court of Alaska
Alaska	Rules of Civil Procedure
Iowa	Iowa Rules of Civil Procedure
Md	Maryland Rules of Procedure
Md Sp	Maryland Proposed Rules on Special Proceedings (1960)
Mich	Proposed Michigan Court Rules
NJ	New Jersey Revised Court Rules
Utah E	Proposed Utah Rules of Evidence
Crim	Alaska Rules of Criminal Procedure
Mc. E.	McCormick on Evidence
Mod E	Model Code of Evidence
Unif E	Uniform Rules of Evidence
Wig E	Wigmore on Evidence

ACLA, CS OR SLA SECTION	AMENDED BY CH. OF SLA	ALASKA RULE NO.	NEW RULE	OBSOLETE	NEW SECTION
58-4-62			Un E 20,21,22;Utah E 20,21,22;Wig E 1000		
58-4-63			Un E 46,47;Utah E 46,47;Wig E 54		
58-4-64			Mod E 105		
58-5-1			Mod E 5		
58-6-1			Un E 7,17;Utah E 7,17		
58-6-2			Un E 7,17;Utah E 7,17		
58-6-3			Un E 28; Utah E 28		
58-6-4			Un E 26; Utah E 26		
58-6-5			Un E 29; Utah E 29		
58-6-6			Un E 27; Utah E 27		
58-6-11		CtAd 9	Alaska 45		
58-6-12			Un E 25; Utah E 25		
58-6-13			Mod E 105		
58-6-14					3.04
58-6-15					3.05
58-6-16					3.06
58-7-1					3.21
58-7-2					3.22
58-7-3					3.16
58-7-4			Un E 23; Wig E 1061		
58-7-5					3.20
58-7-6	013/'57				3.17
58-7-7		5			
58-8-1		27			
58-8-2		27			
58-8-3		27			
58-8-4		27			
58-8-5		27			
58-8-6		27			
58-8-7		27			
58-8-8		27			
58-9-1		29(a)			3.09
58-9-2					3.09
58-9-3		43(d)			
58-9-4		43(d)			
58-9-5		43(d)			
58-9-6				X (65-7-1)	