#34(L) 2/24/64

First Supplement to Memorandum 64-9

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article I. General Provisions - Rule 8)

Attached to this memorandum is Rule 8 as revised in Exhibit II of Memorandum 64-9 together with a suggested comment. The version of Rule 8 attached shows changes from the existing URE rule by strikeout and underline.

The staff recommends this version of Rule 8 because it gives full effect to the exclusionary rules, it is consistent with existing law, and it does not permit the judge to usurp the fact-finding function of the jury.

We hope that you will study the rule and the comment prior to the meeting.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

First Supplement to
Memo 64-9

EXHIBIT I

RULE 8. PRELIMINARY INQUIRY BY JUDGE.

(1) As used in this rule:

(a) "Preliminary fact" means a fact upon the existence of which depends the admissibility or inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or non-existence of a privilege.

(b) "Proffered evidence" means evidence, the admissibility or inadmissibility of which is dependent on the existence of a preliminary fact.

(2) When the qualification or disqualification of a person to be a witness, or the admissibility or inadmissibility of evidence, or the existence or nonexistence of a privilege [~~is stated in these rules to be subject to a condition, and the fulfillment of the condition~~] depends on the existence of a preliminary fact, and the existence of the preliminary fact is in [~~issue~~] dispute, [~~the issue is to be determined by~~] the judge shall determine the existence of the preliminary fact as provided by this rule. [~~and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises.~~] The judge may hear and determine such matters out of the [~~presence or~~] hearing of the jury, except that on the admissibility of a confession or admission of a defendant in a criminal action, the judge, if requested, shall hear and determine the question out of the [~~presence and~~] hearing of the jury. In determining the existence of a preliminary fact under subdivisions (4), (5), and (6), exclusionary rules of evidence do not apply except for Rule 45 and the rules of privilege. [~~But~~] This rule [~~shall not be construed to~~] does not limit the right of a

party to introduce before the ~~[jury]~~ trier of fact evidence relevant to weight or credibility.

(3) Whenever the relevance of the proffered evidence depends on the existence of a preliminary fact, the proponent of the proffered evidence has the burden of producing evidence on the existence of the preliminary fact, and the proffered evidence is inadmissible unless there is evidence sufficient to sustain a finding of the preliminary fact. The judge may admit conditionally the proffered evidence, subject to the evidence of the preliminary fact being later supplied in the course of the trial. By way of illustration, and not by way of limitation, the proponent of the proffered evidence has the burden of producing evidence sufficient to sustain a finding of the preliminary fact in the following cases:

(a) When the disputed preliminary fact is one specified in Rule 19, 21(1), 56(1), 63(1), 63(7), 63(8), 63(9)(b), 63(9)(c), 67, 67.5, 68, 69, or 71.

(b) When the proffered evidence is hearsay and the disputed preliminary fact is whether the statement was made at all or was made by the claimed declarant.

(4) Subject to subdivision (3), whenever the admissibility of the proffered evidence depends on the existence of a preliminary fact, the proponent of the proffered evidence has the burden of proof as to the existence of the preliminary fact, and the proffered evidence is inadmissible if the proponent fails to meet the burden of proof. By way of illustration, and not by way of limitation, the proponent of the proffered evidence has the burden of proof as to the existence of the preliminary fact in the following cases:

(a) When the proffered evidence is claimed to be privileged and the disputed preliminary fact is whether the proffered evidence is within an exception to the privilege claimed.

(b) When the disputed preliminary fact is one specified in Rule 55.2, 70, or 72.

(c) When the proffered evidence is hearsay and the disputed preliminary fact is one that is not referred to in subdivision (3) or subdivision (5).

(5) Subject to subdivision (6), when the disqualification of a person to be a witness or the inadmissibility of evidence depends on the existence of a preliminary fact, the person objecting to the proffered evidence has the burden of proof on the preliminary fact, and the proffered evidence is admissible (if otherwise relevant and competent) if the person objecting to the proffered evidence fails to sustain the burden of proof as to the existence of the preliminary fact. By way of illustration, and not by way of limitation, the party objecting to the proffered evidence has the burden of proof as to the existence of the preliminary fact in the following cases:

(a) When the disputed preliminary fact is one required by Rule 17, 21(3), 52, 52.5, 53, or 62(7).

(b) Subject to paragraph (a) of subdivision (4), when the proffered evidence is claimed to be privileged.

(c) When the proffered evidence is hearsay and the disputed preliminary fact is whether the statement was made in bad faith as provided in Rule 63(12) or under such circumstances that the declarant had motive or reason to deviate from the truth as provided in Rule 63(23), Rule 63(24), or Rule 63(27.1).

(6) Whenever the proffered evidence is claimed to be privileged under Rule 25 and the disputed preliminary fact is whether the proffered evidence is incriminating, the person objecting to the proffered evidence has the

burden of producing evidence on the existence of the preliminary fact, and the proffered evidence is inadmissible if there is evidence sufficient to sustain a finding that the proffered evidence is incriminating.

COMMENT

Rule 8 generally. Rule 8 sets forth the well settled rule that preliminary questions of fact upon which the admissibility of evidence depends must be decided by the judge. Code Civ. Proc. § 2102; Reed v. Clark, 47 Cal. 194 (1873).

Under existing law, a judge determines some preliminary factual questions on the basis of all of the evidence presented to him by both parties, resolving any conflicts in that evidence. See, for example, People v. Glab, 13 Cal. App.2d 528, 57 P.2d 588 (1936), in which the judge considered conflicting evidence and decided that a proposed witness was not married to the defendant and, therefore, was competent to testify. On the other hand, on some preliminary factual questions, the judge does not resolve conflicts in the evidence submitted on the preliminary question, and the proffered evidence must be admitted upon a prima facie showing of the preliminary fact. For example, acts of an agent or co-conspirator are admissible against a defendant upon a prima facie showing of the agency or conspiracy. Union Constr. Co. v. Western Union Tele. Co., 163 Cal. 298, 125 Pac. 242 (1912); People v. Steccone, 36 Cal.2d 234, 223 P.2d 17 (1950).

Rule 8 has been expanded to define clearly those situations in which the judge must be persuaded of the existence of the preliminary fact and those situations where he must admit the evidence upon a prima facie showing of the preliminary fact.

Subdivision (1). The terms "preliminary fact" and "proffered evidence" have been defined in the interest of clarity.

"Preliminary fact" is defined to distinguish a fact upon which the admissibility of evidence depends from the fact sought to be proved by that evidence. The URE uses the word "condition" for this purpose. The word "condition" is confusing, however, for it implies that a rule must be worded conditionally, i.e., with "if" or "unless", for Rule 8 to apply. The use of the term "preliminary fact" makes clear that Revised Rule 8 applies to all preliminary fact determinations.

"Proffered evidence" is defined to avoid confusion between the evidence whose admissibility is in question and the evidence offered on the preliminary fact issue. "Proffered evidence" includes the testimony of a witness who is claimed to be disqualified; it includes testimony or tangible evidence claimed to be privileged; and it includes any other evidence to which objection is made.

Subdivision (2). This subdivision sets forth the general rule that preliminary questions of fact upon which the admissibility of evidence depends are to be decided by the judge. The jury does not participate in the process of determining whether evidence is admissible, i.e., whether it may be considered by the trier of fact. Evidence relevant to weight and credibility, however, may be presented to the jury, and in some cases this evidence may be the same evidence considered by the judge on the question of admissibility.

For example, the judge determines whether a witness offered as an expert is in fact an expert. The jury is not asked to review the witness's qualifications and exclude his testimony from consideration if it determines that he is not an expert. But it may consider the witness's qualifications in determining the weight to give his testimony.

In some cases, a judge's ruling on the admissibility of evidence is merely a preliminary determination that there is sufficient evidence on the

question to permit the jury to decide the disputed question. For example, if plaintiff P claims that representations in a letter purportedly written by defendant D constitute part of an agreement between P and D, the judge, before admitting the letter as evidence, must decide preliminarily if there is sufficient evidence of the authenticity of the letter to permit the jury to find that it is authentic. If there is evidence sufficient to sustain a finding of authenticity, the judge must admit the letter and permit the jury to decide finally whether or not the letter is actually authentic.

Here, too, the judge's ruling on the question of admissibility is final. The ruling on admissibility is not reviewed by the jury in the sense that the jury decides whether or not the evidence can be considered. The jury considers the evidence and decides whether or not to believe it.

Subdivision (2) is generally expressive of existing California law; however, it will change the California law in several significant respects that are discussed below.

Subdivision (2)--preliminary hearing on confession. Subdivision (2) provides that, on request, the judge is required to determine the admissibility of a confession out of the presence of the jury. Under existing law, whether the preliminary hearing is held out of the presence of the jury is left to the judge's discretion. People v. Gonzales, 24 Cal.2d 870, 151 P.2d (1944); People v. Nelson, 90 Cal. App. 27, 31, 265 Pac. 366 (1928).

The existing rule permits evidence that may be extremely prejudicial to be heard by the jury. For example, in People v. Black, 73 Cal. App. 13, 238 Pac. 374 (1925), the alleged coercion consisted of threats to send the defendants to New Mexico to be prosecuted for murder. To avoid this kind of prejudice, subdivision (2) forbids the conduct of the preliminary hearing in

the presence of the jury if the defendant objects.

Subdivision (2)--confessions, dying declarations, spontaneous statements. Under existing California law, the rulings of the judge on the admissibility of confessions, dying declarations, and spontaneous statements are not final. If the judge decides preliminarily that the evidence is admissible, he submits the matter to the jury for a final determination whether the confession was voluntary, whether the dying declaration was made in realization of impending doom, or whether the spontaneous statement was in fact spontaneous; and the jury is instructed to disregard the statement if it does not believe the condition of admissibility has been satisfied. People v. Baldwin, 42 Cal.2d 858, 866-67, 270 P.2d 1028 (1954)(confession--see instruction at 866); People v. Gonzales, 24 Cal.2d 870, 876-77, 151 P.2d 251 (1944)(confession); People v. Singh, 182 Cal. 457, 476, 181 Pac. 987 (1920)(dying declaration); People v. Keelin, 136 Cal. App.2d 860, 871, 289 P.2d 520 (1955)(spontaneous declaration).

Under Revised Rule 8, the judge's rulings on these questions will be final. The jury will not get a "second crack." The change is desirable. The existing rule is a temptation to the weak judge to avoid difficult decisions by "passing the buck" to the jury. The existing rule requires the jury members to perform the impossible task of erasing the hearsay statement from their minds if they conclude that the condition of admissibility has not been met. A complex instruction to this effect is needed. Frequently, the evidence presented to the judge out of the jury's presence must again be presented to the jury so that it can rule on the admissibility question intelligently.

Revised Rule 8 deals only with the admission of evidence at the trial level. Hence, the finality of the judge's rulings on the admissibility of confessions will have no effect on the well-settled rule that an appellate

court will make an independent determination of the voluntariness of a confession upon the basis of the uncontradicted facts or the facts as found by the trial court. Watts v. Indiana, 338 U.S. 49, 50-52 (1948); People v. Trout, 54 Cal.2d 576, 583, 6 Cal. Rptr. 759, 354 P.2d 231 (1960); People v. Baldwin, 42 Cal.2d 858, 867, 270 P.2d 1028 (1954).

Subdivision (2)--admissibility of evidence on preliminary determination by judge. Subdivision (2) provides that most exclusionary rules of evidence do not apply during a preliminary hearing held by the judge to determine whether evidence is admissible under subdivisions (4), (5), and (6). However, the privilege rules are applicable and the judge may exclude evidence under Rule 45 if it is cumulative or of slight probative value. Subdivisions (4), (5), and (6) provide the procedure for determining the admissibility of evidence under rules designed to prevent the introduction of evidence either for reasons of public policy or because the proffered evidence is too unreliable. Subdivision (3) provides the procedure for determining whether there is sufficient competent evidence on a particular question to permit that question to be submitted to the jury; hence, all rules of evidence must apply to a hearing held under subdivision (3).

Under existing California law, the rules governing the competency of evidence do apply during the preliminary hearing. People v. Plyler, 126 Cal. 379, 58 Pac. 904 (1899)(affidavit cannot be used to show death of witness at preliminary hearing to establish foundation for introduction of former testimony at trial).

This change in California law is desirable. Many reliable, and in fact admissible, hearsay statements must be held inadmissible if the formal rules of evidence apply to the preliminary hearing. For example, if witness W hears X shout, "Help! I'm falling down the stairs", the statement is admissible only if the judge finds that X was actually falling down the stairs while the statement was being made. If the only evidence that he was falling down the stairs is the statement itself, or the statements of bystanders who can no longer be identified, the statement must be excluded. Although the statement is admissible as a substantive matter under the hearsay rule, it must be held inadmissible if the formal rules of evidence are rigidly applied during the judge's preliminary inquiry.

The formal rules of evidence have been developed largely to prevent the presentation of weak and unreliable evidence to a jury of laymen, untrained in sifting evidence. Thayer, Preliminary Treatise on Evidence, 509 (1898). The hearsay rule is designed to assure the right of a party to cross-examine the authors of statements being used against him. Morgan, Some Problems of Proof 106-17 (1956). Where factual determinations are to be made solely by the judge, the right of cross-examination is not uniformly required and he is permitted to determine the facts entirely from hearsay in the form of affidavits and to base his ruling thereon. Code Civ. Proc. § 2009 (general rule); Code Civ. Proc. § 657 subd. 2 (affidavits used to show jury misconduct): Buhl v. Wood Truck Lines, 62 Cal. App.2d 542, 144 P.2d 847 (1944)(jury misconduct); Church v. Capital Freight Lines, 141 Cal. App.2d 246, 296 P.2d 563 (1956)(competency of juror); and see Cont.

Ed. Bar, California Condemnation Practice 208 (1960)(affidavits used to determine amount of immediate possession deposit in eminent domain case); see also Witkin, California Procedure 1648 (1954).

No reason is apparent for insisting on a more strict observation of the rules of evidence on matters to be decided by the judge alone when the question is raised during trial than when the question is raised before or after trial. In ruling on the admissibility of evidence, he should be permitted to rely on affidavits and other hearsay that he deems reliable. Accordingly, Revised Rule 8 is recommended in order to provide utmost assurance that all relevant and competent evidence will be presented to the trier of fact.

Subdivision (3). Subdivision (3) has been added to cover rulings on the relevancy of evidence where the relevancy depends on the existence of a preliminary fact. These rulings are made by the judge on the basis of a prima facie showing of the existence of the preliminary fact. Under subdivision (3), as under existing law, a judge's rulings on questions of relevancy are preliminary only--that is, the questions decided by the judge are ultimately decided by the jury--because the judge is passing on the basic issues in dispute between the parties. The judge merely decides if there is sufficient evidence to permit a jury decision on the question. If the judge's rulings were final, he would deprive a party of a jury decision on a question that the party has a right to have the jury decide. For example, if the question of A's title to land is in issue, A may seek to prove his title by deed from a former owner, O. Rule 67 requires that the deed be authenticated, and the judge, under Rule 8, must rule on the question of authentication. If A introduces sufficient evidence to sustain a finding of the genuineness of

the deed, the judge is required to admit it. If the judge, on the basis of the adverse party's evidence, decided that the deed was spurious and not admissible, the judge would have resolved the basic factual issue in the case. A would be deprived of a jury finding on the issue even though entitled to a jury decision and even though he had introduced sufficient evidence to warrant a jury finding in his favor.

Hence, in ruling on questions of relevancy, the judge's rulings are preliminary only. He does not decide finally whether a document is authentic or whether a witness has personal knowledge; if he did so he would be usurping the function of the jury.

Existing California law is in accord. If P seeks to fasten liability upon D, evidence as to the actions of A is inadmissible because irrelevant unless A is shown to be the agent of D. On this question, the California cases agree, evidence as to the actions of A is admissible upon a prima facie showing of agency only. Brown v. Spencer, 163 Cal. 589, 126 Pac. 493 (1912). The same rule is applicable when a person is charged with criminal responsibility for the acts of another because they are conspirators. See discussion in People v. Steccone, 36 Cal.2d 234, 238, 223 P.2d 17 (1950).

Because it is not always clear when a preliminary question is one of relevancy, the subdivision lists by way of illustration many of the preliminary fact questions that may arise under the rules that should be decided by the judge under subdivision (3). The illustrative matters listed are:

Rule 19--the requirement of personal knowledge. A prima facie showing of personal knowledge seems to be sufficient under the existing California practice. See, for example, People v. Avery, 35 Cal.2d 487, 492, 218 P.2d

527 (1950)("Bolton testified that he observed the incident about which he testified. His testimony, therefore, was not incompetent under section 1845 of the Code of Civil Procedure."); People v. McCarthy, 14 Cal. App. 148, 151, 111 Pac. 274, 275 (1910).

Rule 21(1)--conviction of a witness for a crime, offered to attack credibility. The only preliminary fact issue would be whether the person convicted was actually the witness. This involves the relevancy of the evidence and should be a question to be resolved by the jury. The judge should not be able to decide finally that it was the witness who was convicted and prevent a contest of that issue before the jury. The existing law is uncertain in this regard; however, it seems likely that prima facie evidence of the identity of the person convicted is sufficient to warrant admission of the evidence. See People v. Theodore, 121 Cal. App.2d 17, 28, 262 P.2d 630 (1953)(relying on presumption of identity of person from identity of name). Subdivision (3) does not affect the special procedural rule in Rule 21 itself requiring the proponent of the evidence to make the preliminary showing out of the hearing of the jury.

Rule 56(1)--requires lay opinion to be based on personal perception. This is merely a specific application of the personal knowledge requirement in Rule 19.

Rule 63(1)--pretrial statements of witnesses. These are prior inconsistent statements, prior consistent statements made before bias arose, and recorded memory. In each case, the evidence is relevant and probative if the witnesses to the statements are credible, and the credibility of the witnesses testifying to these statements should be decided finally by the jury. Hence, evidence should be admitted upon prima facie evidence of the preliminary

fact. California cases discussing the nature of the foundational showing required are few. However, the practice seems to be consistent with the procedure provided here, for the cases permit the prior statements to be admitted merely upon the proponent's showing. See, Schneider v. Market Street Ry., 134 Cal. 482, 492, 66 Pac. 734 (1901)(prior inconsistent statement); People v. Kynette, 15 Cal.2d 731, 753 (1940)(prior consistent statement); People v. Zammora, 66 Cal. App.2d 166, 224, 152 P.2d 180 (1944)(recorded memory).

Rule 63(7)--admissions of a party. Existing California law apparently requires but a prima facie showing that the party made the alleged statement. Eastman v. Means, 75 Cal. App. 537, 242 Pac. 1089 (1925).

Rule 63(8)--authorized and adoptive admissions. Under existing law, both the question of authorized and the question of adoptive admissions are treated as relevancy questions, and the proffered evidence is admissible upon a prima facie showing of the foundational fact. Sample v. Round Mountain Citrus Farm Co., 29 Cal. App. 547, 156 Pac. 983 (1916)(authorized admission); Southers v. Savage, 191 Cal. App.2d 100, 12 Cal. Rptr. 470 (1961)(adoptive admission).

Rule 63(9)(b)--admission of co-conspirator. Under existing law, an admission of a co-conspirator is admissible upon a prima facie showing of the conspiracy. People v. Robinson, 43 Cal.2d 132, 137, 271 P.2d 865 (1954).

Rule 63(9)(c)--admissions of third persons whose liability is in issue. Under existing California law, the preliminary showing required is the same as if the declarant were being sued directly; hence, a prima facie showing of the making of the statement is sufficient to warrant its admission. Langley v. Zurich General Accident & Liability Insur. Co., 219 Cal. 101 (1933).

Rules 67, 67.5, 68, 69--authentication of writings. Under existing law, a writing is admissible upon introduction of evidence sufficient to sustain a finding of the authenticity of the writing. Verzan v. McGregor, 23 Cal. 339 (1863).

Rule 71--proof of execution of witnessed writings. The only preliminary issue apt to arise is whether a witness actually saw the writing executed. This is merely a specific application of the personal knowledge requirement of Rule 19.

Hearsay. For most hearsay evidence, admissibility depends upon two preliminary determinations: (1) Did the declarant actually make the statement as claimed by the proponent of the evidence? (2) Does the statement meet the admissibility standards of some exception to the hearsay rule?

The first determination involves the relevancy of the evidence. For example, if the issue is the state of mind of X, a person's statement of 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 should be admitted upon a prima facie showing that the claimed declarant made the statement.

The second determination involves the competency of the evidence. It must meet the requisite standards of an exception to the hearsay rule or, despite its relevance, it must be kept from the trier of fact because it is too unreliable or because public policy requires its suppression. For example, if an admission was in fact made by a defendant to a criminal action, the admission is relevant. But public policy requires that the admission be held inadmissible if it was not given voluntarily.

The admissibility of some hearsay declarations is dependent solely upon

the determination that the statement was made by the declarant claimed by the proponent of the evidence. Some of these exceptions to the hearsay rule--such as prior statements of trial witnesses, admissions--are specifically identified in paragraph (a) of subdivision (3). As the only preliminary fact to be determined involves the relevancy of the evidence, these declarations should be admitted upon a prima facie showing of the preliminary fact.

Paragraph (b) is included in subdivision (3) to make clear that when the admissibility of hearsay depends both upon a determination that a particular declarant made the statement and upon a determination that the requisite standards of a hearsay exception have been met, the former determination is to be made upon evidence sufficient to sustain a finding of the preliminary fact.

Subdivision (4). Subdivision (4) prescribes the preliminary fact finding procedure when the competence of evidence depends on the existence of some preliminary fact. The subdivision is "subject to subdivision (3)" because it is drafted to apply to all cases where evidence is admissible if a preliminary fact is determined to exist. As this language also applies to the situations listed in subdivision (3), subdivision (4) has been made "subject to subdivision (3)" in order to provide assurance that all relevance questions will be decided under the standards set forth in subdivision (3).

The proponent of the evidence has the burden of proof as to the existence of the preliminary fact on questions arising under subdivision (4). Therefore, the judge, before admitting the evidence, must consider all of the evidence of both the proponent of the evidence and the party objecting, and he must be persuaded of the existence of the preliminary fact. If the judge is not persuaded, he must exclude the proffered evidence.

Subdivision (4) is generally consistent with existing California law. See Code Civ. Proc. § 2102; Risley v. Lenwell, 129 Cal. App.2d 608, 634, 277 P.2d 897 (1954) (qualifications of expert to be determined by judge alone).

The illustrative matters listed are:

Privilege exceptions. Most of the exceptions to the privilege rules do not involve a preliminary fact question; the relevancy of the information sought determines the application of the privilege. A few exceptions, however, may involve a disputed preliminary fact. For example, there is an exception to most of the communication privileges (attorney-client, doctor-patient, husband-wife) for communications made to enable anyone to commit a crime. Subdivision (4) provides that the proponent of the evidence has the burden of persuading the judge that the proffered communication was made to enable someone to commit a crime.

Under existing California law, the proponent of evidence may not be required to persuade the judge that a proffered communication was made to facilitate a contemplated crime; he may be required to make but a prima facie showing that a crime was contemplated. See Agnew v. Superior Court, 156 Cal. App.2d 838, 840, 320 P.2d 158 (1958); Abbott v. Superior Court, 78 Cal. App.2d 19, 21, 177 P.2d 317 (1947); Witkin, California Evidence § 420. Such a standard, however, weakens the privilege to too substantial a degree. The policy of the law is to protect disclosures between attorneys and clients, doctors and patients, and husbands and wives. If that policy is to be effective, the privilege should not disappear, merely because there is some evidence that the particular communication might have been in contemplation of a crime, when the judge is not persuaded that the communication was probably for the proscribed purpose.

Rule 55.5--qualifications of an expert witness. Under existing law, too, the proponent must show his expert to be qualified, and it is error for the judge to submit the qualifications of the expert to the jury. Eble v. Peluso, 80 Cal. App.2d 154, 181 P.2d 680 (1947); Fairbank v. Hughson, 58 Cal. 314 (1881).

Rule 70, 72--best evidence rule and photographic copies as best evidence rule. Subdivision (4) requires the proponent of the evidence to persuade the judge of the existence of any fact necessary to establish an exception to the best evidence rule permitting introduction of a copy of a writing. Of course, if the disputed fact is the authenticity of the original writing, the proponent need introduce only prima facie evidence of that fact under the provisions of subdivision (3). See Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 489-91 (1946).

Existing law also requires the trial judge to determine the preliminary fact necessary to warrant the reception of secondary evidence of a writing. Cotton v. Hudson, 42 Cal. App.2d 812 (1941).

Hearsay. Paragraph (c) of subdivision (4) requires the proponent of a hearsay declaration to persuade the trial judge of the spontaneity of a statement offered as a spontaneous declaration, the death of the declarant and his sense of impending doom when making a statement offered as a dying declaration, the voluntariness of a confession, the unavailability of the declarant (if the hearsay exception is conditioned on unavailability), and the existence of any other fact which is stated to be a condition of an exception to the hearsay rule.

The only preliminary facts arising under the hearsay rule that are not determined in accordance with subdivision (4) are those discussed above

in connection with subdivision (3) and certain limitations on the admissibility of hearsay that are discussed below in connection with subdivision (5).

Under existing law, too, the judge is required to determine whether proffered hearsay meets the conditions of an exception. However, under Revised Rule 8, the question of the voluntariness of a confession, the spontaneity of a spontaneous declaration, and the realization of impending death by the maker of a dying declaration will not again be submitted to the jury under an instruction to disregard the statement if the preliminary fact is found not to exist. Cf. People v. Baldwin, 42 Cal.2d 858, 866-67, 270 P.2d 1028 (1954)(confession, see instruction in note at 866); People v. Singh, 182 Cal. 457, 476, 188 Pac. 987 (1920)(dying declaration); People v. Keelin, 136 Cal. App.2d 860, 871, 289 P.2d 520 (1955)(spontaneous declaration); see discussion, above, under subdivision (2).

Subdivision (5). This subdivision states the general rule when a preliminary fact is made a condition of the inadmissibility of evidence. Here, the burden of proof on the preliminary fact is on the person asserting the inadmissibility of the proffered evidence.

The subdivision is subject to subdivision (6), because subdivision (6) provides that a person objecting to evidence on the ground of the self-incrimination privilege does not have the burden of proof on the preliminary fact, he has merely the burden of producing evidence.

The illustrative matters set forth are:

Rule 17--disqualification of a witness for mental incapacity.

Rule 21(3)--conviction of a crime when offered to attack credibility and the disputed preliminary issue is whether a pardon has been granted.

Rule 52, 52.5, 53--admissions made during compromise negotiations. The objecting party has the burden of proof on the question whether an admission actually occurred during compromise negotiations.

Rule 63(7)--unavailable as a witness. The party objecting to hearsay evidence has the burden of showing that the proponent of the evidence procured the unavailability of the hearsay declarant.

Privileges generally--the objecting party has the burden of proof on the facts that show the proffered evidence is subject to a claim of privilege. This paragraph is subject to subdivision (4), because subdivision (4) provides that the proponent of the evidence has the burden of proof on the preliminary facts that show an exception applies.

Limitations on hearsay exceptions--bad faith under the state of mind exception in Rule 63(12), lack of motive to deceive under exceptions for statements concerning family history of declarant (Rule 63(23)) or another (Rule 63(24)) and for statements concerning boundary (Rule 63(27.1)).

To the extent that California cases can be found on the illustrative matters listed, they are in accord that the burden of proof is on the objecting party to establish that the proffered evidence is inadmissible. San Diego Professional Ass'n v. Superior Court, 58 Cal.2d 194, 199, 23 Cal. Rptr. 384, 373 P.2d 448 (1962); Chronicle Pub. Co. v. Superior Court, 54 Cal.2d 548, 565, 7 Cal. Rptr. 109, 354 P.2d 637 (1961); Dwelly v. McReynolds, 6 Cal.2d 128, 131 (1936); People v. Craig, 111 Cal. 460, 469 (1896); People v. Gasser, 34 Cal. App. 541, 543 (1917); People v. Harden, 24 Cal. App. 522, 523 (1914); People v. Tyree, 21 Cal. App. 701, 706 (1913).

Subdivision (6). Subdivision (6) has been added to Revised Rule 8 to provide a special procedure to be followed by the judge when an objection is made in reliance upon the privilege against self-incrimination.

Subdivision (6) provides that the objecting party has the burden of producing evidence, but not the burden of proof, on the question whether the proffered evidence is actually incriminating. If the objecting party produces evidence indicating that the information sought might be incriminating, the judge must sustain the claim of privilege.

Subdivision (6) is consistent with existing California law. Under existing law, the party claiming the privilege "has the burden of showing that the testimony which was required might be used in a prosecution to help establish his guilt." Cohen v. Superior Court, 173 Cal. App.2d 61, 68, 343 P.2d 286 (1959). And the court may require the testimony to be given only if "it clearly appears to the court" that the claim of privilege is mistaken and "that the answer(s) cannot possibly have such tendency [to incriminate]." Cohen v. Superior Court, 173 Cal. App.2d 61, 70, 72, 343 P.2d 286 (1959).

Respectfully submitted,

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