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PRELIMINARY QUESTIONS OF FACT: A NEW THEORY

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Statement of the Problem

When a party to a judicial proceeding objects to an offer of evidence, the judge will usually be able to make a ruling on the objection by considering only the terms of the offer.[1] In the usual case a judge will make an authoritative ruling at the time of the objection, either admitting or excluding the offered evidence. In reaching a determination on the objection, the judge will not consult the jury and will make no direct reference to his ruling before the jury, except to instruct the jurors to disregard any evidence which has been stricken. The trial judge's ruling, of course, will be subject to review on appeal. The principle that the judge rather than the jury should determine the admissibility of evidence is based upon at least three premises: (1) the problem of admissibility will always present a question of law, and it is basic that judges decide legal questions; (2) the expeditious conduct of the trial demands that the judge have power to make summary decisions upon questions of admissibility; and (3) collaboration with the jury on the question of admissibility might defeat the very purpose of the exclusionary rule.

However, in some situations[2] the question of admissibility of evidence cannot be determined from the offer itself. In some instances, it may be necessary for either the judge or the jury to make a factual determination before the judge can determine whether or not the evidence offered should be admitted. A few of the many examples of this problem may serve as illustrations: A confession may not be used against a criminal defendant unless it was voluntarily obtained; vol-

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[1]This is not to suggest that the ruling will always be easy to make, or that the answer to the question of admissibility is readily found in the authoritative legal source materials. It may be that the judge will have to fall back upon remote analogies, his own conclusions as to policy matters, or his own beliefs as to what should be expected according to the normal course of human experience. Of course he will consider such authoritative legal source materials, *e.g.*, decisions and legislative enactments, as are available.

[2]These situations are probably a minority, although they nevertheless constitute a substantial number.

untariness of the alleged confession is a preliminary question of fact. A witness may not testify to something he claims to have perceived unless he had an adequate opportunity to observe the matter to which he offers to testify; opportunity to observe is a preliminary question of fact. Testimony regarding the contents of a document may not be heard unless a foundation is established by showing a legitimate excuse for not producing the document itself; whether or not such a foundation has been established is a preliminary question of fact. A criminal defendant objects to the testimony of an offered witness upon the ground that the witness is his spouse;[3] if there is a true issue as to whether the defendant and the witness are in fact married, for example, whether a purported divorce is legally valid, a resolution of that question is a fact which must be determined before it can be decided whether or not to admit the testimony of the witness.

Inherent in all situations in which a judicial determination of admissibility requires a preceding factual determination is the problem of deciding whether the judge or the jury should determine the preliminary questions of fact. In some situations, the judge should make the decision and admit or reject the evidence depending upon whether he finds that the fact exists. In other instances, the judge should admit the disputed evidence upon a prima facie showing and instruct the jury that, before it decides the main issues of the case, it must decide a preliminary factual question. The jury is further instructed that whether or not it considers the disputed item of evidence in deciding the main issues of the case depends upon the conclusion reached on the preliminary question of fact.

Current Orthodox Analysis

Until the 1920's, the standard solution to the problem of who should decide preliminary questions of fact was simply that since the judge decides problems of admissibility, he should also decide all preliminary facts upon which admissibility depends.[4] However, since the 1920's a new orthodoxy has developed. A rule, divided into two

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[3]A criminal defendant's spouse may not testify against him over his objection.

[4]Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1926). If the results of decisions be examined, however, rather than the official pronouncements, no such harmony existed. The case law was in considerable confusion. J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 217-30 (1947); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 170-75 (1929). Various practices were suggested or found support in decided cases. Most of the suggestions are enumerated by Professors Maguire and Morgan in the aforementioned sources.

complementary sets of principles, seems to offer a simplified and easily applicable solution to the problem of preliminary questions of fact. While credit for the basic formulation of these principles must go primarily to Professors Morgan, Maguire and Epstein,[5] a modern unified statement of this formulation has been presented by Professor McCormick.[6] According to the formulation, if the application of an exclusionary rule based upon a "technical" rule of evidence depends upon a preliminary fact, the existence of the fact should be determined by the judge. The jury may or may not be allowed to pass subsequently upon the weight of the evidence,[7] but it cannot completely disregard the evidence upon the ground that the evidence never should have been admitted. The term "competency" of evidence is sometimes used to refer to such situations, examples of which are the hearsay rule and the various privileges.[8]

Professor McCormick contrasts competency cases with cases in which "the *relevancy, i.e.,* probative value, of a fact offered in evidence depends on the existence of another conditioning [*i.e.,* preliminary] fact."[9] In such a situation the proponent of evidence need merely make a showing sufficient to enable the judge to determine that a reasonably prudent juror could find the existence of the preliminary fact.[10] The jury is then instructed to make the preliminary factual determination. If the jury finds that the preliminary fact does not exist, it must disregard the offered evidence; if the finding as to the existence of the preliminary fact is affirmative, the jury must give the offered evidence the weight to which it thinks the evidence is entitled.

This competency-relevancy dichotomy seems to be expressed by the proposed *Rules of Evidence for United States Courts and Magistrates.*[11] Rule 104 deals with preliminary questions and reads in part as follows:

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[5]*Supra* note 4.

[6]C. McCORMICK, McCORMICK ON EVIDENCE § 53, at 121-125 (2d ed. 1972) (hereinafter cited as McCORMICK).

[7]This presents a complicating circumstance dealt with in text accompanying note 58. *infra.*

[8]Although listed together in McCormick's book, these two examples present quite different situations. *Cf.* text accompanying notes 44, 50, at 51, *infra.*

[9]McCORMICK at 124-25.

[10]As a general proposition it may be said that a judge will never submit any issue to the jury unless he believes that the evidence is such that the issue could be decided either way. The obvious exception is that in a criminal case the judge may not withdraw an issue unfavorable to the defendant from the jury.

[11]The proposed federal rules of evidence were drafted by a committee of judges, practitioners and law professors appointed by the United States Supreme Court. The

(a) *Questions of admissibility generally.* Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of subdivision (b) . . . .
(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Alternate Theory

Before specifying in detail the ambiguities in the orthodox theory, a brief preview of the alternate theory advocated by this writer is offered. In a situation in which the preliminary fact has no significance in the case except to condition the admissibility of evidence,[12] the alternate theory reaches the same conclusion as the orthodox theory: the judge decides whether the preliminary fact exists. If his decision is affirmative, the evidence is admitted; if negative, it is excluded. If the evidence is admitted, the jury would have no occasion to consider whether or not the preliminary fact exists because it has no bearing upon any question the jury is called upon to decide.

A different basis for analysis exists in cases in which the preliminary fact has a bearing upon the case apart from conditioning the admissibility of evidence.[13] In such a situation, if the challenged evidence is admitted, the jury must still evaluate the evidence for and against the conditioning fact because whether the fact exists or not has a bearing upon the main issues of the case. Supposedly, under

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process took several years. In their final form they were approved by the United States Judicial Conference and the United States Supreme Court (Mr. Justice Douglas dissenting). They were ordered to take effect July 1, 1973 unless Congress should provide otherwise. They were not as favorably received in Congress as had been anticipated. Congress enacted S.583, which provides that the Rules shall not take effect unless expressly so ordered by Congress. S.583, 93d Cong., 1st Sess. (1973). On February 6, 1974, the House of Representatives passed HR 5463 which is intended as a substitute for the rules. HR 5463, 93d Cong., 2d Sess. (1974). In some instances the rules are included in the bill as they were approved by the Supreme Court. In other instances, changes have been made, and some of the proposed rules have been deleted altogether. When the proposed rules are referred to in this article, it may be assumed that they are included in the Congressional bill in the same form unless it is otherwise indicated.

[12] This type of fact is an "interlocutory" fact. *See* text accompanying note 46, *infra.*

[13] This type of fact is a "collateral" fact. *See* text accompanying note 46, *infra.*

the orthodox analysis the judge would merely decide whether prima facie the preliminary fact exists. If his decision is affirmative, the jury would decide whether the preliminary fact really exists. However, it will be shown that such a result is not always reached by courts purportedly following the orthodox theory.[14] In fact, the orthodox theory contains no valid basis for differentiation between questions of competency to be determined by the judge, and questions of relevancy to be decided by the jury. The alternate theory proposes that a judge, in determining whether to decide a preliminary fact himself or leave it to the jury, should be guided by the *nature* of the preliminary fact, considering such factors as its degree of technicality, and the directness or remoteness of its bearing upon the controlling issues of the case.

Criticism of the Orthodox Analysis

The orthodox solution to the problem of preliminary facts seems to be simple and easily applicable. Unfortunately, the orthodox solution is too simplistic and thus difficult to apply in marginal cases. The difficulty lies in determining which questions truly involve relevancy issues and which involve competency issues—a difficulty which results from ambiguities in both the concept of relevancy and that of competency.[15] *A priori* it would appear that the difference between the two would be as follows: if the preliminary fact has no bearing upon the case other than to condition the admissibility of evidence, the issue would be one of competency; if, on the other hand, the preliminary fact has a logical bearing upon the ultimate issues of the case, apart from its significance as conditioning the admissibility of evidence, the issue would be said to be one of relevancy. The trouble with the foregoing explanation is that it does not adequately explain the results in all situations involving preliminary questions of fact. Suppose, for example, that the results of a blood test are offered in evidence. Admissibility depends upon whether the test was properly conducted, a matter of competency.[16] If the blood test was not properly administered, it is unreliable and thus does not tend to prove the proposition for which offered, a matter of relevancy.[17] Thus the preliminary fact would appear to be one of relevancy to be de-

[14]*See* text accompanying notes 44, 53, 59, 64, 69, 72.

[15]The writer was first impressed with these ambiguities when he tried to formulate the difference between the concept of competency and that of relevancy so as to be better able to explain it to his students.

[16]*See* text accompanying note 37, *infra*.

[17]*See* text accompanying note 20, *infra*.

cided by the jury. Yet, very likely a judge following the orthodox analysis would decide the issue himself[18] on the basis that the question is one of competency.

Ambiguities in the Orthodox Analysis: Relevancy v. Irrelevancy

The first ambiguity in the orthodox analysis relates to the concept of relevancy. What is meant by "relevancy"? Are "relevancy" and "irrelevancy" true contradictories[19] and, if not, are we not primarily concerned with irrelevancy as a basis for exclusion rather than with relevancy as a basis for admission? In discussing the concept of relevancy, Professor McCormick has stated that evidence may be excluded as "irrelevant" for either of two quite different reasons: it may be immaterial or it may lack probative value.[20] Every item of evidence is offered to prove some proposition. Two questions then arise: (1) does the proposition have a bearing on the case under the rules of

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[18]*See* Pruitt v. State, 216 Tenn. 686, 393 S.W.2d 747 (1965).

[19]Inconsistent propositions may be either contradictory to each other or they may be contrary to each other. *Contradictories* are two propositions so related that both cannot be true and both cannot be false. One must be true and the other false. There are no other possibilities. *Contraries* are two propositions so related that both cannot be true but it is possible for both to be false. Some other proposition may represent the truth. For example, the propositions "John Doe told the truth" and "John Doe told a lie" are contraries and not contradictories. John Doe's statement may have not been in accord with reality but it may not have been held out as being true, in which instance it would be a fiction and neither the truth or a lie. It is difficult to devise true contradictories except by opposing a proposition with a denial in *haec verba*. Possibly the statements "John Doe is dead" and "John Doe is alive" would be true contradictories; but is there a third state of existence for a human being which is neither life or death?

Fallacious legal reasoning sometimes results from mistakenly regarding a contrary as though it were a contradictory. This occurs in the case of argumentative pleading. The rule in pleading is that the defendant puts a proposition asserted by the plaintiff in issue by contradicting it. For example: Plaintiff alleges "D struck P." Properly, defendant should put that allegation in issue by the proposition "D did not strike P." Suppose that, instead, defendant alleges "It was X who struck P." Defendant has opposed plaintiff's proposition with a contrary proposition, whereas he should have used a contradictory, and thus defendant has committed the defect of form known as argumentative pleading. Both propositions "D struck P" and "X struck P" could be false. It is possible that it was really Y who struck P or possibly P was not struck at all. The writer believes that the fallacy of regarding the concepts of relevancy and irrelevancy as contradictories, when they are really contraries, may be partially responsible for the confusion in the orthodox analysis.

[20]McCORMICK at 434-41. Professor McCormick cites with approval Professor James' excellent article, *Relevancy, Probability and the Law*, 29 CALIF L. REV. 689 (1941).

substantive law;[21] and (2) if the answer to (1) is "yes," does the evidence offered tend to prove the proposition? Conventionally and arbitrarily we refer to the first issue as one of materiality.[22] The second issue is one of probative value or relevancy, as distinguished from materiality.[23]

A basic incongruity in the concepts of relevancy and irrelevancy underlies orthodox thinking on this subject so far as it relates to preliminary questions of fact. In order to obtain a focal point for criticism, McCormick[24] and the Advisory Committee's Notes to the proposed federal rules of evidence may be regarded as presenting the orthodox view.[25]

Professor McCormick links the problem of irrelevancy with the problem of circumstantial evidence. He states that "[i]n our usage questions of relevancy arise only in respect to circumstantial evidence."[26] He also says that "the most acceptable test of relevancy is

[21]The phrase is usually "under the rules of substantive law and the pleadings." However, since pleadings are quite informal these days and can be readily amended, the focus of interest in connection with questions of proof should be on the substantive law.

[22]The use of this term has been criticized. *See* RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, Advisory Committee Notes at 31 (West pamphlet ed. 1972) (hereinafter cited as Proposed Rules). Just as words, there would seem to be little difference between "relevant" (or "irrelevant") and "material" (or "immaterial"). It seems desirable, however, that there be a term which can be used to test the significance, under the substantive law, of any proposition sought to be approved. The term "materiality" is used for that purpose, and it would seem that, if properly understood, no harm is done. The so-called "Parol Evidence Rule" is really a rule of substantive law and not a rule of evidence. Before directed verdicts became as common as they are today, questions of substantive law were more frequently decided by rulings on the admission of evidence than is now the case.

[23]It should be noted that either problem can be converted into the other. If an offer of evidence is rejected because the proposition for which it is offered is immaterial under the substantive law, it is always possible to state that it is being offered to establish something else, something which unquestionably has a substantive law significance. Then the problem is whether this evidence really proves the new proposition for which offered. Conversely, the proposition for which an item of evidence is offered may clearly be material, but the evidence is objected to because it does not tend to prove the proposition. But any offer of reliable evidence will tend to prove something. If the objection is met by changing the purpose of the offer, the relevancy objection will be overcome only to be met by an objection based upon substantive law or lack of materiality.

[24]MCCORMICK § 53, at 121-25.

[25]Of course, these works are predicated upon other writings, the most outstanding of which are the works by Morgan, Maguire, Epstein, and James, notes 4 and 20, *supra*.

[26]MCCORMICK at 436. Similar statements are made in both the third and fourth editions of McCormick's casebook. C. MCCORMICK, CASES AND MATERIALS ON THE LAW

the question, does the evidence offered render the desired inference *more probable than it would be without the evidence?*"[27] This same concept of relevancy is expressed in proposed Federal Rule 401:[28] " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

If "relevancy" and "irrelevancy" are regarded as contradictories, the assertions that problems of relevancy are related to circumstantial evidence and that relevant evidence is any evidence which renders a proposition in issue more or less probable cannot be completely reconciled. Professor McCormick correctly differentiates direct evidence from circumstantial evidence.[29] Evidence is direct if its probative value depends only upon the credibility of a witness who makes an assertion which is offered as proof of a proposition, or upon the perception of a trier of fact who observes some item of "real"[30] evidence. If the thing the direct evidence is offered to establish is not legally significant unless something else may be inferred from it, a problem of circumstantial evidence is presented. Suppose that fact B is material, or a "fact of consequence." The direct evidence available tends to prove fact A. Does the existence of fact A make fact B more or less likely than it would be otherwise? If it does, a permissible inference of fact B exists; if not, the evidence tending to prove fact A is irrelevant.

But suppose that although fact A tends to make fact B more or less likely than it would be otherwise, the testimony offered to prove fact A is hearsay three times removed, or an assertion made by a known incompetent person.[31] It may be assumed that the offer would be rejected. It certainly does not meet the standards of relevancy, because it does not make fact B either more or less likely. On the other hand, it is not irrelevant since its vice does not result from its circumstantial nature. It is an inherently unreliable type of evidence.

OF EVIDENCE 290 n.1 (3d ed., 1956); C. MCCORMICK, F. ELLIOTT & J. SUTTON, EVIDENCE, CASES AND MATERIALS 9 n.1 (4th ed. 1971).

[27]MCCORMICK at 437 (emphasis added).

[28]Proposed Rules at 30.

[29]MCCORMICK at 435.

[30]"Real" evidence is evidence which the judge or jury actually observes, *e.g.*, a homicide weapon, the scene of an accident, land being condemned, or a contract. The terms "demonstrative evidence" and "autoptic proference" are also used.

[31]This is comparable to the old chestnut about whether the presumption that John Doe is dead resulting from proof of seven years of unexplained absence is rebutted by the testimony of the village idiot that he "saw John Doe in Singapore last week."

Thus, it would seem that there are two reasons why evidence may lack probative value: (1) because it may be inherently unreliable, *i.e.*, lack probative value for any purpose; (2) because, although reliable enough for some purposes, the evidence offered lacks probative value for the particular purpose for which it is offered. This second reason presents a problem of circumstantial evidence and thus a problem of irrelevancy.

It is clear that relevancy and irrelevancy are not *contradictory* but *contrary* concepts.[32] An offer cannot be both relevant and irrelevant. Yet the offer may not fall into either category. It may fail to be relevant because its unreliable nature does not make the proposition for which it is offered more or less likely than it would be without this evidence; and yet it may not be irrelevant because it would not fail to measure up to the requirements for valid circumstantial evidence. Since irrelevant evidence is excluded, but relevant evidence is not necessarily admissible,[33] it would seem that the more important focus of attention should be on the problem of irrelevancy rather than upon that of relevancy.

The significance of the analysis just presented is that it indicates the inadequacy of the orthodox analysis. If the jury decides preliminary questions of fact when the relevancy, as distinguished from irrelevancy, of offered evidence depends upon how the preliminary question is resolved, the principle is internally inconsistent. Both *McCormick on Evidence*[34] and proposed Federal Rule 104(a)[35] recognize that problems relating to the hearsay rule, the rule preferring original writings, and rules relating to the competency of witnesses should be decided by the judge. However, in all of these instances the probative value of the challenged evidence is at stake. Thus, these instances concern preliminary questions of fact involving a problem of relevancy which, according to the orthodox test, should be decided by the jury.

An important type of case is sometimes erroneously regarded as one involving the decision of a preliminary question of fact. An issue which relates to the basic substantive issues of a case may sometimes be mistakenly regarded as involving a preliminary question. Although reaching the correct result, the Supreme Judicial Court of Massachusetts erroneously discussed preliminary questions of fact in

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[32]James recognizes this distinction in *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 691 n.6 (1941).

[33]*See* Proposed Rules at 32-33.

[34]MCCORMICK at 121.

[35]Proposed Rules at 13.

Coghlan v. White,[36] a case which did not involve that problem. Defendant's liability depended upon whether an appropriate notice had been served. The court correctly held that the trial judge erred in excluding a copy of the notice based upon his determination that proper service had not occurred.

Ambiguities in the Orthodox Analysis: Competency v. Incompetency

Evidence is thought of as incompetent when it is excluded because of some distinctively evidential rule, as distinguished from a rule of substantive law. A prototype case is *Bartlett v. Smith*,[37] which involved a suit brought on a bill of exchange. If the bill had been executed in Dublin, it bore the proper stamps and thus was admissible in evidence; but if the bill had been executed in London, it was improperly stamped and thus inadmissible. It will be noted that the sanction for a failure to place the proper stamps on the bill was not the invalidity of the bill but its inadmissibility into evidence.[38] Thus,

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[36]236 Mass. 165, 128 N.E. 33 (1920). The plaintiff sued for the death of his intestate resulting from slipping on ice formed from a spout on defendant's premises. Whether defendant had a duty to clear away this ice (and hence whether plaintiff had a cause of action) depended, under the appropriate statutes, upon whether a notice to clear away the ice had been served upon an occupant of the premises. Plaintiff offered in evidence a copy of a sufficient notice with the constable's return to the effect that he had served the notice on one Flaherty, admittedly an occupant. The return was prima facie evidence of the facts stated therein. Defendant objected to receiving the notice in evidence upon the ground that it had not been served. In support of his objection, defendant produced the testimony of his agent and Flaherty to the effect that no notice had been served upon Flaherty. The trial judge regarded the question as a preliminary question of fact, made the finding that no notice had been served, rejected the offered evidence, and withdrew the case from the jury. The higher court properly sustained exceptions. It concluded its opinion by saying:

> Whether the notice here in question had been given or not depended in its last analysis on the point whether the return of the constable or the testimony of Flaherty was true. Whether the *prima facie* effect of the return of the constable was overcome by other evidence was a question of fact upon a vital issue between the parties. Under the circumstances it presented a matter for the jury on which the judge could not make a final determination.

128 N.E. at 35. From the quoted language it may be inferred that the court realized that the issue of whether or not the notice was served involved an operative fact in the case and not a preliminary question of fact. It is unfortunate that most of the opinion was devoted to a discussion of preliminary questions of fact.

[37]152 Eng. Rep. 895 (Ex. 1843).

[38]It is difficult to understand the logic supporting this sanction. If the stamping of commercial paper is a desirable way to raise revenue, the sanction for failure to use the proper stamps should have a more direct bearing upon the purpose of the act. A logical although drastic penalty would be to declare the paper void. It might also be

the plaintiff could still recover if, without introducing the bill into evidence, he could prove in some other way his cause of action on the bill.[39] It was ruled that the trial court improperly submitted to the jury the issue as to whether the bill was properly stamped; that was a preliminary question of fact which the trial judge should have decided.

Two related observations should be made about *Bartlett v. Smith.* First, the issue as to whether the offer should be admitted or excluded was unrelated to the value of the offer as evidence. There was no question as to the materiality of the bill of exchange, *i.e.,* that it related to the substantive issues of the case. Also, there was no question as to its probative value. It was both reliable (there was no contention that it was a forgery) and relevant in the sense that it tended to prove the proposition for which it was offered, *i.e.,* that the defendant owed the plaintiff money. It may be said that the bill of exchange was liable to exclusion for some "policy"[40] reason more important than ascertainment of the true facts of the case. In *Bartlett v. Smith* the legal policy involved was the provision of a sanction for the enforcement of the tax laws. Second, the preliminary fact involved in *Bartlett v. Smith* had no logical bearing upon any of the substantive issues of the case. This is not to say that the resolution of the preliminary question of fact might not be important in determining the outcome of the case; indeed, it might be controlling. But, if so, the case would be decided upon some basis unrelated to its intrinsic merits.

The difference between *Coghlan v. White*[41] and *Bartlett v. Smith* is fundamental and provides a starting point for tackling more marginal and difficult problems. At the one extreme is the situation presented by *Coghlan v. White,* in which an operative fact appears to be a preliminary fact. Of course, decision as to the existence of such

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made an offense to pass improperly stamped paper. But to make the bill inadmissible in evidence does not seem to be an appropriate sanction.

[39]*Compare* Slatterie v. Poole, 151 Eng. Rep. 579 (Ex. 1840), in which it was held that the content of an improperly stamped piece of commercial paper might be proved by the admission of a party opponent.

[40]This term is used for want of a better one for the concept involved. There are many exclusionary rules based upon policy considerations, *i.e.,* social interests considered more important than the ascertainment of truth in a particular case. The best examples are the various privileges. For example, a criminal defendant's spouse may be able truthfully to give very damaging testimony against him. But it is considered more socially desirable that the testimony be excluded than that spouses be permitted to testify against each other.

[41]236 Mass. 165, 128 N.E. 33 (1920).

a fact is for the jury. The judge decides only whether there is sufficient prima facie evidence to warrant submission to the jury. At the other extreme is the situation in *Bartlett v. Smith,* where the admissibility of an offer of evidence, challenged upon a ground which has no connection with the main issues of the case, depends upon determination of a question of fact which is unrelated to the main issues to be determined. All reasonable considerations indicate that the judge should make such a determination.[12]

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[12]The following examination question was drafted by the writer:

A state statute provides that suit cannot be brought against a municipal corporation for injuries resulting from the defective condition of its streets unless notice of the defective condition was personally served on the mayor prior to the accident; and that no purported copy of any such notice may be admitted into evidence for the purpose of proving service on the mayor unless the copy bears an acknowledgement of service signed by the mayor personally. P is suing the City of D for injuries occurring when his automobile hit a hole in a street. He offers in evidence a paper addressed to the mayor and bearing an acknowledgement of service over what purports to be the mayor's signature. The paper is dated before the accident and states the fact regarding the hole in the street. D objects to the admission of the paper on the ground that the paper was never actually served on the mayor, and that the mayor's name appearing thereon was not written by him but by someone else. The state of evidence is such that a reasonable man could reasonably find that the paper was actually served on the mayor or that it was actually served on someone else temporarily in the mayor's office; the state of evidence is also such that a reasonable person could reasonably find that the purported signature of the mayor was actually written by him or that it was written by someone else.

Complete the following statement, filling in blanks and striking out inapplicable words:

The judge should (decide whether or not the person upon whom the paper was served was the mayor; if he decides it was not the mayor he should exclude the paper; if he decides that it was the mayor he should admit the paper into evidence unless he decides that it is inadmissible for some other reason) (admit the paper into evidence, unless inadmissible for some other reason, submitting to the jury, under proper instructions, the question as to whether the person upon whom served as actually the mayor) because said question is one of

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The judge should (decide whether the signature on the paper was actually written by the mayor, excluding the paper if he decides it is not, admitting the paper if he decides it is, unless inadmissible for some other reason) (admit the paper into evidence, unless inadmissible for some other reason, submitting to the jury, under proper instructions, the question as to whether the signature on the paper was actually written by the mayor) because said question is one of

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In a case in which the exclusionary rule is based upon a policy consideration, there are at least two reasons why the preliminary fact should be decided by the judge. First, the issues should be kept as simple as possible. If the evidence were provisionally admitted and the jury told that it should decide the existence of the preliminary fact before deciding upon the weight to be given to the offered evidence, the jury might become confused by having to decide questions unrelated to the main issues of the case. Second, for the jury to decide the preliminary questions might defeat the very policy considerations underlying the exclusionary rule. The latter objection is most obvious in the case of a privilege: if the jury were to decide the preliminary question of fact upon which the existence of a privilege depends, it would have to hear the privileged testimony.[43]

If the concept of competency were limited to the *Barlett v. Smith* situation and the concept of relevancy limited to that of materiality, little problem would exist. But how should one handle the situation in which the probative value of an offer of evidence depends upon a preliminary fact? According to the orthodox analysis, this involves a problem of relevancy and, thus, the jury has the ultimate decision. Yet there are situations in which probative value is unquestionably involved, because the reliability of evidence is at stake, which never-

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The purpose of this question is to compare two exclusionary rules which look quite similar but upon analysis are quite different. Of course, the requirement that notice be served upon the mayor personally is substantive in nature. It is one of the essential conditions necessary for the plaintiff's recovery. Thus, it should be decided by the jury as other main issues are. The judge only decides if there is sufficient prima facie evidence to warrant a jury decision. Thus, in the first part of the exercise the first alternative should be struck out and the second allowed to stand and the words "materiality: application of a rule of substantive law" would appear on the first line.

By contrast, the requirement that the mayor's signature acknowledging service be written by him personally is strictly evidentiary in nature. The admissibility of the paper, as a method of proving service, depends thereon, but not the cause of action. If service was on the mayor personally, but he had his secretary attach his name to the acknowledgment of service, the plaintiff would not be denied his cause of action if he could prove the service in some other way. Thus, in the second part of the exercise the first alternative should be allowed to stand and the second struck out. On the second line should appear: "competency: admissibility dependent upon a technical rule of evidence."

[43]For example: A criminal defendant's alleged wife knows, and is willing to testify to, some facts very damaging to him. Defendant objects on the ground that the witness is his wife. There is a question as to whether the parties were in fact married. If the judge admits the testimony and leaves to the jury the question of whether to consider it, even if the jury decides that the marriage did exist, and therefore should not consider the adverse testimony, it will have heard that testimony. It is questionable whether the members of the jury could erase the adverse testimony from their minds.

theless may be regarded as situations involving problems of competency. Consider two examples: (1) the party offering a hearsay declaration contends that it is a declaration against interest; admissibility depends upon whether or not extraneous facts made the statement self-serving;[44] (2) the result of a blood analysis is offered in evidence; objection is made upon the ground that the test was not properly conducted by a competent technician.[45] In both cases, authorities supporting the orthodox analysis recognize that the preliminary question of fact (*i.e.*, whether the statement was really self-serving in the first case, and whether the technician was competent in the second) will be decided by the judge. Both cases involve the application of technical evidence rules which are regarded as matters of competency. Yet both involve relevancy in the sense that the probative value of the evidence depends upon the factual determination. Therefore, if relevancy vis-a-vis competency is the test, the orthodox analysis offers no clue to a solution of those situations where the notions of competency and relevancy coincide.

Two Types of Preliminary Facts

Preliminary facts thus far have been discussed mainly as if a single phenomenon were involved. Actually, there are two types of preliminary facts, which may be called *interlocutory* facts and *collateral* facts.[46] A preliminary question of fact is called "interlocutory" if its resolution has no bearing on the case other than to provide the basis for determining whether a challenged offer of evidence should be admitted. Preliminary facts in cases such as *Bartlett v. Smith,* in which the exclusionary rule is based upon some policy consideration, are interlocutory facts. For example, a witness offers to testify to having seen the defendant commit a criminal offense. The defendant objects upon the ground that the witness is his wife. The admissibility of the testimony depends upon whether the defendant and the witness are in fact married. But the fact of their marriage has no bearing upon whether the defendant committed the

[44] *See, e.g.*, Demasi v. Whitney Trust & Sav. Bank, 176 So. 703 (La. 1939), in which the declarant's statement that she had authorized certain deductions was offered as a declaration against interest. It was shown, however, that the declarant could not withdraw the balance of the account unless said statement was signed. Thus, the statement was self-serving and inadmissible. The judge made the decision.

[45] *Compare* Pruitt v. State, 216 Tenn. 686, 393 S.W.2d 747 (1965).

[46] This terminology has been coined by the writer. He does not believe that heretofore this distinction has been made.

offense charged.[47]

On the other hand, preliminary facts may have a logical bearing, however remote, upon the legally operative facts, wholly apart from the consequence that the admissibility of some item of evidence depends thereon. Consider again the issue of the skill of a technician making a blood test. If the skill is lacking, the specimen should not be admitted. But if the specimen is admitted, the question of the technician's skill is still present. It is a preliminary fact of this type to which the term "collateral" fact is hereinafter applied. Another example is the issue of the opportunity of a witness to observe the matter concerning which he offers to testify. Professor McCormick raises the question of whether the judge or the jury should make the determination of opportunity to observe and states that the decisions are not uniform.[48] This problem is resolved by proposed Federal Rule 602 as follows:

> A witness may not testify to a matter *unless evidence is introduced sufficient to support a finding* that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses. (emphasis added).

Rule 602 requires only a prima facie showing of personal knowledge to render the testimony admissible by the judge. If the testimony is admitted, however, the question must be resolved eventually by the jury.

Although Rule 602 refers to Rule 703 as a limitation, Rule 702, stating the basic requirements for expert testimony, is more interesting than Rule 703 from the present point of view.[49] It is inferable from

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[47]Of course, whether the offered testimony is admitted may have a vital bearing upon the outcome of the case, but for reasons other than those upon which the acceptance of the testimony depends.

[48]C. McCORMICK, CASES AND MATERIALS ON THE LAW OF EVIDENCE 21 n.13 (3d ed 1956).

[49]Rule 703, which serves as a limitation on Rule 602, provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Proposed Rules at 94. Rule 702, stating the basic requirements for expert testimony provides:

Rule 702 that the judge decides whether a person offered as an expert meets the requirements therefor. However, the qualification of an expert constitutes a collateral fact rather than an interlocutory fact, since such probative value as may flow from an expert witness' testimony depends upon his qualification to be an expert witness.

It might appear that the orthodox distinction between questions of competency and questions of relevancy is tantamount to the distinction here made between interlocutory preliminary facts and collateral preliminary facts. Probably the orthodox analysis is predicated upon that assumption. Certainly, when preliminary facts are interlocutory facts, decision should be made by the judge.[50] As regards collateral facts, McCormick states: "When the conditioning fact determines merely the relevancy of the offered fact there is no need for any special safeguarding procedures, for relevancy is a mere matter of probative pertinence which the jury understands and is willing to observe . . . ."[51]

If the basis for distinction is as just stated, it proves too much. In all cases in which an exclusionary rule is based upon probative value, conditioning facts will be collateral. Yet some rules relating to the probative value of evidence are based upon its reliability and are highly technical in nature, *e.g.*, the technical proficiency of a witness offered as an expert or of a technician who made a test. Even the orthodox analysis regards these latter as competency rules and empowers the judge to decide preliminary facts, without distinguishing as to which type of preliminary fact is involved. Thus, another line of distinction must be found.

Exclusionary Rules Based on Probative Value

The distinction between interlocutory and collateral preliminary questions of fact is significantly related to the reasons for exclusion of evidence. Of course, with respect to exclusion of evidence on the ground of immateriality, there is no problem of preliminary questions of fact at all, because what may appear to be preliminary facts are

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> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Id. at 95.

[50]The only possible exception to this treatment involves the problem of coincidence of issues, discussed in text accompanying notes 99-105, *infra*.

[51]McCormick at 125.

really operative facts of the case to be decided by the jury. On the other hand, where evidence is excluded for policy reasons, preliminary questions of fact will nearly always be interlocutory[52] and thus for the judge to decide, since the basis for the policy supporting the exclusion will almost never have a bearing upon the issues actually being litigated. It is only where the reason for exclusion is based upon weakness in probative value[53] that the problem arises as to whether the judge or the jury should make the decision. Where weakness in probative value is the reason for exclusion, the preliminary facts are collateral to the main issues of the case. The case authority as to who decides these collateral facts is far from conclusive.

An excellent example of the confusion of authority is forcefully presented in the confession cases prior to 1935. Prior to the development starting with *Brown v. Mississippi*[54] and culminating with *Rogers v. Richmond*,[55] which bases the rule excluding coerced confessions upon public policy (due process of law), involuntary confessions were excluded upon the ground that they were unreliable.[56] At that time decisions were badly divided as to whether the judge should decide the question of voluntariness and admit or exclude the confession based upon his decision, or whether he should admit the confession if supported by prima facie evidence, leaving the jury to determine whether the confession was voluntary and therefore whether to consider it.[57] The confusion in the cases at the time when exclusion

[52]Although facts conditioning policy exclusions are usually interlocutory, such need not always be the case. It is possible for a policy exclusion to be conditioned upon a collateral fact. *See* text accompanying note 78, *infra*. Of course, the most standard type of policy exclusions are the privileges. In cases involving privileges, the preliminary facts are interlocutory facts. For example, if the issue is the privilege against the adverse testimony of a spouse, the issue as to whether the marriage took place is held to be for the judge. Goodson v. State, 162 Ga. 178, 132 S.E. 899 (1926); *In re* Pusey's Estate, 180 Cal. 368, 181 P. 648 (1919); State v. Hancock, 28 Nev. 300, 82 P. 95 (1905).

[53]It should be noted that exclusion on the basis of weakness in probative value may arise either from (1) unreliability *i.e.*, weakness in probative value for any purpose or (2) irrelevancy, *i.e.*, lack of probative value for the purpose for which offered. The solution offered in this article to the problem of who decides preliminary questions of fact does not depend on the distinction between these two categories of weakness in probative value.

[54]297 U.S. 278 (1936).

[55]365 U.S. 534 (1961); *see also* Haynes v. Washington, 373 U.S. 503 (1963).

[56]3 WIGMORE ON EVIDENCE § 822 (J. Chadbourn rev. 1970). Today it is regarded as a violation of due process of law for the judge to submit the issue of voluntariness to the jury; he must decide the question himself. Jackson v. Denno, 378 U.S. 368 (1964). This result follows sensibly from the development basing the exclusion of involuntary questions on policy grounds.

[57]*See* MCCORMICK at 349 *et seq*. Cases presenting both points of view are collected

was based upon reliability demonstrates the inadequacy of the orthodox approach.

For the purposes of deciding preliminary questions of fact all exclusionary rules based upon probative value present the same type of problem. Common to both problems of unreliability and problems of irrelevancy is the consideration that the preliminary fact in either case cannot logically be isolated from the main issues of the case. To differentiate by designating those rules designed to eliminate unreliable evidence as rules of "competency" is undesirable because that term is also applied to exclusionary rules based upon policy. The two types of competency involve different problems.

Rival Considerations

There are strong arguments both for submitting factually conditioned questions of probative value to the jury, provided a prima facie showing has been made, and for allowing the judge to decide such questions. In favor of submitting these preliminary questions to the jury is the obvious argument that they logically relate to the controlling issues the jury is to decide. In a trial by jury, the jury decides facts. Can it be said that the operative issues of a case are being submitted to the jury if it is not permitted to decide every question which relates to those main issues? It may well be argued that if the judge excludes from the jury any evidence which prima facie has a bearing upon the case, the party offering that evidence pro tanto has been deprived of his right to a jury trial.

In favor of permitting the judge to decide preliminary questions of fact is the procedural interest in relieving the jury from deciding too many collateral issues. Since the jury must consider the entire case at one time, it is desirable to keep its attention focused as much as possible on a limited number of controlling issues. The judge is in a position to decide summarily questions that arise during the trial; from a mechanical point of view, the jury has no such advantage. Additionally, the jury could well become confused by too many collateral questions requiring very complicated instructions.

The question as to who should decide the preliminary question of fact becomes acute principally in cases in which the offer of evidence is rejected by the judge. In those cases in which the judge admits the

in Annot., 170 A.L.R. 567 (1947) and Annot., 85 A.L.R. 870 (1933). There is also a third point of view which is known as the "Massachusetts Rule." According to that view, the judge decides the admissibility of the confession in the first instance. If he lets it go in, the issue of voluntariness is resubmitted to the jury. *Cf.* text accompanying notes 102-104, *infra*.

evidence, the jury still passes upon its weight and so will have an opportunity to consider the evidence supporting and opposing the preliminary fact.[58] The only difference in the jury's function in situations in which the judge decides the question as one of fact and those in which the jury makes the decision is in the form of the instruction. If the question is for the jury, the jury may be instructed that if it decides against the conditioning fact it should disregard the controverted evidence. Such an instruction would be improper if this question is for the judge and he admits the evidence; however, the jury would still be instructed that it is to evaluate the evidence.

Suggested Solution

In cases where an exclusionary rule based upon probative value is conditioned upon the determination of a preliminary question of fact, a result need not be reached in which the judge himself decides all such questions or, to the contrary, one in which all such questions are submitted to the jury if a finding could be supported by prima facie evidence. It is suggested that resolution of the issue be based upon the relative facility with which the jury can decide preliminary questions. If the significance of a preliminary collateral question of fact may be made readily obvious to a reasonable layman, the judge should only require prima facie evidence that the conditioning fact does exist and submit the question to the jury for final decision. If, on the other hand, the significance of the preliminary collateral question of fact would require considerable explanation to the jury, in the interest of expediting the trial the judge himself should decide that question. Thus, the jury should decide, for example, whether a witness had an opportunity to observe the thing concerning which he offers to testify. On the other hand, the judge should decide the qualifications of the technician who made a blood test, or whether a statement offered as a declaration against interest was truly against the interest of the declarant. One aspect of the determination as to who will decide the preliminary question is whether the issue is one of fact in the most limited sense, *i.e.*, credibility or inference, or whether it involves the application of legal standards. In the former

[58]United States v. Dennis, 183 F.2d 201 (2d Cir. 1950); Nass v. Nass, 149 Tex. 41, 228 S.W.2d 130 (1950). Fowel v. Wood, 62 A.2d 636 (D.C. Mun. Ct. App. 1948). Bell v. State, 164 Ga. 292, 138 S.E. 238 (1927). In the last two cases cited it was held that the judge should decide whether a child was a competent witness. The court ruled, however, that the jury could also consider the child's capacity in evaluating his testimony. *See also* Conway v. State, 177 Miss. 461, 171 So. 16 (1936); State v. Dotson, 96 W. Va. 596, 123 S.E. 463 (1924).

situation, the issue would seem to be more suitable for jury decision. Since the determination of legal standards is traditionally and distinctively within the province of the judge, the latter situation would be more likely to call for the judge's decision.

It is quite likely that in many instances the analysis suggested herein will reach the same result as the orthodox analysis. This similar result, although perhaps frequent, is nevertheless accidental since the theories upon which the results are reached are quite different. However, when the ambiguities in the concepts of relevancy and competency are considered, it is believed that the analysis suggested herein more realistically indicates the judicial process involved in making a determination.

It is no objection to the suggested analysis that many borderline questions will be found in which considerable discretion will have to be left with the trial judge. The law is replete with standards rather than rules capable of rigorous application to all situations. Neither the traditional analysis nor that suggested will clearly explain all of the cases. The traditional analysis may seem more clear-cut as a literary matter, but there is little rational basis for making the distinction between questions of competency and those of relevancy unless it is upon the basis herein suggested.

Comparisons

How does the proposed theory compare with the orthodox theory so far as actual results are concerned? As previously explained, there is no difference in result between the two theories as regards materiality and policy exclusions.[59] It is only when an offer of evidence challenged on the ground of lack of probative value depends upon a preliminary collateral fact that a different analysis, although not necessarily a different result, is involved.

A review of three problems discussed earlier will illustrate this difference in analysis.[60] Under the proposed theory and proposed Federal Rule 602,[61] the decision as to a witness' opportunity to observe

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[59]*Cf.* text accompanying notes 41, 42, 52, and 53, *supra*.

[60]These problems are (1) the opportunity of a witness to observe the matter to which he offers to testify (text accompanying note 45, *supra*); (2) the qualifications of an expert witness (text accompanying note 45, *supra*); (3) the voluntariness of confessions at a time when involuntary confessions were excluded because of unreliability (text accompanying notes 51-55, *supra*).

[61]*See* quotation in text accompanying notes 48 and 49, *supra*. This rule is not changed by the proposals made in a bill introduced in Congress to reconsider the proposed rules. *See* H.R. 5463, 93d Cong., 1st Sess. (1973).

would be resolved by the jury. The logic of a rule forbidding a witness to testify to matters outside his knowledge should be obvious to any reasonable juror. Yet so far as the orthodox rule is concerned, Professor McCormick states that the decisions are in conflict.[62] Such a result is natural under the orthodox analysis. A witness' knowledge has a bearing upon his credibility and thus upon the probative value of his testimony; the problem, however, is one of reliability and not one of circumstantial evidence. If a witness who offers to testify to fact X lacked opportunity for adequate observation, his testimony does not increase the probability that fact X occurred. Thus it is not relevant. But if fact X is itself the operative fact, it is not sought to prove fact X in order to prove something else. Thus no problem of circumstantial evidence is involved although there is a problem of probative value in the sense of reliability. Whether the opportunity to observe would involve a problem of relevancy or one of competency points up the ambiguity in those two terms.

There is complete concurrence between the proposed theory and the orthodox theory that the judge should pass upon the qualifications of a witness offered as an expert. Of course, if the judge admits the testimony of the witness, the jury may again consider his qualifications in evaluating his testimony. That is probably why expert witnesses are normally questioned regarding their qualifications in the presence of the jury. The procedure for qualifying an expert witness is usually quite perfunctory, and qualifications are frequently acknowledged or waived. If a real contest over the technical capacity of an expert witness should develop, however, the proper procedure would be for the judge first to hear the testimony outside the presence of the jury. If ruled to be unqualified, the witness would not testify; if ruled competent, evidence as to the witness' qualifications would again be repeated in the presence of the jury. That the judge should pass upon the witness' qualifications as a matter of fact and not merely as a matter of prima facie evidence is supported by proposed Federal Rule 702.[63] Current decisions also seem to support that result.[64] If the orthodox analysis is applied, however, would the expert's

[62]C. McCORMICK, CASES AND MATERIALS ON THE LAW OF EVIDENCE 21 n.13 (3d ed. 1956).

[63]*See* note 49, *supra*.

[64]Pruitt v. State, 216 Tenn. 686, 393 S.W.2d 747 (1965); Wisniewski v. Weinstock, 130 N.J.L. 58, 31 A.2d 401 (1943); Meiselman v. Crown Heights Hosp., 285 N.Y. 389, 34 N.E.2d 367 (1941); United Rys. and Elec. Co. v. Corbin, 109 Md. 442, 72 A. 606 (1909). In *Meiselman v. Crown Heights Hosp.*, the trial judge ruled that a doctor, offered as an expert, was incompetent because he received his training abroad. The ruling was reversed. The reviewing court held that the doctor was competent and

qualifications be a matter of competency or relevancy? It would clearly seem to be the former. Yet, the issue as to qualifications is clearly collateral to the main issues of the case in that the probative value of the expert's opinion depends upon his qualification to give an opinion. But since probative value is involved, the issue might well be regarded as one of relevancy under the orthodox analysis.

The confusion in the pre-1935 confession cases[65] demonstrates the ineptness of the traditional differentiation between questions of competency and questions of relevancy. The decisions were well divided as to which type of issue was involved in the question of voluntariness. Under the suggested analysis there would have been no problem of classification. The issue would clearly have been one of probative value based upon a question of reliability.

This writer is of the opinion that the line of decisions which held the issue to be for the judge was correct for two reasons. First, the question of voluntariness involves the determination and application of legal standards as well as matters of fact in the strictest sense, *i.e.*, matters of credibility and inference. Second, if the jury makes the determination, it is necessary for it to be aware of the challenged confession irrespective of its final decision as to whether the confession was voluntary.

Another comparison between the two bases for analysis may be found in connection with the determination of whether or not a document is authentic. There are various methods by which a document may be used and different types of preliminary questions involved.[66]

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should be allowed to testify. It was held, however, that it was proper for the jury also to consider the doctor's qualifications in deciding what weight to give to his testimony.

[65]*See* text accompanying notes 54-57, *supra.* Between 1936 (date of decision of Brown v. Mississippi, 297 U.S. 278) and 1961 (date of decision of Rogers v. Richmond, 365 U.S. 534), both the reliability and the privilege rationales were used to decide cases dealing with whether an offered confession was voluntarily obtained. Even after *Rogers v. Richmond*, the idea that an involuntary confession should be excluded on grounds of unreliability is not entirely obsolete. If the judge determines that a confession was voluntary and thus admissible, the jury should still be allowed to consider the evidence as to how the confession was obtained in passing upon its weight, and such a consideration necessarily entails a consideration of the reliability of the confession.

[66]All documentary evidence falls into one of two categories. Either the document is a form of real evidence, *i.e.*, the existence of the document is an operative fact or circumstantial evidence of a fact in issue, or it is a form of admissible hearsay. If the document is being offered to prove the truth of the matter asserted therein, it is being used testimonially and, to be admitted, must be qualified under the hearsay exceptions. If the document is a form of real evidence, its very existence may be an operative fact, as is usually true of a will, contract or deed. If the authenticity of a document offered as real evidence is in issue, a question of materiality would be involved and

Whatever the use of a document may be, however, it will lack probative value unless it is authentic, *i.e.*, unless it actually is what it purports to be. Thus, under either line of analysis, the decision should be for the jury. Under the traditional analysis it should be for the jury because authenticity would clearly seem to involve a question of relevancy. Under the theory herein advanced, the jury should decide because that body can readily understand the importance of authenticity.

Circumstantial Evidence

Under the traditional analysis preliminary facts relating to relevancy should be left to the jury. However, even if the concept of relevancy be limited to cases involving circumstantial evidence, *i.e.*, to problems of irrelevancy, preliminary questions of fact are not al-

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therefore the problem of preliminary facts would not arise. *See* text accompanying note 53, *supra*. *Compare* Patton v. Bank of LaFayette, 124 Ga. 965, 53 S.E. 664 (1906).

Although a document might not itself be an operative fact, it might be circumstantial evidence of an operative fact. Since the circumstantial value of the document would depend upon its authenticity, there would be a relevancy question in the strictest sense of the word and, under the orthodox analysis, the jury should make the final decision as to authenticity. This result was reached in Winslow v. Bailey, 16 Me. 319 (1939), where the authenticity of a paper which defendant claimed plaintiff had used to execute fraudulently the note sued upon was in issue. A similar result was reached in Dunklee v. Prior, 80 N.H. 270, 116 A. 138 (1922), where the authenticity of an impeaching statement was in issue. No hearsay problem was involved because an impeaching statement is not offered to prove the truth of the matter asserted in the statement. The mere fact of the existence of the impeaching statement is circumstantial evidence which has a bearing upon the reliability of the witness' testimony. Under the suggested theory the decision in these two cases would also be for the jury. The significance of authenticity is a matter readily understood by the jury and one which the jury is as capable of deciding as the judge. The question is one of fact in the most fundamental sense of the term, *i.e.*, one in which the credibility of witnesses is involved, as distinguished from a fact involving an element of evaluation.

If the document is to be used testimonially, *i.e.*, to prove the truth of the matter asserted, a hearsay problem arises. Under the orthodox analysis, preliminary questions concerning hearsay problems are usually for the judge. Furthermore, if the document is offered upon the theory that it includes an admission, such as in Coleman v. McIntosh, 184 Ky. 370, 211 S.W. 872 (1919), an even greater conceptual difficulty is presented because, under the analysis suggested herein, a question of procedural policy is involved and preliminary questions are for the judge. See text accompanying notes 77-78, *infra*. Regardless of how the hearsay problems are analyzed, however, they do not arise until the question of authenticity has been resolved. The significance and difficulty of the authenticity question would seem to be no different in cases in which the document is used testimonially than in cases in which it is presented as a form of real evidence. Thus, whatever other problems are decided by the judge, the problem of authenticity should be for the jury.

ways decided by the jury. Consider the problem of *comparables* in eminent domain cases. If the market value of a piece of land being condemned is in issue, evidence of the sales price of other similar land in the same neighborhood may be admissible. Of course, it is important that the other land sold be truly comparable to that now being evaluated. The comparability of the other land would seem clearly to present a problem of circumstantial evidence and thus one of irrelevancy. The sale price of the other land is of no significance except as it has a bearing upon the value of the land being condemned. Under the traditional analysis the decision should be made by the jury. At the same time, the legal significance of the question of comparability is such as to make it a question for the judge under the suggested analysis. There is case authority to sustain this latter approach.[67]

Sometimes it becomes necessary to establish a *similarity of conditions.* This necessity may exist in cases in which testimony of the prior condition of an instrumentality is offered as having a bearing upon its condition at the time of an accident. Under both the traditional[68] and suggested analyses, such preliminary questions would seem to be for the jury. Indeed, under the orthodox analysis all questions in which the use of circumstantial evidence depends upon a preliminary fact are questions for the jury. However, in *Bell v. State*[69] it was held to be for the judge to determine similarity of conditions in a case involving evidence of a pre-trial experiment. There again the problem involved circumstantial evidence but related to scientific data more understandable by the judge than the jury. Under the orthodox analysis the issue would necessarily have been for the jury.

Evidence of a *prior offense* may be used against a criminal defendant if it is relevant upon some basis other than proof of the bad character of the defendant. It is essential, however, that the prior offense was actually committed. The question as to whether or not it was committed is a preliminary question of fact. Should the judge be

[67]State v. Elder, 70 Wash.2d 414, 423 P.2d 533 (1967); People v. Graziadio, 42 Cal. Rptr. 29 (1965); Manda v. City of Orange, 82 N.J.L. 686, 82 A. 869 (1912); Kendal v. Flanders, 72 N.H. 11, 54 A. 285 (1903).

[68]Broderick v. Coppinger, 40 Ariz. 524, 14 P.2d 714 (1932). *Compare* Finch v. W.R. Roach Co., 295 Mich. 589, 295 N.W. 324 (1940), in which a plaintiff offered to introduce in evidence a model of a ladder which collapsed while he was working, causing his injuries. The purpose of the model was to aid a witness in connection with his testimony. Of course, the similarity of the ladder to that involved in the accident had to be determined before it could be used. It was held that the question of similarity was basically for the jury.

[69]164 Ga. 292, 138 S.E. 238 (1927).

convinced that the offense was committed before allowing evidence thereof, or is it sufficient that there be only prima facie evidence to establish the other offense, the jury being left to determine whether it was committed before considering it as circumstantial evidence? Since this is a problem of circumstantial evidence, the orthodox rule would require only a prima facie finding by the judge. There is indeed support for that point of view.[70] However, it would seem that under the analysis herein suggested, the other result should be reached. Upon consideration of the drastic effect of confronting a defendant being tried for one offense with having committed another, it would seem that the fact of the other offense should be established to the judge's satisfaction before the evidence is admitted. Also, the jury should not be confused by having to consider two cases at the same time.[71]

Whether an injured party *actually heard* a statement intended to give notice of the existence of a defective condition seems clearly to be a preliminary question of fact for the jury. The significance of the issue as to whether the statement was heard would be apparent to most jurors. The same result would be reached under the orthodox analysis because the issue involves a matter of circumstantial evidence and thus a question of irrelevancy.[72]

Competency of Witnesses

Under all views it is conceded that the competency of witnesses to testify is a preliminary question of fact for the judge.[73] This view is also carried forward under proposed Federal Rule 104(a).[74] Since

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[70]Lankford v. State, 93 Tex. Crim. 442, 248 S.W. 389 (1923); Commonwealth v. Robinson, 146 Mass. 571, 16 N.E. 452 (1888).

[71]*Cf.* Maguire and Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392, 404 n. 41 (1926).

[72]However, the United States Supreme Court in Gila Valley, Globe & H. Ry. v. Hall, 232 U.S. 94 (1914), held that such a preliminary question should be decided by the judge. The Court uncritically based its holding upon the old theory that all questions of admissibility of evidence are for the determination of the judge. Professor Maguire has justifiably criticized that decision. J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW, 223-25 (1947).

[73]Bell v. State, 164 Ga. 292, 138 S.E.238 (1927); Western Nat'l. Life Ins. Co. v. Williamson-Halsell-Frazier Co., 37 Okla. 213, 131 P. 691 (1913); Parrish v. State, 139 Ala. 16, 36 So. 1012 (1904); Commonwealth v. Reagan, 175 Mass. 335, 56 N.E. 577 (1900).

[74]"Preliminary questions concerning the *qualification of a person to be a witness*, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, . . ." Proposed Rules at 13 (emphasis added). This rule has been unchanged by proposed H.R. 5463, 93d Cong., 1st Sess. (1973).

problems relating to the competency, as distinguished from the credibility, of witnesses are of a technical nature, it would follow that under the proposed theory the decision should be made by the judge. Furthermore, if the jury were to make the decision as to competency, the distinction between competency and credibility would be eliminated. The two systems of analysis reach the same result in this situation, but it should be noted in passing that rules relating to the competency of witnesses really depend upon what is considered the witness' reliability. Since the reliability of testimony has a bearing upon whether it renders the propositions for which offered more or less probable, the question would seem to be one of relevancy under the orthodox analysis and thus for the jury. Nevertheless, the correct result is reached under the orthodox theory by the *tour de force* of classifying the questions under the heading of competency. The right result is reached by cases following the orthodox theory but not for the right reason. The correct reason is reached under the theory suggested herein: the technical nature of such questions and the need for summary decisions require decision by the judge.

Dying Declarations

The issue as to who should determine whether a dying declarant realized his extreme situation when making an accusatory statement is subject to the same diversity of answers as the issue as to who should pass upon the voluntariness of confessions.[75] It is natural that this confusion should exist under the traditional analysis. The rule admitting dying declarations is an exception to the hearsay rule, which in turn is based upon the principle that evidence should be reliable. Thus, according to the orthodox view, the reliability of an offer, having a bearing upon its probative value, would involve an

[75]Holding that the judge should make the decision are State v. Rich, 231 N.C. 696, 58 S.E.2d 717 (1950); People v. Hubbs, 401 I11. 613, 83 N.E.2d 289 (1949); Comer v. State, 212 Ark. 66, 204 S.W.2d 875 (1947); People v. Corder, 306 Ill. 264, 137 N.E. 845 (1922); and State v. Monich, 74 N.J.L. 522, 64 A. 1016 (1906). However, even if the dying declaration is admitted by the judge, the jury will still consider the same evidence in determining what weight to give to it. For cases which hold that the judge merely passes upon whether there is prima facie evidence leaving to the jury the final question, *see* State v. Proctor, 269 S.W.2d 624 (Mo. 1954); State v. Garver, 190 Ore. 291, 225 P.2d 771 (1950); People v. Denton, 312 Mich. 32, 19 N.W.2d 476 (1945); Berry v. State, 143 Tex. Crim. 67, 157 S.W.2d 650 (1942); State v. Dotson, 96 W. Va. 596, 123 S.E. 463 (1924); Commonwealth v. Regan, 175 Mass. 335, 56 N.E. 577 (1900); Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1898). In *Commonwealth v. Reagan*, it was felt that the trial judge has a discretion as to whether to decide the issue himself or to leave it to the jury for decision. 56 N.E. at 579.

issue of relevancy and would seem to be a question for the jury. However, the authorities classify hearsay problems in general as involving issues of competency for the judge to decide.[76] Evidence of a dying declaration has a highly emotional impact upon the jury and is difficult to refute. Even if the jury decides that the legal prerequisites of the dying declaration have not been met, the effect of the declaration may remain in the minds of its members. When the potential dangers of having a jury consider a dying declaration are considered, the proposed theory would seem to require that preliminary questions of fact conditioning the admissibility of such an offer be decided by the judge.

Procedural Questions

Most evidential rules are designed to help in the process of ascertaining truth and promoting justice. There are some rules, however, which are designed merely to provide for orderly and expeditious trials. Matters must be disposed of even at some sacrifice of truth and justice. Evidence rulings concerning procedural problems involve matters of procedural policy and thus may be regarded as falling within the third type of reason for exclusion previously examined.[77] Thus classified, preliminary facts conditioning such rulings should be decided by the judge. Preliminary facts which relate to exclusionary rules based upon policy are usually interlocutory facts, *i.e.,* they have no logical connections with the main issues of the case. However, in some cases they may be collateral facts. For example, the issue as to the sufficiency of a showing of probable cause to justify the issuance of a search warrant has a bearing upon the ultimate issue of the case. Thus it is a collateral fact. Yet, because it involves a policy against invasion of privacy, it may properly be regarded as a question for the judge and not the jury.[78]

There are various examples of preliminary facts conditioning exclusionary rules based upon procedural considerations which are decided by the judge. The judge decides whether a proper foundation has been laid for impeachment,[79] whether a prospective witness is unavailable so as to qualify a hearsay exception,[80] and if consent is required before a blood test may be administered, whether the con-

[76]*See* text accompanying notes 7-8, *supra.*

[77]*See* text accompanying note 52, *supra.*

[78]Steele v. United States, 267 U.S. 505 (1925).

[79]Schmidt v. Stone, 50 N.D. 91, 194 N.W. 917 (1923).

[80]New York Central R.R. v. Pinnell, 112 Ind. App. 116, 40 N.E.2d 988 (1942).

sent was obtained.[81] Four particular types of procedural problems, the "Dead Man's Statutes," vicarious admissions, questions of opinion, and the "Best Evidence Rule," warrant a more extended consideration.

Most states have statutes relating to cases prosecuted or defended by the personal representative of a deceased party which forbid a living party to the litigation or any other interested witness from testifying to a transaction (or, in some states, occurrence) involving the deceased. These statutes are colloquially called "Dead Man's Statutes." The issue of preliminary facts arises in these cases where the survivor has sought to divest himself of any interest by assigning any cause of action he might have had. May he then testify in favor of his assignee, who will be a party to the case? Whether he is competent to testify is sometimes said to depend upon whether the assignment was made in good faith. Under both the traditional analysis and the new analysis suggested, the question of good faith should be decided by the judge.[82]

Historically, no party or other person interested in the outcome of a case could testify. The rule forbidding a survivor from testifying is regarded as the remnant of the more general historical exclusionary rule based upon the idea that a person's interest in a case would cast doubt upon the reliability of his testimony. If that were the basis for the modified rule, the traditional analysis should require that the final decision be left to the jury. The preliminary fact of good faith would be collateral to the main issue because it would relate to the interest of the witness and thus his reliability. Under the alternate analysis, the decision would be for the judge because the matter is a technical one and not readily related to the main issue. It would seem, however, that the narrowing of the exclusionary rule implies a changed basis for it. Now it seems that the testimony of the survivor is excluded out of a notion of fair play. It is said that since death has sealed the lips of one party to the transaction, the law should seal the lips of the other. Thus a matter of procedural policy is involved, and the preliminary question of whether the assignment of the cause of action was made in good faith should be decided by the judge.

All admissions, including vicarious admissions,[83] have generally

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[81]*But see* Poston v. Clinton, 66 Wash.2d 911, 406 P.2d 623 (1965), in which the opposite result was reached.

[82]Moosbrugger v. Swick, 86 N.J.L. 419, 92 A. 269 (1914); Semple v. Callery, 184 Pa. 95, 39 A. 6 (1898); Hill v. Helton, 80 Ala. 528, 1 So. 340 (1887).

[83]A vicarious admission is unlike other admissions in that it is not made by a party to the litigation. Under appropriate circumstances, a statement made by an agent of

been regarded as exceptions to the hearsay rule. Application of the hearsay rule is an outstanding example of evidence being excluded because of its unreliability. It has been said that hearsay exceptions should be qualified by a showing of necessity and some basis for reliability, the latter to take the place of the oath and cross examination. Upon that basis it is difficult to support the admissibility of any admission, much less a vicarious admission.[84]

The drafters of the proposed federal rules of evidence have developed a more rational way of handling the admissions problem.[85] Rule 801(d) does not attempt to rationalize any type of hearsay exceptions so far as admissions are concerned; rather, the concept of hearsay is redefined so as to exclude all types of admissions. Thus, the rule allowing the introduction of admissions becomes a procedural rule[86] and not a rule based upon some showing of reliability. Just as a party may testify against himself,[87] extra-judicial statements made by him may be used against him. He may then attempt to refute his prior admission or lessen its force by explanation. The same analysis applies when the extra-judicial declaration is made by a party's agent, servant, or co-conspirator.

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a party, predecessor in title, or co-conspirator of a party, may be used against the party as if he had made the statement himself.

[84]*Compare* Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921).

[85]Rule 801(d) provides in part:

> (d) *Statements which are not hearsay.* A statement is not hearsay if—
>
> . . . .
>
> (2) *Admissions By Party-Opponent.* The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption of belief in its truth, or (C) *a statement by a person authorized by him to make a statement concerning the subject*, or (D) *a statement by his agent or servant concerning a matter within the scope of his agency or employment*, made during the existence of the relationship, or (E) a statement by a *co-conspirator* or a party during the course and in furtherance of the conspiracy.

(emphasis added).

[86]That the drafters of the proposed federal rules believed that they were basing the admissibility of all admissions upon procedural grounds rather than upon some theory of reliability is shown by their comment to Rule 801(d)(2). *See* Federal Rules at 108, wherein the drafters state: "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. . . ."

[87]Of course, a party will rarely testify against himself voluntarily, but he may well do so unwittingly on cross-examination.

Under standard authority extra-judicial statements by an agent are admissible against his principal if the agent had authority to make statements binding upon his principal.[88] The preliminary question of fact involved is whether the alleged agent had the authority to make the statement. Under the theory suggested the question is procedural in nature and the preliminary fact should be decided by the judge. Under the traditional view it would seem that the same result should be reached. The statement made by an agent involves a hearsay problem usually regarded as a matter of competency. Whether the alleged agent was actually authorized to make the statement would seem to have no bearing upon the realiability of the statement. Thus, the preliminary fact would be interlocutory, not collateral, and should be determined by the judge. Considerable authority, however, reaches the other conclusion.[89] A modern trend would admit extra-judicial statements made by an agent or servant while the employment relationship is still in existence and related to any matter occurring within the course of his employment.[90] If this new trend should ever become established, the same analysis should apply to the preliminary question of whether the employment relation exists: decision should be by the judge.

The issue as to the admission of the extra-judicial statement of a co-conspirator may arise in two contexts. First, there may be the situation in which the prosecution is for a conspiracy, with or without a concurrent charge of an overt act. If, in such a situation, the extra-judicial statement of a co-conspirator is offered to prove the fact of the conspiracy, a coincidence of issues problem is presented; that is to say, the very issue upon which the competency of the testimony depends is the same as an ultimate issue of the case. The resolution of preliminary questions in this context is dealt with below,[91] where it is submitted that the issue should be left to the jury. The other situation concerns cases where only the charge of an overt act is in issue, and the extra-judicial statement of an alleged co-conspirator is offered not to prove the conspiracy but to prove the overt act itself. In such a situation, existence of the conspiracy is a preliminary fact necessary for acceptance of the declaration of the co-conspirator.

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[88]This is comparable to the test indicated in Rule 801(d)(2)(c), note 85, *supra*.

[89]J.C. Lysle Willing Co. v. S.W. Holt and Co., 122 Va. 565, 95 S.E. 414 (1918); Smith v. O'Bryant, 181 S.W. 123 (Mo. 1916); Eagle Iron Co. v. Baugh, 147 Ala. 613, 41 So. 663 (1906); Birmingham Mineral R.R. v. Tennessee Coal, Iron and R.R., 127 Ala. 137, 28 So. 679 (1900).

[90]*See* Rule 801(d)(2)(D), note 85, *supra*.

[91]*See* text accompanying notes 102-104, *infra*.

Under both the traditional analysis and that suggested, the existence of the conspiracy is a preliminary fact for the judge to decide.[92]

Under the common law rule, the vicarious admission of a predecessor in title may be offered against a party presently claiming under the predecessor.[93] Thus, John Doe either as plaintiff or defendant may claim to own a piece of real or personal property or a chose in action, and may claim that he acquired the property on a specified date by conveyance from Richard Roe. If, at a time when, under John Doe's theory, Richard Roe owned the property, Roe made a statement to the effect that he did not own the property, the statement may be used in evidence against Doe. The issue as to when Roe's statement was made constitutes a preliminary question of fact.[94] This type of preliminary question of fact provides a clear example of a procedural question, and thus the time of the statement should be decided by the judge.[95]

The issue of the credibility of evidence, when challenged under the rule which forbids a witness to testify as to his opinion, is rarely conditioned upon the determination of a preliminary question of fact.

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[92]Runels v. Lowell Sun Co., 318 Mass. 466, 62 N.E.2d 121 (1945).

[93]Rule 801(d)(2) seems not to embrace the situation of a vicarious admission by a predecessor in title. If the predecessor in title is not available, his statement might be used as a declaration against interest under Rule 804(b)(4). *See* Proposed Rules at 131. If available, he might be called as a witness, and if he repudiates his denial of ownership at the appropriate time, his prior statement could be admitted under Rule 801(d)(1), which provides:

> (d) A statement is not hearsay if—
>
> (1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, . . .

The proposed federal rules of evidence are, as previously mentioned, in an indeterminate status at the present time. *See* note 12, *supra*. The House bill, H.R. 5463, 93d Cong., 1st Sess. (1973), seeks to weaken the force of the above quotation by adding the following proviso:

> . . . Provided that a prior inconsistent statement under clause (a) shall not be admissible as proof of the facts stated unless it was given under oath and subject to the penalty of perjury at a trial or hearing or in a deposition or before a grand jury.

[94]If Roe is unavailable to testify at the trial and his statement denying ownership was made in a *disserving* context (the denial might be self-serving as, for example, where Roe thereby seeks to avoid a tax liability), this statement may be used as a declaration against interest. In that event the judge would make the necessary preliminary determination. *See* text accompanying note 80, *supra*. If the statement does not qualify as a declaration against interest, it must be used, if at all, as a vicarious admission by a predecessor in title.

[95]De Grappenrud v. Thomas, 14 Ala. 681 (1848).

Thus, it is generally beyond the scope of this article. However, there is at least one instance in which the determination of such a preliminary question may be involved. It is well established that an expert may testify in response to a hypothetical question. Of course, whether the hypothetical question may be used depends upon the preliminary question of fact whether the hypothesis is in accord with the evidence in the case. Should the judge or jury make that determination? The probative value to be attached to the expert's opinion depends upon how closely the hypothesis upon which he based his opinion reflects actual facts of the case. Thus the preliminary question is a collateral one. According to the orthodox view the issue would become one of relevancy, and thus the decision should be by the jury. There are decisions which support that point of view.[96]

In order to apply the theory suggested herein to the problem of hypothetical questions, it is necessary to determine the rationale for the rule excluding opinion evidence. It seems that the exclusion is based upon procedural policy. A tribunal is composed of several parts: judge, jury, counsel, witnesses. There seems to be a separation of powers. Normally, the function of a witness is to relate his perceptions, but interpretation of those perceptions is a function of the jury. There are situations in which the only way a witness can relate his perceptions is by giving what could be interpreted as a conclusion. One of the values of expert testimony is that it allows a technically proficient witness to aid the jury by interpreting his perceptions, *i.e.*, giving his opinion, as to matters the jury might otherwise find difficult to decide.

Upon consideration of the rationale for the opinion rule, it is submitted that the decision as to the similarity of the hypothetical question to the evidence should be made by the judge for two reasons. First, the decision as to similarity is technical in nature and thus one which the judge is in a better position to make. Of course, it must be remembered that even if the judge allows the expert to express an opinion, the jury will still consider the similarity between the hypothesis and its view of what the evidence shows the facts of the case to be. Second, the competency of all opinion evidence, including expert opinion, involves a separation of function between witness and jury which is a matter of procedural policy which, like all policy-oriented preliminary questions of fact, should be decided by the judge. It may be objected that the conditioning fact is collateral rather than interlocutory. It has been recognized,[97] however, that although facts condi-

[96]Weissman v. Dept. of Labor and Indus., 52 Wash. 2d 477, 326 P.2d 745 (1958).

[97]*See* text accompanying note 78, *infra*.

tioning exclusionary rules based upon policy are usually interlocutory, they may be collateral.[98]

The so-called "Best Evidence Rule"—that a copy of, or oral testimony regarding, the contents of a document is not admissible unless it is established that there is an original document and that it cannot be produced for legitimate reasons—is predicated both upon reliability and upon procedural policy. Under either theory the judge should determine the preliminary facts. Even if the weakness in probative value, *i.e.*, the unreliability of the secondary evidence, be regarded as the basis for exclusion, this matter is so technical in nature that a summary determination by the judge is preferable. These conclusions seem to be supported by the case authority even under the traditional approach.[99]

Coincidence of Issues

Suppose that a type of preliminary question of fact which would normally be decided by the judge coincides with one of the operative facts of the case. There may appear to be a dilemma as to wheher the decision should be made by the judge or jury. Fortunately this situation does not frequently arise. For example, the dilemma posed in the famous case of *State v. Lee*[100] would not occur now because spouses are no longer disqualified from testifying in each other's behalf.[101]

As previously mentioned, a coincidence of issues problem may exist in conspiracy cases.[102] Consider a case in which the prosecution is for conspiracy either joined or not joined with charges of the overt act.[103] The logic of the situation would seem to require the same

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[98]This is especially true when matters of procedural policy are involved. Consider, for example, the rule against leading questions. This is basically a procedural rule to obtain the orderly presentation of evidence. However, it may be considered that answers in response to a leading question are not reliable. *Compare* Patton v. Bank of LaFayette, 124 Ga. 965, 53 S.E. 664 (1906).

[99]Fauci v. Mulready, 337 Mass. 532, 150 N.E.2d 286 (1958); St. Croix Co. v. Seacoast Canning Co., 114 Me. 521, 96 A. 1059 (1916); People v. Dolan, 186 N.Y. 4, 78 N.E. 569 (1906).

[100]127 La. 1077, 54 So. 356 (1911).

[101]The case involved a murder prosecution. Admittedly Lee was the murderer. The sole question was whether the defendant was Lee. He claimed not to be. Mrs. Lee was called to testify that the defendant was not her husband. Objection was made that a wife cannot testify for her husband. The judge was permitted to pass upon that question although it was the ultimate issue involved in the case. *Id.* at 357.

[102]*See* text accompanying note 91, *supra*.

[103]Compare this situation with that in which a defendant is charged only with the overt act but an attempt is made to use the extra-judicial declarations of an alleged

treatment as that followed by the traditional "Massachusetts Rule" in regard to the voluntariness of confessions.[104] Under that approach the judge would decide first whether, in his opinion, the conspiracy existed. If the decision is negative, the prosecution would be required to prove the conspiracy without the aid of the extra-judicial statements of the alleged co-conspirator. If affirmative, the statements could be used, but the jury would still be allowed to pass on the existence of the conspiracy.

The coincidence of issues problem may take a turn in which the offer of evidence is self-defeating. Consider the case of a bigamy charge wherein the alleged first wife is presented to testify to the fact of the alleged first marriage.[105] The very theory upon which the prosecution offers her testimony would make her an incompetent witness since, if she is his wife, she cannot testify against her husband over his objection. It may be argued that by objecting to her testimony, defendant concedes that she is his wife. But although the rule excluding her testimony is generally said to be a rule of privilege, it is in reality a rule of competency.[106] The inconsistency in the prosecution's offer precedes that in the defendant's objection, and thus the judge should exclude the testimony.

Conclusion

The differences in results between the two theories as to whether the judge or jury should determine preliminary questions of fact are not great. An attempt is made herein to provide a conceptual clarification of the process which actually occurs in making the decision. In two instances, that in which an operative fact appears to be a preliminary fact and that in which the preliminary fact has no rela-

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co-conspirator against him. *See* text accompanying note 92, *supra*.

[104]*See* McCormick at 349 *et seq.*; Annot., 170 A.L.R. 567, 587-88 (1947); Annot., 85 A.L.R. 870, 888-89 (1933).

[105]Barber v. People, 203 Ill. 543, 68 N.E. 93 (1903). This must not be confused with cases in which the alleged second wife is offered as a witness, *e.g.*, Matz v. United States, 81 App. D.C. 326, 158 F.2d 190 (1946); Murphy v. State, 122 Ga. 149, 50 S.E. 48 (1905); Lowery v. People, 172 Ill. 466, 50 N.E. 165 (1898); Cole v. Cole, 153 Ill. 585, 38 N.E. 703 (1894). In cases such as these no problem exists. If the first marriage cannot be established, there is no bigamy irrespective of the validity of the second marriage. If the first marriage is established, the second marriage is invalid and there is no bar to testimony by the purported second wife.

[106]*See* Brown v. Commonwealth, 208 Va. 512, 158 S.E.2d 663 (1968), in which it was held to be error even to put the wife on the stand in the absence of express consent by the defendant husband.

tion to the case except to condition the introduction of evidence, the same result is reached under both theories. In the former situation the jury decides the preliminary question of fact provided that the judge finds prima facie evidence, and in the latter situation the judge decides.

It is in those situations in which the preliminary fact relates to the probative value of evidence that there is a difference of reasoning and, to some extent, a difference in result between the two theories. In fact, the orthodox analysis offers no conceptual scheme based upon meaningful referents; a judge's decision as to whether to decide the preliminary question of fact himself must be based upon his unguided personal evaluation. Although the alternate theory suggested involves variable concepts with considerable room for judgment in their application, it does form a meaningful frame of reference for the making of specific decisions.

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