Indiana Law Journal

Volume 17 | Issue 5 Article 7

6-1942

Another Exception to the Hearsay Rule

EVIDENCE

ANOTHER EXCEPTION TO THE HEARSAY RULE

Plaintiff, after being discharged as a chauffeur-carrier of United States mail, sued the government to recover sums which had been deducted from his salary for the purpose of establishing a pension. Defendant entered and established a counterclaim for money which plaintiff had taken from the mail and which had resulted in claims against the post office department. Alleging that the affidavits of alive and physically capable people upon which the counterclaim was based were inadmissible as hearsay evidence,[1] plaintiff appealed. *Held,* affidavits admissible; defendant made out a *prima facie case.*[2]

The hearsay rule of evidence is a rule excluding assertions offered testimonially which cannot in some way be subjected to the test of cross-examination.[3] This rules has been zealously guarded.[4] Nevertheless, some exceptions, most of them based upon *necessity* and *circumstantial probability of trustworthiness,* have developed.[5] Thus, courts have held that death of the declarant[6] or his physical incapacity[7] is sufficient cause to admit his statements as exceptions to the hearsay rule, provided that there is some guarantee of reliability.[8]

In holding that the great expense of bringing the many declarants or their depositions before the court made them unavailable and

---

[1] These were claims against the post office department of losses of 66 items of C. O. D. and insured parcels post mailed to addressees on plaintiff's route from various parts of the country. Each affidavit contained (1) a declaration by the initial postmaster that the parcel had been received, (2) a declaration by the postmaster at the point of destination that there was no record of its delivery, (3) affidavits by sender of contents of parcel and their value, and (4) affidavits of addressee of its non-receipt.

[2] Boerner v. United States, 117 F. (2d) 387 (C.C.A. 2d, 1941), *cert. denied,* 313 U. S. 587 (1941). Several other points were involved, but this note limits itself to the issue of hearsay evidence.

[3] 5 WIGMORE, EVIDENCE (3d ed. 1940) § 1362.

[4] *See* Queen v. Hepburn, 7 Cranch 290 (U. S. 1813), 294 to 297, where Chief Justice Marshall discusses the importance and nature of the hearsay rule, saying "the court is not inclined to extend the exceptions further than they have already been carried." *See also* Ellicott v. Pearl, 35 U. S. 412 (1836) at 435 to 437 for a further illustration of the narrow limits of the early hearsay rule.

[5] United States v. Westcoat, 49 F. (2d) 193, 195 (C.C.A. 4th, 1931); 5 WIGMORE, EVIDENCE (3d ed. 1940) §§ -941, 1942. See *Hearsay and the English Evidence Act* (1938) 34 ILL. L. REV. 974, 979.

[6] The Spica, 289 Fed. 436, 443 (C.C.A. 2d, 1923) (Court also recognized as a valid excuse for non-production of the declarant inability to find one who could speak with personal knowledge); 5 WIGMORE, EVIDENCE (3d ed. 1940) §§ 1456, 1506, 1403, 1521, 1523.

[7] 5 WIGMORE, EVIDENCE (3d ed. 1940) §§ 1456, 1506, 1406, 1408.

[8] The proofs of loss of postal matter required by the federal government as a condition precedent to payment, and penalties imposed by law for making false claims against the government and for perjury, sufficiently insured trustworthiness in the instant case. For a typical example of what will satisfy the requirement of reliability. See Seals v. United States, 70 F. (2d) 519, 520 (C.C.A. 5th, 1934) (regular entries).

hence justified admitting their statements under the necessity exception,[9] the court in the instant case relaxed the hearsay rule even further.[10] Moreover, it admitted evidence which did not fall within any of the traditional exceptions.[11]

The court's ruling was clearly in accord with modern criticisms of the rule which have been levied by many legal scholars[12] and some courts.[13] One recent federal decision, similar to the principal case, also suggests a tendency to break away from the traditional limitations of the hearsay rule.[14] Some will not object to the admission of the evidence on the peculiar facts of the instant litigation, but will decry the tendency of the court.[15] Others will applaud the decision.[16]

---

[9] The court showed extraordinary realism, for it would have been somewhat absurd to bring in the addressees or their depositions to prove items of 76 cents and up, with only two over $30 and two-thirds less than $10 each. Such a rule would have meant that actual proof could not have been had, for 66 proofs of loss were in evidence.

[10] The court carefully pointed out that one reason it admitted the evidence was that it established a *prima facie* case which the plaintiff could rebut with his own testimony, if he wished.

[11] Although there was some guarantee of reliability, as pointed out in note 8, *supra*, the proofs of loss which the affidavits represented did not fall into any of the traditional categories, i. e. dying declarations, statements against interest, declarations about family history, etc. For a complete list of traditional exceptions, see 5 WIGMORE, EVIDENCE, (3d ed. 1940) § 1426.

[12] Callahan & Ferguson, *Evidence and the New Federal Rules of Civil Procedure: II* (1937) 47 YALE L. J. 194, 196; McCormick, *Tomorrow's Law of Evidence* (1938) 24 A.B.A.J. 507; Wigmore *Jury Trial Rules of Evidence in the Next Century* in LAW, A CENTURY OF PROGRESS (1937) 347. Because of the expert character of the fact-finders sitting on administrative tribunals, the case against the hearsay rule in that area is much stronger. Consequently, the hearsay rule has been greatly relaxed and sometimes abolished in administrative proceedings. See Seymour, *The Professor Soliloquizes on Fact-Finding Boards and the Rules of Evidence* (1938) 24 A.B.A.J. 891. Moreover, with less civil litigation being disposed of by jury trials, the need for the hearsay rule is lessened. Clark & Shulman, *Jury Trial in Civil Cases* (1934) 43 YALE L.J. 867, 870. See also CODE OF EVIDENCE (Am. Law Inst. 1941) draft no. 4, rule 603 and 615, and introductory note to c. VII.

[13] Standard Oil Co. of N.Y. v. Johnson, 299 Fed. 93, 98 (C.C.A. 1st, 1924) ("the modern tendency is to increase the number" of exceptions to the hearsay rule).

[14] United Fruit Co. v. United States, 33 F. (2d) 664 (C.C.A. 5th, 1929) (In an action by the government against a carrier for value of stolen mails, court admitted in evidence files of postoffice department showing verified claims made by senders of registered mail).

[15] The court could perhaps have admitted the evidence on the ground that it fell within the recognized exception of official statements; the necessity requirement is almost completely relaxed; expediency is sufficient. But the court declined to follow this rationale. For further discussion of this exception to the hearsay rule, see 5 WIGMORE, EVIDENCE (3d ed. 1940), §§ 1630, 1631. See also United States v. Westcoat, 49 F. (2d) 193 (C.C.A. 4th, 1931).

[16] See the authorities cited in note 11 *supra*.