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Evidence- Hearsay-Scope of Federal Rule 43(a)

David K. Kroll S. Ed
University of Michigan Law School

EVIDENCE — HEARSAY — SCOPE OF FEDERAL RULE 43 (a) — The clock-tower of plaintiff county's courthouse buckled and collapsed into the courtroom below. Charred timbers were found in the wreckage. Several residents reported that they saw lightning strike the tower five days before the collapse. Plaintiff carried insurance for loss by fire or lightning, and sued the insurers when they denied liability. Defendant claimed that the tower collapsed of its own weight because of faulty design, deterioration, and overloading. To account for the charred timbers defendant introduced into evidence a fifty-eight-year-old newspaper article from the files of the city newspaper describing a fire in the courthouse during its construction. The court overruled plaintiff's objection that the article ought to be excluded as hearsay, and the jury found that lightning did not cause the collapse of the tower. Plaintiff appealed, specifying as sole error the admission of the newspaper article. On appeal, *held,* affirmed. Rule 43 (a) of the Federal Rules of Civil Procedure allows a federal court to relax the exclusionary hearsay rule when the evidence is relevant, material, and necessary, and there is circumstantial probability of its truthfulness.

Dallas County v. Commercial Union Assur. Co., 286 F.2d 388 (5th Cir. 1961).

Rule 43 (a) governs the admissibility of evidence in the federal courts. It provides that evidence must be admitted if admissible under any of these three categories: (1) federal statutes, (2) the rules of evidence applied in equity proceedings in federal courts, or (3) the rules of evidence applied in the courts of the forum state.[1] At the time of its adoption there was hope that rule 43 (a) would result in a judicial modernization of the strict and often conflicting rules of evidence followed in the various state courts,[2] and most writers agree that there has been significant progress.[3] However, the federal courts have been criticized for taking an unnecessarily restrictive interpretation of rule 43 (a) and for failing to use all of its potential to liberalize and modernize their exclusionary rules. The criticism is that although rule 43 (a) provides only that evidence must not be excluded if acceptable under any of the three standards, the federal courts generally construe it as requiring that evidence not be admitted on a different outside standard[4] if the forum state excludes it and no federal statute or rule admits it.[5] The principal case and *Monarch Ins. Co. v. Spach*,[6] decided six months earlier by the same court, appear to be the first cases to break away from the restrictive interpretation and adopt the full latitude of discretion available under the rule. In *Monarch*, the court held that the district court's exclusion of plaintiff's written statement introduced to impeach him was reversible error even though a state statute prohibited admission. The holding was based on a finding that such evidence was admissible under the precedent of federal equity decisions. The court added,

1 "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made." FED. R. CIV. P. 43 (a).

2 5 MOORE, FEDERAL PRACTICE ¶ 43.02[3] (2d ed. 1951); 1 WIGMORE, EVIDENCE § 8a (3d ed. 1940); Conrad, *Let's Weigh Rule 43(a)*, 38 VA. L. REV. 985, 987 (1952). With respect to hearsay, see MODEL CODE OF EVIDENCE 222-23 (1942); 5 WIGMORE, *op. cit. supra* § 1427.

3 See 5 MOORE, *op. cit. supra* note 2, at ¶ 43.02[3]; Conrad, *supra* note 2, at 985; Comment, *History and Application of Rule 43 (a) of The Federal Rules of Civil Procedure*, 30 TEXAS L. REV. 350 (1952). *But see* Green, *Federal Civil Procedure Rule 43 (a)*, 5 VAND. L. REV. 560, 579-80 (1952); Note, *Federal Rule 43 (a)—A Decadent Decade*, 34 CORN. L.Q. 238 (1948).

4 Green, *supra* note 3, at 571.

5 Hope v. Hearst Consol. Publications, Inc., 30 U.S.L. WEEK 2127 (2d Cir. 1961) (dictum); Schillie v. Atchison, T. & S.F.R.R., 222 F.2d 810 (8th Cir. 1955); Atlantic Coast Line R.R. v. Dixon, 207 F.2d 899 (5th Cir. 1953) (dictum); Wright v. Wilson, 154 F.2d 616 (3d Cir. 1946); 5 MOORE, *op. cit. supra* note 2, at 1320. *But see* Een v. Consolidated Freightways, 120 F. Supp. 289 (D.N.D. 1954) (dictum), *aff'd*, 220 F.2d 82 (8th Cir. 1955).

6 281 F.2d 401 (5th Cir. 1960).

however, the dictum that although rule 43 (a) defines three standards for admissibility, ". . . it does not purport to prohibit the admission of other relevant material probative evidence which, in the considered exercise of judicial wisdom, is trustworthy."[7]

In the principal case, the court refused to rest its decision on the "business record" or "ancient document" exceptions to the hearsay rule.[8] Accepting the *Monarch* dictum,[9] the court went on to state its own test for governing admission of hearsay evidence.[10] The court adopted the two general principles that Wigmore[11] derived from the common law exceptions to the hearsay rule, applied with "common sense."[12] The first of Wigmore's principles is "necessity";[13] unless the hearsay is admitted the benefit of the evidence will be lost entirely. The reason may be either that the person whose assertion is offered is dead or unavailable, or that evidence of the same value cannot be obtained from the same person or other sources. The second principle is "probability of trustworthiness";[14] where the circumstances[15] surrounding the statement indicate its reliability, the need for cross-examination is thereby diminished.

7 *Id.* at 411. See 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (Supp. 1960, at 255) (discussing the *Monarch* dictum).

8 "We do not characterize this newspaper as a 'business record,' nor as an 'ancient document,' nor as any other readily identifiable and happily tagged species of the hearsay exceptions." Principal case at 397-98.

9 Although the court decided the principal case on the basis of the nonrestrictive interpretation of rule 43 (a), it also reverted to the category of federal equity decisions as an alternative basis for its holding, stating: "Even if Rule 43 (a) should be interpreted as carrying the necessary implication that evidence to be admissible must fit into one of the three categories specified in the rule, the cryptic reference to 'rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity' is so uncertain in its meaning as to give broad latitude to a trial judge in his rulings on admissibility. . . . In finding and applying rules of evidence applicable to hearing of suits in equity, his chief censor is the conscience of a Chancellor." Principal case at 394.

10 The traditional objection to hearsay statements is the lack of opportunity to cross-examine. "Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." MCCORMICK, EVIDENCE § 225 at 460 (1954). "The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination. . . . It is here significant to note that the Hearsay rule, as accepted in our law, signifies a *rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of Cross-examination.*" 5 WIGMORE, *op. cit. supra* note 2, § 1362.

11 5 WIGMORE, *op. cit. supra* note 2, §§ 1420-23.

12 "There is no procedural canon against the exercise of common sense in deciding the admissibility of hearsay evidence." Principal case at 397.

13 5 WIGMORE, *op. cit. supra* note 2, § 1421.

14 *Id.* § 1422.

15 "*a.* Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification formed; *b.* Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy

Wigmore derived these general principles by determining what he considered to be the basic elements running through the common law exceptions. Each specific exception contains these two elements in varying degrees, however, and some are almost totally lacking in one or the other.[16] Use of such general standards as the only test of admissibility may be just as disadvantageous as the conservative decisions adhering to the strict hearsay rules of the common law. First, admission and exclusion of hearsay on the basis of common sense application of Wigmore's principles *alone* could result in the exclusion of some evidence because of the apparent absence of one of the elements, even though the evidence would properly be admitted under the present common law exception, and which would be valuable in the case before the court. Second, common sense application of Wigmore's vague principles may be too difficult. The two principles, standing alone, are so broad that lawyers will have little to guide them in attempting to determine whether a given piece of evidence will be admissible. Moreover, judges may prefer to adhere to common law precedents rather than make a qualitative appraisal in each case,[17] especially if there is some indication that proof of circumstances tending to show trustworthiness may be lengthy or involved. Whether evidence is trustworthy or not is a question of degree, and trials could be prolonged considerably by extensive argument whether, for example, a particular newspaper article or trade journal was sufficiently reliable to be admitted.

Many writers recommend that the federal courts adopt formal rules of evidence to supplement rule 43 (a).[18] They suggest the adoption of liberal but specific standards to guide the courts in the exercise of their discretion. This solution avoids the disadvantages of the conservative common law rules and also supplies the definiteness lacking in *ad hoc* decisions like that in the principal case. Formal rules could be specific as well as modern and liberal.

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detection or the fear of punishment, would probably counteract its force; *c.* Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected." 5 WIGMORE, *op. cit. supra* note 2, § 1422.

16 "The two principles are not applied with equal strictness in every exception; sometimes one, sometimes the other, has been chiefly in mind. In one or two instances one of them is practically lacking." 5 WIGMORE, *op. cit. supra* note 2, § 1423.

17 See 5 MOORE, *op. cit. supra* note 2, ¶ 43.02[5]; Clark, *Symposium on the Uniform Rules of Evidence—Foreword*, 10 RUTGERS L. REV. 479 (1956); McCormick, *Symposium on the Uniform Rules of Evidence—Hearsay*, 10 RUTGERS L. REV. 620 (1956). *But see* Conrad, *supra* note 2, at 1009.

18 See authorities cited note 17 *supra*; Degnan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341 (1960); Estes, *The Need for Uniform Rules of Evidence in the Federal Courts*, 24 F.R.D. 331 (1960); Joiner, *Uniform Rules of Evidence for the Federal Courts*, 20 F.R.D. 429 (1957).