ROLE OF JUDGE WHERE PRELIMINARY QUESTION OF COMPETENCY COINCIDES WITH ULTIMATE ISSUE

THE *LUTWAK* CASE

The recent case of *United States v. Lutwak*[1] reflects the tendency to depart from the orthodox rule[2] that where the competency[3] of an item of evidence depends on the existence of a disputed fact, the judge is to determine this preliminary fact on a preponderance of all the evidence.[4] In the *Lutwak* case, two aliens obtained entry into the United States under the War Bride Act[5] as spouses of American citizens honorably discharged from the armed forces. The United States prosecuted the aliens on a count of conspiracy to obtain entry into this country by willfully false representations,[6] and to defraud the government of its right to administer the immigration laws by effectuating the illegal entry.[7] The gravamen of the alleged conspiracy was that the marriage ceremonies which enabled the aliens to enter the United States had resulted in nothing more than "sham marriages." In the course of the trial, the prosecution called the alleged spouses to testify against the defendants, whereupon defendants claimed their spousal privilege. Thus the preliminary question of fact, the validity of the marriages, coincided with the ultimate issue for the jury. District Judge Barnes, without a voir dire examination, overruled defendants' objection, stating: "There has been plenty of testimony here which certainly makes it a question of fact as to whether this woman is the wife of [defendant]. I will submit it to the jury and let this woman testify."[8] On appeal, the Seventh Circuit approved this procedure, stating that on the basis of evidence submitted before the question of competency arose the trial court had "obviously believed that a prima facie case of invalidity of the marriages had been presented."[9]

[1] 195 F. 2d 748 (C.A. 7th, 1952), appeal pending S. Ct., No. 775.

[2] See Maguire, Evidence: Common Sense and Common Law 224 (1947).

[3] Where admissibility of the questioned evidence turns on relevancy, as opposed to competency, the existence of the preliminary fact is normally for the jury. See Morgan, Functions of Judge and Jury in Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165, 169 (1929); Maguire and Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392, 404 (1927). But cf. 9 Wigmore, Evidence § 2550 (3d ed., 1940).

[4] The ordinary rules of evidence do not apply in preliminary rulings by a judge on the admissibility of evidence. 5 Wigmore, Evidence § 1385(1) (3d ed., 1940).

[5] 59 Stat. 659 (1945), as amended, 8 U.S.C.A. § 232 et seq. (1951).

[6] 45 Stat. 1551 (1929), 8 U.S.C.A. § 180a (1942).

[7] 62 Stat. 771 (1948), 18 U.S.C.A. § 1546 (1950).

[8] Transcript of Record at 187, United States v. Lutwak, 195 F. 2d 748 (C.A. 7th, 1952), appeal pending S. Ct., No. 775.

[9] United States v. Lutwak, 195 F. 2d 748, 761 (C.A. 7th, 1952), appeal pending S. Ct., No. 775. The Appellate Court in its initial opinion, January 3, 1950, had first explained that since the jury had found the marriages to be invalid, it necessarily followed that the witnesses were competent to testify. This part of the opinion was deleted at denial of rehearing. The

The prima facie standard,[10] a somewhat imprecise concept in itself,[11] is only one of the variations to which courts have subjected the orthodox rule in coincidence cases. The proponent of the evidence may be required to make only a showing from which the existence of the preliminary fact "may be fairly inferred."[12] Or the evidence may be admitted if there is other testimony "tending materially to show"[13] the existence of the preliminary fact. Both of these phrases may in effect be identical with the prima facie rule. As a further variation, the trial judge may admit the evidence without any initial showing whatsoever, on condition that the proponent "corroborate" the existence of the preliminary fact at some later point in this case.[14] The evidence may be sent to the jury as a "question of fact," which would seem to require a showing by the proponent that would permit reasonable men to infer the existence of the preliminary fact.[15] Or the whole matter may simply be left to the "discretion" of the trial judge.[16] But regardless of the form of words employed, each of these variations

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court then argued that the objection of spousal incompetency should no longer be recognized, but "[i]f we be wrong in this conclusion, then we think that, for another reason, the condition of the record here was such that the court was justified in permitting them to testify. . . . The court obviously believed that a prima facie case of invalidity of the marriages had been presented."

[10] The use of a prima facie standard in the Lutwak case is not novel. Cf. Clark v. United States, 289 U.S. 1 (1933). Other cases, employing a prima facie test for the preliminary fact of conspiracy where this fact coincides with the ultimate issue, are: Machio v. Breunig, 125 Conn. 113, 3 A. 2d 670 (1939); Kight v. American Eagle Fire Ins. Co. of New York, 125 Fla. 608, 170 So. 664 (1936); McCutchan v. Kansas City Life Ins. Co. of Kansas City, 122 S.W. 2d 59 (Mo. App., 1938); State v. McLaughlin, 132 Conn. 325, 44 A. 2d 116 (1945); Hamilton v. Standard Oil Co. of California, 190 Wash. 496, 68 P. 2d 1031 (1937).

[11] See 9 Wigmore, Evidence § 2494(1), (2) (3d ed., 1940). The second meaning is the appropriate one in this context.

[12] Bartlett v. United States, 166 F. 2d 920, 925 (C.A. 10th, 1948) (agency).

[13] J. C. Lysle Milling Co. v. S. W. Holt & Co., 122 Va. 565, 95 S.E. 414, 416 (1918), a modification of the standard agency doctrine that an alleged agent cannot testify to his own agency. Cf. cases cited, Maguire and Epstein, op. cit. supra note 3, at 419 n. 78.

[14] United States v. U.S. Gypsum Co., 67 F. Supp. 397 (D.C. D.C., 1946). The court held that though admission of declarations subject to a promise of independent proof of conspiracy and connection of defendants with it was within the discretion of the trial court, the promise had not been fulfilled.

[15] Chadwick v. Wiggin, 95 Vt. 515, 116 Atl. 74 (1922) (agency). The court apparently thought that the preliminary fact was for the jury because of the jury's role as the paramount fact-finding body.

Accord: People v. Talbott, 65 Cal. App. 2d 654, 151 P. 2d 317 (1944). The court held that a statute requiring the fact of conspiracy to be proved before declarations against co-conspirators could be admitted permitted proof of that fact on a prima facie standard rather than by a preponderance standard in civil cases or a standard requiring proof beyond a reasonable doubt in criminal cases. But the court said that since it could not really determine the preliminary question (in view of the coincidence with the ultimate issue) the evidence would be received conditionally subject to later determination by the jury. It should be noted that substantial evidence for the fact had already been presented. Cf. Smith v. Barrick, 151 Ohio 201, 85 N.E. 2d 101 (1949).

[16] Wiborg v. United States, 163 U.S. 632 (1896).

relaxes to some extent the proponent's burden of convincing the judge by a preponderance of the evidence that the preliminary fact exists. To just that extent, evidence which would be excluded by the strict operation of the technical exclusionary rules may go to the jury. Thus, all of these variations raise the question: What reasons, if any, justify deviating from the orthodox rule in coincidence cases? Parenthetically, it may be observed that the question is of special interest in federal criminal cases in view of the fact that Rule 26 of the Federal Rules of Criminal Procedure permits the federal courts to interpret the common law of competency of evidence "in the light of reason and experience."[17]

Against the application of the orthodox rule in coincidence cases it may be argued that:

(1) The court will sometimes foreclose the jury's decision by excluding evidence which may be decisive. This seems to be inconsistent with a guarantee of trial by jury, or to involve a "usurpation" of the jury's fact-finding role by the judge.[18]

(2) It is a waste of time, effort and money to require the same evidence to be presented twice: once on the voir dire and again on the merits.[19]

(3) The preliminary question of fact in coincidence cases is inseparable from the ultimate issue for the jury; it has "no true independent identity."[20] As such, it should be decided by either judge or jury, but not both. Since the decision on the ultimate issue is entrusted to the jury, the judge should not be permitted to exclude evidence by an independent preliminary decision.

(4) A relaxation of the orthodox rule is a convenient way to undercut technical exclusionary rules that have outlived their usefulness.[21]

The first argument concerns the "usurpation" of the jury's role. In the case of *State v. Lee*,[22] which influences much of the discussion on this point, it was agreed that the husband of X had committed the murder for which defendant was being tried. The defendant offered X as a witness to testify that defendant was not her husband. The Louisiana rule at that time excluded both favorable

[17] See The Search for Reason and Experience Under the Funk Doctrine, 17 Univ. Chi. L. Rev. 525 (1950).

[18] See People v. Doran, 246 N.Y. 409, 416–18, 428, 432, 159 N.E. 379, 381–82, 386, 388 (1927), discussed in Maguire, op. cit. supra note 2, at 220.

[19] Morgan, op. cit. supra note 3, at 188.

[20] Maguire and Epstein, op. cit. supra note 3, at 418. But cf. Maguire, op. cit. supra note 2, at 219.

[21] Cf. Morgan, op. cit. supra note 3, at 189–91. One further possible argument for relaxation of the orthodox standard of admissibility in coincidence cases is that if the judge takes jurisdiction over the preliminary question, he will improperly convey to the jury an implied expression of his opinion on the cardinal issue of the case. Yet even if the jury could understand the import of the judge's decision on the preliminary fact, which is problematical at best, the judge could prevent the jury from hearing his decision by retiring them during the determination of this question. Consult Maguire, Evidence: Common Law and Common Sense 218 (1947).

[22] 127 La. 1077, 54 So. 356 (1911).

and adverse spousal testimony. The judge, in a preliminary hearing, found that X was in fact defendant's wife, and thus excluded the most knowledgeable witness on the basis of a determination of fact which coincided with the ultimate issue for the jury. Since the evidence excluded was decisive, it might be argued that the judge rather than the jury in effect decided the guilt of the defendant, and on a standard of preponderance of the evidence rather than one requiring the trier to be convinced of the fact beyond a reasonable doubt.

This objectionable result of the strict application of the orthodox rule is limited to cases where evidence for the defendant is excluded.[23] It would not occur where the judge *admitted* the evidence,[24] or where he excluded evidence *against* the defendant. Furthermore, the judge may in effect foreclose the jury's decision whenever he excludes important evidence on the basis of a technical rule, even though no coincidence between preliminary fact and ultimate issue is involved. If this is considered "usurpation" of the jury's function, the argument reduces itself to the notion that the value of a jury decision on all the relevant evidence outweighs the value of the exclusionary rules themselves.[25]

The argument that the preliminary examination is a wasteful procedure is also at bottom an attack on the value of the exclusionary rules, as Professor Morgan has pointed out.[26] But it has been suggested that under a relaxed standard where proponent's showing need only be such as to permit reasonable men to infer the existence of the preliminary fact, a preliminary hearing may still be required.[27] In this event, any saving of time would be minimal. It should be

[23] This seems to be a very limited group. In fact, the rule of incompetency invoked in State v. Lee itself, which prohibited a wife from testifying for her husband, has today been generally repudiated. Funk v. United States, 290 U.S. 371 (1933).

[24] The somewhat vague feeling that inequity results from the judge's determination of a preliminary question of fact which coincides with the ultimate issue for the jury occasionally is the basis of criticism where the judge *admits* evidence against defendants. Thus it was urged by counsel in the Lutwak case that by permitting the wives to testify, "the trial court invaded the province of the jury to determine the fact question as to the validity of the marriages. This is necessarily so, for the trial court could not have allowed the wives to testify unless it determined the marriages were invalid, as, in fact, it did." Petition for Rehearing at 6, United States v. Lutwak, 195 F. 2d 748 (C.A. 7th, 1952). The defendant in People v. MacDonald, 24 Cal. App. 2d 702, 76 P. 2d 121 (1938), likewise contended that the judge in overruling defendant's objection on competency took away the most important question for the jury. However, the judge only decides the preliminary fact for purposes of admissibility; and the fact that hs is deciding a "fact which is for the jury" does not prevent the jury from giving its own decision on that fact ultimately on the basis of all the evidence.

[25] In Miles v. United States, the Appellate Court said that even if proof of bigamy were rendered difficult by exclusion of both wives' testimony against defendant, "this is not a consideration by which we can be influenced." Miles v. United States, 103 U.S. 304, 315 (1881); cf. Matz v. United States, 158 F. 2d 190 (App. D.C., 1946). Miles v. United States holds that the judge is to establish the preliminary fact of defendant's prior marriage, by the proof offered, "to his satisfaction." This formulation, though somewhat ambiguous, seems to indicate that the judge is to apply the orthodox standard in coincidence cases where the purpose of the technical rule is the protection of a favored relationship.

[26] Morgan, op. cit. supra note 3, at 188–89.

[27] Maguire and Epstein, op. cit. supra note 3, at 415.

noted, however, that a relaxed standard for the judge has apparently never been coupled with a preliminary hearing.[28] Instead, the judge decides whether the standard has been satisfied solely on the basis of evidence presented by the proponent in the trial proper.

The notion that preliminary fact and ultimate issue in coincidence cases are "inseparable" and so cannot be decided at different times by judge and jury appears to be a mere verbalism. The fact is that the two are analytically separable —one going to admissibility and the other to the merits. The idea that since the jury is entrusted with the decision on the merits it might as well be trusted with all the evidence on the merits begs the very question in issue. The jury is "trusted" to rule on the merits only on the basis of evidence that has satisfied the technical rules of admissibility. And even the "trust the jury" argument can only be advanced for the admission of "untrustworthy" evidence (e.g., hearsay), and not for the admission of evidence which is proscribed in order to protect some favored relationship.

The possibility that relaxation of the orthodox rule is just a roundabout way of undercutting the technical exclusionary rules finds some support in the *Lutwak* case itself. Invoking Rule 26 of the Federal Rules of Criminal Procedure, the *Lutwak* court first found that the exclusionary rule barring spousal testimony was indefensible and outmoded, and should be completely abolished.[29] Immediately thereafter, and as an alternative ground of admissibility, the court introduced the prima facie rule. This juxtaposition of the expression of dislike of the technical rule with the introduction of the prima facie formula perhaps suggests that the appellate court may have chosen the prima facie rule as a device for diluting the vitality of the spousal privilege involved. This interpretation is, however, conjectural since the trial court's only justification for its treatment of the coincidence problem was that "plenty of testimony" had been offered to establish competency. In any event, it seems clear that any rule which would make the strength of the predicate for admissibility fluctuate with the assumed desirability of the exclusionary rule involved would inject added complexity to

[28] The cases cited in support of this rule, in Maguire and Epstein, op. cit. supra note 3, at 418 n. 78, do not represent instances where the suggested rule has been applied.

[29] United States v. Lutwak, 195 F. 2d 748, 761 (1952), appeal pending S.Ct., No. 775. But the spousal privilege is retained in United States v. Walker, 176 F. 2d 564 (C.A. 2d, 1949), in which case Judge Learned Hand states: "[W]e should await the choice of Congress between the conflicting interests involved, or such an overwhelming general acceptance by the states of abolition of the privilege, as induced the Supreme Court to action in Funk v. United States." Ibid., at 568. Accord: Paul v. United States, 79 F. 2d 561 (C.A. 3d, 1935); Brunner v. United States, 168 F. 2d 281 (C.A. 6th, 1948).

Funk v. United States, 290 U.S. 371 (1933), had decided that a wife was competent to testify in her husband's behalf in a criminal prosecution in the federal courts, holding that in such cases the federal courts were not bound by the rules of the law of the land as they existed at a specified time in the respective states, but were to apply the common-law rules in accordance with present day standards of wisdom and justice. Justice Clark, dissenting in the Walker case, interpreted this holding of the Funk case to mean that the court did not have to wait upon the expression of Congressional intent.

the rules of evidence which already present a quite sufficient degree of complexity.[30]

The foregoing analysis suggests that economy is the most persuasive reason for departing from the orthodox rule in the coincidence situation. The obvious rejoinder is that economy should not be effected at the expense of the exclusionary rules; the rules should be enforced or repealed outright. But at a time when dockets are overloaded, the rejoinder may appear to be overly rigid and to ignore the fact that some of the exclusionary rules are themselves a "concession . . . to the shortness of human life."[31] The rejoinder does, however, sharpen the question underlying the coincidence problem; viz., are the exclusionary rules as a body sufficiently useful to justify a voir dire hearing for the purpose of presenting evidence on the preliminary question of fact which controls competency? Perhaps this question would be best resolved by vesting in the trial judge the power to relax the preponderance requirement where evidence already received on the merits establishes a "prima facie" case for admissibility and where a voir dire hearing on the preliminary hearing would be unduly time consuming.[32] The judge would often avoid the need to exercise his discretionary power by using his power over the order of proof so as to get before the jury the maximum

[30] As Professor Morgan has said, "If the time has come for these rules of evidence to cease to trouble the course of litigation, it is to be hoped that a more speedy and merciful means of extermination will be found." Morgan, op. cit. supra note 3, at 191.

Assuming that it is desirable to enforce the technical rules of evidence, the main argument in favor of retaining the orthodox rule is that it *does* enforce the technical rules strictly. In addition, several other merits of the orthodox rule have been suggested:

(1) The rule avoids confusing the jury about questions of admissibility of evidence, as these questions are reserved solely for the judge.

(2) The judge's training and experience enables him to handle problems of admissibility consistently, and the attorney is able to predict in advance with a fair degree of accuracy whether a given item of evidence will be admitted.

(3) A clean-cut division of function between judge and jury permits appellate courts to determine with precision the exact points at which error in the admissibility of evidence is alleged to have been committed. Maguire and Epstein, op. cit. supra note 3, at 392–95.

Relaxing the standard that the judge is to apply to evidence on the preliminary question of fact will not necessarily result in loss of any of these merits. Questions of admissibility can still be resolved solely by the judge; the judge can apply a relaxed standard just as consistently as he could the orthodox one; and assignment of error may be just as precisely handled by the appellate court.

However, one variation of the orthodox rule gives the jury a role to play in questions of admissibility. See, e.g., People v. Talbott, 65 Cal. App. 2d 654, 151 P. 2d 317 (1944). This is the so-called "second-crack" doctrine, where the judge admits the questioned item of evidence on an instruction that the jury is to disregard it unless, on a preponderance of the rest of the evidence, they find the existence of the preliminary fact. Under this doctrine, the merits of the orthodox rule will be lost. Consult Maguire: Common Law and Common Sense 212 et seq. (1947).

[31] A.L.I., Foreword to Model Code of Evidence 3 (1942).

[32] Variations in the standard of proof required, although they lead to complexity, may be indicated where logical simplicity as a practical matter is beyond the reach of a busy court. State v. Hayes, 127 Conn. 543, 18 A. 2d 895 (1941) (conspiracy). The court found itself unable to separate the declarations against co-conspirators which required preliminary finding from other testimony which did not require such finding.

amount of competent evidence which bears on the preliminary question. Thereafter a short supplemental voir dire hearing might be sufficient to insure that the exclusionary rules were being applied in the light of the pertinent facts. Such a solution would, of course, require trial courts to be alert both to the existence of a coincidence between preliminary fact and ultimate issue, and the underlying question posed by such a coincidence. The cases unfortunately suggest that the problem is often ignored, and sometimes misunderstood, by the courts.

LIMITATIONS ON SEIZURE OF "EVIDENTIARY" OBJECTS

A RULE IN SEARCH OF A REASON

"Significant but confusing" appropriately describes the rule first enunciated in 1921 in *Gouled v. United States*[1] that objects of "evidentiary value only" can never be seized even though an otherwise valid search warrant has been issued for the objects and a properly conducted search has taken place.[2] In the *Gouled* case some bills for legal services, an executed contract and an unexecuted contract were seized under a valid search warrant by federal agents while investigating alleged use of the mails to defraud the United States. The Supreme Court held, on the evidence presented, that these objects were of "evidential value"[3] only and accordingly immune from seizure; their seizure violated the Fourth Amendment and the use of them in evidence violated the Fifth Amendment.[4]

I

For several reasons the *Gouled* rule is significant. First, the rule, originating in the Supreme Court, has retained its vitality by frequent application in the lower federal courts.[5] Even a few state courts have utilized the rule, although

[1] 255 U.S. 298 (1921).

[2] Of course, it is possible to conduct a valid search incident to arrest without a search warrant. The cases indicate that the scope of seizure incident to arrest may vary somewhat from the scope under a search warrant. See, e.g., Sayers v. United States, 2 F. 2d 146 (C.A. 9th, 1924).

[3] Gouled v. United States, 255 U.S. 298, 310 (1921). [4] Ibid.

[5] Cases in which the court suppressed the evidence: United States v. Lerner, 100 F. Supp. 765 (N.D. Cal., 1951) (Gouled cited); Freeman v. United States, 160 F. 2d 72 (C.A. 9th, 1947) (Gouled not cited); United States v. Chodak, 68 F. Supp. 455 (D. Md., 1946) (Gouled not cited); In re Ginsburg, 147 F. 2d 749 (C.A. 2d, 1945) (Gouled cited); United States v. Richmond, 57 F. Supp. 903 (S.D. W.Va., 1944) (Gouled cited); Takahashi v. United States, 143 F. 2d 118 (C.A. 9th, 1944) (Gouled cited); United States v. Antonelli Fireworks Co., 53 F. Supp. 870 (W.D.N.Y., 1943) (Gouled not cited); United States v. Thomson, 113 F. 2d 643 (C.A. 7th, 1940) (Gouled cited); United States v. Genello, 10 F. Supp. 751 (M.D. Pa., 1935) (Gouled cited); Bushouse v. United States, 67 F. 2d 843 (C.A. 6th, 1933) (Gouled cited); United States v. Poller, 43 F. 2d 911 (C.A. 2d, 1930) (Gouled not cited); United States v. Kirschenblatt, 16 F. 2d 202 (C.A. 2d, 1926) (Gouled cited); United States v. Snow, 9 F. 2d 978 (D. Mass., 1925) (in setting the case for further hearing, court distinguished between evidentiary and nonevidentiary materials and expressed view that evidentiary materials cannot be seized; Gouled cited); In re No. 191 Front Street, 5 F. 2d 282 (C.A. 2d, 1924) (Gouled cited);