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Federal Civil Procedure Rule 43(a): A Freak Among the Rules

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FEDERAL CIVIL PROCEDURE RULE 43 (a)

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A Freak Among the Rules

Rule 43(a) is an anomaly in the Federal Rules of Civil Procedure.[1] Attorney General Cummings, the chief sponsor of the enabling act,[2] apparently did not contemplate the inclusion of any rule dealing with the admissibility of evidence.[3] The American Bar Association, which sponsored similar bills before Congress for years, laid much of the groundwork but abandoned the project prior to successful completion.[4] A report of the Association's committee charged with the duty of "pushing" the then current version of the bill stated that the court rules were not to deal with evidence.[5] The broadest expression in the bill which was enacted into law in 1934, as well as in the bill upon which the Bar Association committee reported, authorized the Supreme Court to prescribe "procedure" for the district courts. The Supreme Court had previously indicated that procedure includes the law of evidence.[6] The Advisory Committee appointed by the Supreme Court to draft the Rules of Civil Procedure became convinced that the Court had authority under the statute to deal with evidence and that it was necessary for the Court to exercise the authority. Chairman Mitchell has said:

> "When you are uniting actions at law and suits in equity, in matters of procedure, into one form of action and one procedure, and the courts are expected to ignore the question whether an action was originally one cognizable in law or in equity, you run afoul of the question whether the rules of evidence to be followed are those theretofore prevailing in actions at law or those prevailing in suits in equity. There are some differences."[7]

Rule 43(a) was adopted to settle the question stated by Mr. Mitchell. The first sentence of the Rule simply provides for testimony to be taken orally

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1. Federal Rules of Civil Procedure, 28 U.S.C.A. (1950); 1 F.R.D. LXXIV (1941).

2. Act of June 19, 1934, c.651, § 2, 48 STAT. 1064, *as amended*, 28 U.S.C.A. § 2072 (Supp. 1951).

3. Cummings, *Immediate Problems for the Bar*, 20 A.B.A.J. 212 (1934).

4. 57 A.B.A. REP. 119 (1932).

5. *Report of the Committee on Uniform Judicial Procedure*, 6 A.B.A.J 509, 517, 519 (1920).

6. Thompson v. Missouri, 171 U.S. 380, 18 Sup. Ct. 922, 43 L. Ed. 204 (1898); Kring v. Missouri, 107 U.S. 221, 231, 2 Sup. Ct. 443, 27 L. Ed. 506 (1882). For a general discussion see Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?* 26 A.B.A.J. 482 (1940).

7. PROCEEDINGS OF CLEVELAND INSTITUTE ON FEDERAL RULES 186 (1938). What differences does Mr. Mitchell have in mind? One difference was that the federal courts conformed, at least in some circuits, to evidence rules of the states in actions at law but did not in equity. See note 12 *infra*.

in open court as a general practice. This was being done already in equity as well as at law.[8] The second sentence is as follows:

> "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."[9]

No complete explanation of the choice of language has been given. Probably the federal sources were limited to statutes and evidence law applied in equity, because varying degrees of conformity to state law prevailed in actions at law. In some circuits the courts of appeals required conformity to evidence law of the state in which the federal trial court was sitting;[10] in others conformity to state statute law alone was expected.[11] On the equity side of the district court there was no requirement of conformity.[12] Therefore the reference to equity appears to have been used in Rule 43(a) to make clear that existing federal precedents were to control admissibility if they would admit the data sought to be introduced.[13] The law of evidence for courts of equity is in general the same as for courts of law. So far as the rules of admissibility are concerned, the main difference was in the less strict application in equity.[14] Hence it is not surprising that the courts used decisions in actions at law to determine the rules of evidence heretofore applied in equity.[15]

The treatment of evidence in the Federal Rules of Civil Procedure is not limited to a single provision but extends through 21 Rules. Of these, Rules

8. The equity practice was set forth in Equity Rule 46.

9. "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. 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. The competency of a witness to testify shall be determined in like manner." FED. R. CIV. P. 43(a).

10. Franklin Sugar Refining Co. v. Luray Supply Co., 6 F.2d 218 (4th Cir. 1925); Pooler v. United States, 127 Fed. 519 (1st Cir. 1904); Stewart v. Morris, 88 Fed. 461 (7th Cir. 1898); *see* Nashua Savings Bank v. Anglo-American Land, Mortgage & Agency Co., 189 U.S. 221, 228, 23 Sup. Ct. 517, 47 L. Ed. 782 (1903).

11. Pariso v. Towse, 45 F.2d 962 (2d Cir. 1930); West Tennessee Grain Co. v. J. C. Shaffer & Co., 299 Fed. 197 (6th Cir. 1924).

12. 1 WIGMORE, EVIDENCE § 4 (3d ed. 1940). An exception was competency of witnesses. REV. STAT. § 858 (1878), *as amended,* 34 STAT. 618 (1906), *repealed by* 62 STAT. 992 (1948), 28 U.S.C.A. § 39 (1949).

13. W. D. Mitchell in PROCEEDINGS OF CLEVELAND INSTITUTE ON FEDERAL RULES 186 (1938).

14. *See* W. F. & John Barnes Co. v. International Harvester Co., 145 F.2d 915, 917 (7th Cir. 1944), *cert. denied,* 324 U.S. 850 (1945); 1 WIGMORE, EVIDENCE § 4 (3d ed. 1940).

15. Peoples Gas Co. v. Fitzgerald, 188 F.2d 198, 201 (6th Cir. 1951); Reck v. Pacific-Atlantic S.S. Co., 180 F.2d 866, 869 (2d Cir. 1950); Vanadium Corp. of America v. Fidelity & Deposit Co. of Maryland, 159 F.2d 105, 109 (2d Cir. 1947); Note, 46 COL. L. REV. 267, 271 (1946).

26 through 37 deal with depositions and discovery, including physical and mental examination and request for admission of facts. The others and their subject-matters are 43, admissibility, competency of witnesses, form and scope of examination, record of excluded evidence, affirmation, and evidence on motions; 44, proof of official records; 45, subpoena and service; 50, authorization to a party, who moves for a directed verdict at the close of his opponent's evidence, to introduce evidence in the event the motion is not granted; 59(a), additional testimony on certain motions for new trial; 61, harmless error; 68, evidence of an unaccepted offer of judgment, inadmissible; 80(c), proof of prior testimony by the transcript. Although the sponsors and the Advisory Committee at first did not intend for evidence to be included, the 86 Rules finally issued deal with the subject in approximately one fourth of their number. Of these the Rule with the broadest coverage is Number 43.

Subdivision (a) of Rule 43 is an anomaly for the additional reason that it does not advance in its own field the purposes which the Federal Rules of Civil Procedure were designed to serve. These are:[16]

(1) The need to modernize federal procedure. The need was just as great with regard to evidence law as it was in the area of pleading and practice but was not met by the Rules. Some of the specific provisions are commendable, such as those of Rule 44 which furnish a simple, cumulative method of proving official records or absence of record and those of 43(b) providing for calling and examining the adverse party; but these have a very limited scope; the great body of precepts on admissibility is left to two sentences in Rule 43(a). The language will be discussed below. Viewed as a device for modernizing the federal law of evidence it is inadequate.

(2) A desire to make federal procedure more flexible and to place its control in the hands of persons better qualified to deal with it than Congress. The desideratum was to be obtained by replacing common law and statutes with rules of court. This was accomplished in other areas but in the field of evidence most of the principles are not set forth in the Rules; only a statement of where to find them is given. The common law and statutes as interpreted by the authorities designated in Rule 43(a) still prevail to the extent indicated by the Rule. Although the law of evidence applied in the courts of the states will include the limited number of court rules on evidence which are in existence, they are of comparatively small importance.[17] No state has a complete set of rules of court for evidence.

(3) A wish to replace conformity to state procedure with uniformity throughout the district courts so that the federal judiciary would have a

16. Mitchell, *Attitude of Advisory Committee*, 22 A.B.A.J. 780, 781 (1936); PROCEEDINGS OF CLEVELAND INSTITUTE ON FEDERAL RULES 189 (1938).

17. Green, *To What Extent May Courts under the Rule-Making Power Prescribe Rules of Evidence?* 26 A.B.A.J. 482, 484 (1940).

simple, modern, efficient system which would serve as a model for the state courts. The hope was, and is, that the federal example would improve conditions in the state tribunals and that a lawyer would eventually be able to follow practically the same procedure in both sets of courts.[18] In the field of evidence however no provision is made for uniform rules of admissibility. No single system is established to influence reform in the states.

The failure to deal adequately in the Rules of Civil Procedure with the law of evidence is not surprising. An attempt to do so would have doubled the work of the Advisory Committee. Such an effort would have been at least equal to the labor and difficulty involved in the rest of the Rules. The drafting of a code of evidence rules has seldom been attempted. The few attempts have not been well received.[19] The reform of pleading and practice was the problem originally envisaged for the Federal Rules and its solution was much more obvious. Possible controversies in Congress over the proper treatment of the evidence problems might have held up the taking effect of all the Rules.[20] There is less excuse for leaving the original solution unchanged for more than thirteen years.

RULE 43(A) AS AN INSTRUMENT OF MODERNIZATION

The modern tendency is to admit any evidence throwing light on the question but to give to the trial judge discretion as to the reasonable bounds of the hearing.[21] This doctrine, unlike the modern principles of pleading, has not been generally incorporated in state statutes and is not so widely accepted. Where it is accepted the trend is toward less and less emphasis on the opinion, hearsay and other exclusionary rules.[22] Federal Civil Procedure Rule 43(a) has certain inherent limitations which prevent it from contributing strongly to the trend. The language of the Rule does not provide for specific reforms but merely makes available such reforms as spring from other origins. Because neither state nor federal law of admissibility has been greatly influenced by the modern tendency of the more advanced rulings, there will be many instances in which liberal precedents are either nonexistent

18. Clark, *The Influence of Federal Procedural Reform,* 13 LAW & CONTEMP. PROB. 144 (1948).

19. No state has adopted the A.L.I. *Model Code of Evidence.* Falknor, *Evidence* in 1949 ANNUAL SURVEY OF AMERICAN LAW 975 (N.Y.U. 1950).

20. Monte M. Lemann in PROCEEDINGS OF ATLANTA INSTITUTE ON FEDERAL RULES 72 (1938). The Rules were to be reported to Congress at the beginning of a regular session and were not to take effect until the close of such session. Act of June 19, 1934, c.651 § 2, 48 STAT. 1064, *as amended,* 28 U.S.C.A. § 2072 (Supp. 1951).

21. United States v. 25.406 Acres of Land in Arlington County, Virginia, 172 F.2d 990 (4th Cir. 1949).

22. Slifka v. Johnson, 161 F.2d 467, 469 (2d Cir. 1947); Zimberg v. United States, 142 F.2d 132, 135 (1st Cir. 1944); Boerner v. United States, 117 F.2d 387, 389 (2d Cir. 1941).

or constitute a small minority. Judges of the United States courts, like most lawyers in this country, are precedent minded.[23] They are inclined to say that changes in accepted precepts should be made by legislation.[24]

The exceptions to the hearsay rule constitute one of the most unsatisfactory portions of our law. Their unreasonableness and inconsistency is generally recognized but almost nothing has been done in this country to reform them.[25] Although statutes disqualifying a surviving party to a transaction as a witness in litigation with the successor to the deceased or incompetent party to the transaction are universally condemned by modern writers,[26] they are in effect in all but a very few of the states.[27] Thus liberal precedents on these points will be lacking in almost all of the states. The power of precedent was ignored by those who predicted that in general Rule 43(a) would place admissibility upon the sole basis of relevancy and materiality[28] or would give the federal courts freedom to develop their own rules.[29] These predictions were based upon the assertion that few equity decisions pass upon evidence questions and that there is consequently no body of law dealing with admissibility in equity. As stated above the decided cases do not fulfill the predictions.[30] The courts have assumed that decisions in actions at law would have been followed in equity.[31] Judge Clark, the draftsman of the Rules of Civil Procedure, seems to make the same assumption.[32] Even if there were no evidence decisions binding in equity causes in the district court the judges would consider cases from other jurisdictions to be persuasive au-

23. *Compare* Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625 (1914), *with* Gadsden v. United States, 54 F. Supp. 151 (D. Md. 1944), which, however, is not decided under Rule 43(a).

24. Wright v. Wilson, 154 F.2d 616, 620 (3d Cir. 1946).

25. Boerner v. United States, 117 F.2d 387, 389 (2d Cir. 1941); Morgan and Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937); Morgan, *Some Suggestions for Defining and Classifying Hearsay*, 86 U. OF PA. L. REV. 258, 273 (1938).

26. Wright v. Wilson, 154 F.2d 616, 620 (3d Cir. 1946); CHAFEE, MORGAN *et al.*, THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM 27 (1927).

27. 2 WIGMORE, EVIDENCE § 578 n.1 (3d ed. 1940); VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 334 (1949); Rubin, *Evidence* in 1947 ANNUAL SURVEY OF AMERICAN LAW 1068, 1076 (N.Y.U. 1948).

28. 5 MOORE, FEDERAL PRACTICE 1313 (2d ed. 1951).

29. Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure: 2*, 47 YALE L. J. 194, 197-98 (1937).

30. The first edition of Moore is quoted on admissibility being placed on sole basis of relevancy and materiality in United States v. Vehicular Parking, Ltd., 52 F. Supp. 751, 754 (D. Del. 1943), but the objection made to the evidence at the trial was "immaterial and irrelevant." The same quotation is given in Neff v. Pennsylvania R. Co., 7 F.R.D. 532, 534 (E.D. Pa. 1948), but the receipt of the evidence was held justified entirely aside from any consideration of Rule 43(a).

31. Note 15 *supra*.

32. Reck v. Pacific-Atlantic S.S. Co., 180 F.2d 866, 869 (2d Cir. 1950); Vanadium Corporation of America v. Fidelity & Deposit Co. of Maryland, 159 F.2d 105, 109 (2d Cir. 1947); Boerner v. United States, 117 F.2d 387, 391 (2d Cir. 1941); Commercial Banking Corporation v. Martel, 123 F.2d 846, 847 (2d Cir. 1941).

thority.[33] Such is the common law tradition in this country.[34] On the whole the American cases on admissibility are anything but modern or liberal.[35]

However, as inadequate as Rule 43(a) is, it furnishes possibilities for progressive rulings which the courts have not fully exploited. Although there is nothing in the Rule to authorize a major break with the past on a nation-wide scale, the federal tribunal can choose, from among the decisions of the other 47 states, the better view on any point which remains undecided in the forum-state or the federal law. The provision, rules applied in the state or heretofore applied in federal suits in equity, should be interpreted to mean the body of law followed in each of the two designated jurisdictions. If gaps are left by an absence of decisions in the particular jurisdiction the federal courts can decide for themselves what the law is.[36] Unfortunately when the opportunity presents itself they do not take advantage of it.

In *United States v. Aluminum Co. of America*,[37] testimony of a deceased witness at a former hearing was excluded at a later trial although it was offered against the Aluminum Company both times. The party against whom the former testimony was being offered had had an opportunity to cross-examine the deceased witness but the transcript was excluded because the plaintiff, the party offering it, was not a party to the former proceeding. The court said that a quotation of the testimony could not be received because it would not be admissible if offered against the plaintiff; the right to introduce must be reciprocal. A decision of the United States court of appeals for the local circuit was cited.[38] The case relied on and others do indeed support the exclusion but the doctrine is unsound and there are authorities to the contrary.[39] The court in the *Aluminum* case made the exclusionary ruling on the basis of federal law without discussing the law of the state in which the court was held, namely, New York. The courts of New York seem not to

33. For a fuller discussion consult Green, *The Admissibility of Evidence Under the Federal Rules*, 55 HARV. L. REV. 197, 216 (1941).

34. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 19, 103 (1921).

35. Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909 (1937); Tracy, *What Progress in Reform of Evidence Rules?* 20 J. AM. JUD. SOC'Y 80 (1936).

36. See Huddleston v. Dwyer, 322 U.S. 232, 64 Sup. Ct. 1015, 88 L. Ed. 1246 (1944); Michigan Central R.R. v. Powers, 201 U.S. 245, 291, 26 Sup. Ct. 459, 50 L. Ed. 744 (1906); HOLTZOFF, NEW FEDERAL PROCEDURE AND THE COURTS 120 (1940); *cf.* Peoples Loan & Investment Co. v. Travelers Ins. Co., 151 F.2d 437, 441 (8th Cir. 1945). In Lake Shore Nat. Bank v. Bellanca Aircraft Corporation, 83 F. Supp. 795 (D. Del. 1949) the court decided the Delaware law for itself with the result that the evidence was excluded.

37. 1 F.R.D. 48 (S.D.N.Y. 1938).

38. Metropolitan St. Ry. Co. v. Gumby, 99 Fed. 192, 198-99 (2d Cir. 1900).

39. Harrell v. Quincy, O. & K. C.R. Co., 186 S.W. 677 (Mo. 1916); Hartes v. Charlotte Electric Ry. Co., 162 N.C. 236, 78 S.E. 164 (1913); Note, 142 A.L.R. 673, 696 (1943).

have decided the point.[40] Therefore, the United States district court could have assumed that New York would adopt the better view, the one favoring admissibility against a defendant who had already had an opportunity to cross-examine the deceased witness on the same issue.

Altmayer v. Travelers Protective Association[41] held that the United States District Court for the Eastern District of Wisconsin erred in allowing a showing of a statement to his physician by insured, since deceased, that he had suffered a fall. The court of appeals cited no authority. A search for Wisconsin cases should have divulged that the point has not been clearly settled in the state but that at least one decision points toward treating a statement to a physician as to the external cause of an injury as an excepion to the hearsay rule.[42] The result is justified by reference to the probability that a person seeking treatment will give the doctor truthful and accurate information.[43] The district court, which usually would be in a better position to know the state law than the court of appeals, had allowed the statement to be shown. Apparently the question has not been passed on at all by the state courts in Florida,[44] but the Court of Appeals for the Fifth Circuit approved the exclusion, by a United States district court in Florida of testimony as to what deceased told his physician about the cause of his wound.[45] No authority was cited. Here again there was a failure to seize the opportunity to decide that because the forum-state courts had never decided otherwise the evidence was admissible under the state law. These two eases are, of course, in accord with the overwhelming weight of authority.[46] However, the question was not as to the majority view but as to the law of the particular state. In many instances modernizing and liberalizing the rules of evidence can be accomplished only by breaking with the majority.

When confronted with a ease of first impression in federal evidence law the courts have usually failed to use the spirit of Rule 43(a) to reach a liberal result if forum-state law did not require it. In *Palmer v. Hoffman*,[47]

40. See Note, 142 A.L.R. 673, 687 (1943).
41. 119 F.2d 1005 (7th Cir. 1941).
42. Kraut v. State, 228 Wis. 386, 280 N.W. 327 (1938). An earlier ease contains a dictum contra. Maine v. Maryland Casualty Co., 172 Wis. 350, 178 N.W. 749 (1920). The statement was unnecessary to the decision beeause the communications were held privileged.
43. Mutual Life Ins. Co. v. Davis, 48 Ga. App. 742, 173 S.E. 471 (1934); Valentine v. Weaver, 191 Ky. 37, 228 S.W. 1036 (1921); Omberg v. United States Mutual Ass'n, 101 Ky. 303, 40 S.W. 909 (1897).
44. See Notes, 130 A.L.R. 977, 983 (1941), 80 A.L.R. 1527, 1529 (1932), 67 A.L.R. 10, 25 (1930).
45. Walker v. Prudential Ins. Co. of America, 127 F.2d 938 (5th Cir. 1942). The decision might be justified on the ground that the district judge was in better position than the Circuit Court of Appeals to decide state law.
46. See Note, 130 A.L.R. 977, 983 (1941).
47. 318 U.S. 109, 63 Sup. Ct. 477, 87 L. Ed. 645 (1943). The restrictive influence of this case is shown by England v. United States, 174 F.2d 466, 468 (5th Cir. 1949); Gilbert v. Gulf Oil Corp., 175 F.2d 705 (4th Cir. 1949); Clainos v. United States, 163 F.2d 593 (D.C. Cir. 1947).

the Supreme Court had before it an action for damages arising out of a grade-crossing accident. Both the United States district court sitting in New York and the court of appeals had held inadmissible a statement made by the engineer of the train to an assistant superintendent of the railroad two days after the accident. The Supreme Court approved the rulings. The written statement was offered under the Act of Congress of June 20, 1936,[48] which seems from its language to be intended to substitute an entirely new basis of admissibility for the "regular entries" hearsay exception. Nevertheless Mr. Justice Douglas said that the statement was not signed in the regular course of business within the meaning of the Act. An offer to prove that it was, had been made but the trial judge sustained an objection to the offer. Professor Morgan comments: "It is suggested with deference, but with confidence, that Mr. Justice Douglas is taking judicial notice as true of a proposition which is false in fact. . . It is said that James B. Thayer once remarked in effect that the greatness of the Supreme Court was not revealed in its decisions on questions of evidence."[49]

The Court of Appeals for the Sixth Circuit has held testimony of one who had examined deed indexes and had found no record of a judgment of forfeiture, not to be the best evidence. The case came up from Kentucky and authority from that state was cited requiring the production of the custodian of the records. The court of appeals said, "Under the facts of the case at bar, we follow the Kentucky case most applicable to the decision."[50] This would be the proper course if the state case favored admissibility but the evidence should not be excluded without considerating the federal authorities. None are cited in the opinion. If there are no federal decisions directly in point the court could have adopted as the rule in the national tribunals the principle considered to be sound. Wigmore says that there is no preference for one witness over another in this situation. A ruling in favor of admissibility might have been supported by citing federal cases which say that evidence can be admitted in the absence of federal precedents excluding,[51] that the Rules of Civil Procedure have attempted to liberalize admissibility,[52] that when in doubt the ruling should be in favor of admis-

48. 49 STAT. 1561 (1936), 28 U.S.C. § 695 (1936), *now* 28 U.S.C.A. § 1732 (Supp. 1951). A statute drafted from the same model was in force in New York. Hoffman v. Palmer, 129 F.2d 976, 984 (2d Cir. 1942).

49. Morgan, *The Law of Evidence, 1941-1945,* 59 HARV. L. REV. 481, 566 (1946).

50. Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co., 137 F.2d 871, 887 (6th Cir. 1943), *cert. denied,* 320 U.S. 800 (1944). *Contra* on evidence ruling, 4 WIGMORE, EVIDENCE § 1272 (3d ed. 1940).

51. Peoples Loan & Investment Co. v. Travelers Ins. Co., 151 F.2d 437 (8th Cir. 1945).

52. Mattox v. News Syndicate Co., 176 F.2d 897 (2d Cir. 1949); Dellefield v. Blockdel Realty Co., 128 F.2d 85, 93 (2d Cir. 1942); United States v. Vehicular Parking, Ltd., 52 F. Supp. 751 (D. Del. 1943).

sibility.[53] Another case cited only Pennsylvania decisions when excluding a statement offered as *res gestae*.[54] It would seem that some investigation should have been made of the federal cases. If none in point were found the general authorities could be consulted. Instead the court allowed the decision to be controlled by the law of the state in which the court was held and the result was exclusion. A similar failure to look into the federal decisions occurred in connection with the refusal to receive a statement of an employee offered as an admission.[55] Still other cases cited no authority for a debatable application of the controversial opinion rule[56] nor for exclusion of defendants' reputation for honesty.[57] The latter ruling was based on the ground that the proceeding to recover damages for presenting false claims against the United States was not criminal.

Only one case was found which made any attempt to develop the possibilities presented by an absence of authorities in the forum state or the United States courts. There the evidence was received on the basis of the general weight of authority.[58] The opinion did not expressly interpret Rule 43(a) as permitting the court to decide for itself in the absence of controlling authority. However, this interpretation is given in a dictum in another case.[59] It may be significant that both of these opinions were written in the latter half of the period which has elapsed since the adoption of the Federal Rules of Civil Procedure. There is an occasional indication of a tendency on the part of the decisions to become more liberal. In 1940 and 1941 the Court of Appeals for the Fifth Circuit said in three cases that an expert witness cannot give his opinion on an ultimate question for the determination of the jury.[60] Since then the decisions of the courts of appeals have been the other way.[61] They have held that such an opinion may be received or that admissibility

53. Pfotzer v. Aqua Systems, Inc., 162 F.2d 779 (2d Cir. 1947); Neff v. Pennsylvania R.R., 7 F.R.D. 532, 534 (E.D. Pa. 1948).

54. Gaynor v. Atlantic Greyhound Corporation, 86 F. Supp. 284, 290 (E.D. Pa. 1949), *rev'd*, 183 F.2d 482 (3d Cir. 1950).

55. Trouser Corporation of America v. Goodman & Theise, Inc., 153 F.2d 284 (3d Cir. 1946).

56. Crow v. Continental Oil Co., 115 F.2d 740 (5th Cir. 1940).

57. United States *ex rel.* Marcus v. Hess, 41 F. Supp. 197 (W.D. Pa. 1941), *rev'd*, 127 F.2d 233 (3d Cir. 1942), *rev'd*, 317 U.S. 537, 63 Sup. Ct. 379, 87 L. Ed. 443 (1943). The result seems to be unsound. Mutual Life Ins. Co. of New York v. Treadwell, 79 F.2d 487 (5th Cir. 1935); Waggoman v. Fort Worth Well Machinery & Supply Co., 124 Tex. 325, 76 S.W.2d 1005 (1934).

58. Pfotzer v. Aqua Systems, Inc., 162 F.2d 779 (2d Cir. 1947).

59. Peoples Loan & Investment Co. v. Travelers Ins. Co., 151 F.2d 437 (8th Cir. 1945).

60. Farris v. Interstate Circuit, Inc., 116 F.2d 409 (5th Cir. 1941); Continental Casualty Co. v. First Nat. Bank of Temple, 116 F.2d 885 (5th Cir. 1941); United States v. Ware, 110 F.2d 739 (5th Cir. 1940); *cf.* Hamilton v. United States, 73 F.2d 357, 358 (5th Cir. 1934).

61. Builders Steel Co. v. Comm'r of Int. Revenue, 179 F.2d 377 (8th Cir. 1950); Francis v. Southern Pac. Co., 162 F.2d 813 (10th Cir. 1947), *aff'd*, 333 U.S. 445 (1948); Mutual Benefit Health & Accident Ass'n v. Francis, 148 F.2d 590 (8th Cir. 1945).

depends on the nature and circumstances of the case. However these decisions are not from the Fifth Circuit and do not make use of the language of Rule 43(a). The cases from the Fifth as well as the other circuits rely on federal precedents.[62]

WHERE BOTH FEDERAL AND FORUM-STATE PRECEDENTS EXCLUDE

Failure of the federal courts to decide for themselves the evidence law of the forum-state or of the United States courts when the question presented has not been decided in one or both of the two jurisdictions is rather clearly unsound. There is another device by which liberal and progressive rulings could sometimes be made by determining the general weight of authority or the better view among precedents from other jurisdictions. It is more debatable than the solution suggested for the situation where either forum-state or federal precedents are lacking. An early district court opinion said: "Rule 43 does not deal with the law as to what testimony should be excluded. It deals only with what is admissible under the law of the United States or the law of the State in which the particular court sits. It is intended to liberalize admissibility of testimony, but has nothing to do with what should be excluded."[63]

Neither the judge who wrote the opinion nor the commentators who quote him have carried the idea to its logical conclusion. Such conclusion would be that so far as the language of the Rule is concerned evidence need not be excluded just because the three sources mentioned in the Rule would exclude it. This result is reached by the following reasoning: If the logical inference from the language of the Rule is that only such data *shall be* admitted as are admissible under the law of one of the three designated sources, nevertheless other matter *may be* admitted. The Rule says what must be received, but other things may be. When a particular item is inadmissible according to all three sources mentioned, how should the district court's ruling be determined in view of the silence of Rule 43(a)? One of the designated sources is the statutes of the United States[64] and by hypothesis one of such statutes excludes the evidence. We are assuming that all three sources exclude the particular evidence; here the statute is not in conflict with the Rules,

62. Some of these cases cite state decisions in addition to the federal cases.

63. United States v. Aluminum Co. of America, 4 D.J. Bull. 18, 1 Fed. Rules Serv. 43a.-3, Case No. 1 (S.D.N.Y. 1939), quoted in HOLTZOFF, NEW FEDERAL PROCEDURE AND THE COURTS 120 (1940), and in 5 MOORE, FEDERAL PRACTICE 1319 n.3 (2d ed. 1951).

64. If either one of the other two sources would admit, the statute must be disregarded becaus in this situation it is in conflict with the Rules of Civil Procedure and to that extent is repcaled. See note 65 *infra*. This is clearly the correct conclusion concerning a federal statute in force when the Rules were adopted. In the case of a statute adopted afterward the question whether the act prevails over the Rule would depend upon the power of Congress and the intent of Congress.

is not repealed,[65] and controls. The evidence must be excluded because the act of Congress says so. At this point a distinction should be taken between a federal statute such as the Communications Act which is interpreted as forbidding the receipt, in a trial in a United States district court, of information obtained by the Government by wiretapping,[66] and a statute like the Federal Business Records Act which says that certain memoranda and records shall be received and considered in the trial if they meet the requirements of the statute.[67] The former type fixes the canon to be followed except when the statute is in conflict with Rule 43(a)—*e.g.*, when the forum-state law would admit the material. On the other hand when a federal statute merely requires receipt of the data if prerequisites are met and the requirements are not satisfied by the offered evidence, it is not clear that the evidence must be excluded even when the other two sources would exclude.

When the applicable federal statute is of the latter type or there is no federal statute dealing with the subject matter but the federal decisions and the law of the state where the district court is held, exclude, the court may decide in favor of admissibility nevertheless, if justification can be found in principles of law as interpreted by courts in any common law jurisdiction. By specifying in the alternative what is required to be received, Rule 43(a) may imply that the court is not required to receive evidence falling outside the specified categories.[68] However, the Rule does not prohibit the receipt of such evidence.[69] Assuming further that no act of Congress prohibits receipt of the evidence, where are we to look for the law determining admissibility or inadmissibility? The last sentence of Federal Civil Procedure Rule 83 is as follows: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." The provision appears to give the district court absolute discretion over "practice" not covered by the Rules or local rules of court and to exempt the exercise of the discretion from any appellate review. Practice is sometimes given a meaning narrower than that of procedure and is then interpreted as not including evidence.[70] But practice and procedure apparently are used as

65. Sec. 1 of the Act of June 19, 1934, c.651, 48 STAT. 1064, *as amended*, 28 U.S.C.A. § 2072 (Supp. 1951), "says that the rules which the Supreme Court is authorized to prescribe for the district courts shall take effect as provided therein "and thereafter all laws in conflict therewith shall be of no further force or effect." The Rules of Civil Procedure were issued under Section 2 but the two sections should be construed together. 2 MOORE, FEDERAL PRACTICE 9 (2d ed. 1948).

66. 48 STAT. 1103 (1934), 47 U.S.C.A. § 605 (Supp. 1951); Nardone v. United States, 302 U.S. 379, 58 Sup. Ct. 275, 82 L. Ed. 314 (1937).

67. STAT. 945 (1948), 28 U.S.C.A. § 1732 (Supp. 1951).

68. The words in the third sentence "In any case, the statute or rule" appear to mean the statutes or rules to which reference is made in the second sentence.

69. Note 63 *supra*.

70. *See* Kring v. Missouri, 107 U.S. 221, 231, 2 Sup. Ct. 443, 27 L. Ed. 506 (1882).

synonyms at times.[71] Even if the contrast between the use of one term in Rule 1 and the other in Rule 83 is not sufficient to establish the narrower meaning for practice in the latter Rule, the present writer does not believe that Rule 83 applies in any broad fashion to evidence. It probably was intended to take care of minor procedural problems and anything overlooked by the Rules of Civil Procedure.[72] Furthermore, although Rule 43(a) does not specifically provide for the situation where forum-state and federal law both exclude, it does indicate a general attitude of liberal admissibility.[73]

State law which would exclude the testimony need not be followed because Rule 43(a) does not require it, the Conformity Act is repealed,[74] and the Rules of Decision Act seems to be supplanted insofar as it had been interpreted as prescribing conformity to state rules of evidence.[75] There remains for consideration the exclusionary federal decisions. Are they to be followed when the forum-state law is in accord with them? As stated in the preceding paragraphs the answer on principle is, not necessarily. In the absence of any other requirement the district judges should look to the rules of evidence applied in the United States courts, but these rules may change through evolution. The Supreme Court has said that "a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule. . . . It has been said so often as to have become axiomatic that the common law is not immutable but fiexible, and by its own principles adapts itself to varying conditions."[76] It would seem obvious that such changes receive recognition by a minority of jurisdictions before they attain the support of the majority. And so we are led to the conclusion that where the federal decisions and forum-state law would exclude but no act of Congress requires exclusion or admission, the federal courts should follow the soundest doctrine found in any Anglo-American jurisdiction.

No cases adopting this view were found.[77] A United States district court in Pennsylvania held a memorandum made at the time of the occurrence

71. Chicago v. Williams, 254 Ill. 360, 98 N.E. 666 (1912); *see* Poyser v. Minors, 7 Q.B.D. 329, 333 (1881).

72. See Clark and Tolman, in PROCEEDINGS OF WASHINGTON INSTITUTE AND NEW YORK SYMPOSIUM 71, 128, 129 (1938); HOLTZOFF, NEW FEDERAL PROCEDURE AND THE COURTS 163, 164 (1940).

73. The Rules attempt to liberalize admissibility. Mattox v. News Syndicate Co. 176 F.2d 897 (2d Cir. 1949); Dellefield v. Blockdel Realty Co., 128 F.2d 85 (2d Cir. 1942).

74. By Act of June 25, 1948, c.646, § 39, 62 STAT. 992, 28 U.S.C.A. § 39 (1949).

75. I WIGMORE, EVIDENCE 199 (3d ed. 1940).

76. Funk v. United States, 290 U.S. 371, 381, 54 Sup. Ct. 212, 78 L. Ed. 369 (1933), a criminal case decided before the passage of the acts enabling the Supreme Court to pass the civil and criminal procedural rules.

77. *Cf.* cases in note 30 *supra.*

was inadmissible because the witness identifying and vouching for the memorandum was not shown to lack a present recollection of the facts recorded.[78] Pennsylvania and federal cases were cited in support of the ruling. However, the weight of authority and probably the better view is *contra*.[79] In another case the inadmissibility of a statement as to the cause of an injury, made to a physician apparently for treatment, was asserted on the basis of federal and forum-state authorities.[80] If those decisions are not binding, strong authority is available for the opposite view.[81] In a third case, *Wright v. Wilson*,[82] testimony by the plaintiff was not allowed in an action for damages for an injury resulting from being struck by an automobile. The defendant, driver of the car, had died before trial. The Court of Appeals for the Third Circuit approved the ruling "without enthusiasm," saying: "The rule excluding a survivor's testimony seems to stand in the almost unique situation of being condemned by all of the modern writers on the law of evidence."[83] In this case and the case from Pennsylvania the opinions clearly imply that if there is no federal statute in force and the other two sources stated in Rule 43(a) exclude, the evidence must be excluded. Instead of thinking positively the courts drew a negative inference not required by the language of the Rule. The case involving the hearsay statement concerning the cause of the injury did not cite Rule 43(a).

Subdivision (a) has contributed to the development of the liberal attitude toward admissibility expressed in some opinions[84] but there are very few, if any, reported cases in which Rule 43(a) led to a ruling different from what it would have been in the absence of the Rule.[85] Obviously we should

78. *In re* Messenger, 32 F. Supp. 490 (E.D. Pa. 1940).

79. Note, 25 COL. L. REV. 498 (1925).

80. Hartford Accident & Indemnity Co. v. Carter, 110 F.2d 355 (5th Cir. 1940). A similar case, Krug v. Mutual Benefit Health & Accident Ass'n, 120 F.2d 296 (8th Cir. 1941).

81. Note 43 *supra*.

82. 154 F.2d 616 (3d Cir. 1946).

83. *Id.* at 620.

84. For example Reck v. Pacific-Atlantic S.S. Co., 180 F.2d 866 (2d Cir. 1950); Pfotzer v. Aqua Systems, Inc., 162 F.2d 779 (2d Cir. 1947); Vanadium Corp. of America v. Fidelity & Deposit Co., 159 F.2d 105 (2d Cir. 1947); New York Life Ins. Co. v. Seighman, 140 F.2d 930 (6th Cir. 1944); Commercial Banking Corp. v. Martel, 123 F.2d 846 (2d Cir. 1941).

85. The present writer is unable to cite any cases which he considers clear examples. In Peoples Gas Co. of Kentucky v. Fitzgerald, 188 F.2d 198 (6th Cir. 1951) and Slattery v. Marra Bros., 186 F.2d 134, syl. 10 (2d Cir. 1951) it does not appear that federal doctrine is any different from forum-state law nor that any jurisdiction would reach any different result. Notes, 46 COL. L. REV. 267, 275 n.53 (1946), and 34 CORN. L.Q. 238, 244, n.43 (1948) cite three cases said to be examples of reversal of the historical position of the respective circuits. Two of these are discussed in the text of the present article. The third is Aetna Life Ins. Co. v. McAdoo, 106 F.2d 618 (8th Cir. 1939). The *Columbia Law Review* Note *supra* shows that the decisions in the eighth circuit prior to 1938 were in conflict on the conformity question. Therefore in the absence of Rule 43(a) the case under discussion might have been decided the same way. Meaney v. United States, 112 F.2d 538 (2d Cir. 1940), gets a liberal result but cites federal authorities only and does not mention Rule 43(a).

not place in this latter class opinions which cite both federal and forum-state authority, nor those which admit the evidence by conforming to the law of the state but would have done the same before the adoption of the Rules of Civil Procedure in 1938, nor those which cite only federal decisions but did not follow the conformity principle before. Practically all the decisions of the federal courts since the adoption of the Rules fall into those three categories.[86] For example, the United States District Court for the Southern District of California permitted a view of the premises to be treated as evidence on authority of California decisions.[87] California is in the Ninth Circuit, whose court of appeals before 1938 required conformity, in evidence rulings, to the decisions of the state where the district court was sitting.[88]

Judge Clark, reporter for the Supreme Court's Advisory Committee, has cited three cases as showing how well subdivision (a) has served "to set the federal trend toward generous admissibility."[89] However all three are decisions of Judge Clark's own circuit (the Second); all three cite federal cases to support admissibility; and the Second Circuit did not previously conform to state evidence decisions anyway.[90] The results could have been the same in all three cases if the Federal Rules of Civil Procedure had not been adopted. Other opinons which at first glance appear to show the influence of Rule 43(a) yield to a similar analysis. In 1945 the Fifth Circuit Court of Appeals in *Fakouri v. Cadais*[91] applied two Louisiana statutes on the authentication of foreign documents. Before 1938 the doctrine of the Fifth Circuit had been that there was no hard and fast rule requiring federal courts to follow or not to follow the decisions of the state where the trial is held.[92] Furthermore, even circuits which did not feel bound to follow state decisions, apparently were bound by state statutes on evidence.[93] The same analysis can be made of other recent decisions of the Fifth Circuit. In two such cases[94] it is pertinent to note in addition that the opinions do not indicate the existence of a different federal doctrine and seemingly any court would have reached the same result. According to dicta in the Third Circuit, the district courts were governed before 1938 by forum-state rules of evidence

86. Note, 46 COL. L. REV. 267, 274 (1946).

87. *In re* C & P Co., 63 F. Supp. 400 (S.D. Cal. 1945).

88. Metropolitan Casualty Ins. Co. v. Smith & Smith, Inc., 58 F.2d 699 (9th Cir. 1932).

89. Reck v. Pacific-Atlantic S.S. Co., 180 F.2d 866, 869 (2d Cir. 1950).

90. Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co., 18 F.2d 934 (2d Cir. 1927).

91. 147 F.2d 667 (5th Cir. 1945).

92. Royal Ins. Co. v. Eastham, 71 F.2d 385 (5th Cir. 1934).

93. Pariso v. Towse, 45 F.2d 962 (2d Cir. 1930); Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co., 18 F.2d 934 (2d Cir. 1927).

94. Lewis v. E. I. du Pont de Nemours & Co., 183 F.2d 29 (5th Cir. 1950); Petroleum Carrier Corp. v. Snyder, 161 F.2d 323 (5th Cir. 1947).

only when there was no federal rule to the contrary.[95] Consequently, a district court in New Jersey (in the Third Circuit) which admitted evidence[96] on the authority of a United States Supreme Court case could have made the same ruling before 1938.

Rule 43(a), as interpreted by the courts, can bring about a liberalization of evidence law at best only in those instances in which federal law is liberal or in those instances and locations where the local state law is liberal. Actually there is no concrete evidence of any effect on the decisions of the United States courts as distinguished from their opinions.[97]

COMPETENCY OF WITNESSES

The fourth and last sentence of the Rule is: "The competency of a witness to testify shall be determined in like manner." In other words the legal capacity of a witness is to be determined in the same manner as the admissibility of evidence—by reference to the three sources and by following the most liberal precept. An attempt to apply the provision leads to the discovery that a 1906 act of Congress required the competency of a witness in a civil action, suit or proceeding to be determined by the laws of the state in which the court was held.[98] From 1864 to 1906, the acts of Congress made conformity subject to exceptions. Neither color, nor interest, nor being a party to the suit could render a witness incompetent in the courts of the United States. The exception was subject to an exception in the form of a survivor's or deadman's statute.[99] Thus for almost half a century competency as affected by interest or survivorship was controlled both at law and in equity[100] by federal statutes and decisions. Do these constitute the rules of evidence "heretofore applied in the courts of the United States on the hearing of suits in equity" or does the word, "heretofore," point to the state of things just before the adoption of the Rules, *i.e.*, from 1906 to 1938? One

95. E. I. du Pont de Nemours & Co. v. White, 8 F.2d 5 (3d Cir. 1925); Western Union Telegraph Co. v. Ammann, 296 Fed. 453 (3d Cir. 1924).

96. Franzen v. E. I. du Pont de Nemours & Co., 51 F. Supp. 578 (D.N.J. 1943).

97. The legal situations in the cases cited in Note, 30 TEX L. REV. 350, 353 n.21 (1952) are similar to those in the cases discussed above.

98. Act of June 29, 1906, c.3608, 34 STAT. 618, 28 U.S.C.A. § 631 (1928).

99. "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided,* That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." REV. STAT. § 858 (1878).

100. REV. STAT. § 858 applied to suits in equity as well as to actions at law. Rowland v. Biesecker, 181 Fed. 128 (S.D.N.Y. 1910).

authority seems to assume that the reference is to the situation immediately prior to 1938.[101] This would result in conformity to the law of the state and has the advantage of simplicity. The number of sources of law to be considered is reduced from three to one unless and until Congress enters the field by passing statutes. Also the former canons of competency in the United States district courts in a given state remain unchanged; the lawyers need not become familiar with a new practice.

However, there is little logic in the result. The Supreme Court evidently intended to give the proponent of proof three springs from which to drink but the interpretation under discussion dries up one of them by concluding that the rules of competency heretofore applied in the United States courts were simply the rules in force in the forum-state. That conclusion is not entirely true of the period prior to 1906. Since there was a period in which a distinctive federal law of competency as affected by interest or survivorship existed it seems more in line with the spirit of Rule 43(a) to make use of the precedents of that period. Those precedents relate to the one area in which there is much controversy about competency—the field of a survivor's disqualification. The possible usefulness of the federal precedents grows out of the difference in the language and interpretation of the survivors' statutes.[102] The Georgia Code makes a witness incompetent to testify in a proceeding covered by the survivors' act, if he is interested in the result of the suit and if as a party to the cause he would be incompetent.[103] The Supreme Court of the United States in 1880 held the federal disqualification inapplicable to those who, not being parties, have an interest in the result.[104] If the district courts sitting in Georgia would treat the United States Supreme Court decision and the statute which it applies as precedents heretofore applied on hearings in equity, they could allow the interested witness to testify despite the contrary Georgia law. The first sentence of the 1878 federal statute, ". . . no witness shall be excluded . . . because he is . . . interested in the issues tried," would be applicable.[105]

In a 1949 decision, a district court excluded the testimony of the officers of the corporate defendant as to conversations and transactions with the testator of the plaintiff-executor.[106] The court interpreted the state statute as disqualifying the officers, and applied what it conceived to be the forum-

101. 5 MOORE, FEDERAL PRACTICE 1330 (2d ed. 1951).

102. Note, 31 ILL. L. REV. 218, 222 (1936).

103. GA. CODE § 38-1603(4) (1933).

104. Potter v. National Bank, 102 U.S. 163, 26 L. Ed. 111 (1880); *accord,* McMullen v. Ritchie, 64 Fed. 253 (C.C.N.D. Ohio 1894); Stephens v. Bernays, 42 Fed. 488 (E.D. Mo. 1890).

105. Note 99 *supra.*

106. Lake Shore Nat. Bank v. Bellancia Aircraft Corp., 83 F. Supp. 795 (D. Del. 1949).

state law because there is no pertinent United States statute and the court said that there is no rule of evidence, heretofore applied in equity and relating to competency of witnesses, to which attention must be given. The opinion is not clear as to whether no attention is given to the Act of 1878 because it was superseded by the Act of 1906 or because the 1878 Act applied to actions at law as well as in equity. Neither reason is satisfactory. Rule 43(a) does not say that the rule applied in equity must have been in force at the time Rule 43(a) took effect. The Rule on the contrary indicates an intention to make available whatever equity canon would admit, in spite of an exclusionary state law. The second reason is no more adequate. A law is none the less applicable in equity simply because it also applies at law. The court's interpretation of the state statute is very dubious[107] but if right as to the state law the court could still have considered the federal law heretofore applied in equity. It seems that the officers could have testified under the 1878 federal statute.[108]

Wright v. Wilson[109] rests on firmer ground. There the court assumes that the state survivors' statute would control only if the federal law heretofore applied would not admit. After testing the admissibility of the evidence by the common law, the forum-state law, and the federal statutes, including the 1878 Act, the result was stated as follows: "The inevitable conclusion is that whatever door one tries it is firmly locked against the admissibility of the proffered testimony in this case."[110] One door which the court ignored was the precedent of the six states which, as brought out in the opinion, allow all parties including survivors to testify. The court adopted the prevailing attitude towards Rule 43(a) by assuming that if there is no pertinent federal statute which is in force at the present time and if the other two designated sources exclude, the evidence must be excluded. The opinion starts on a very liberal note by speaking of 43(a) as "a rule of admissibility not exclusion."[111] However, the statement is not followed to its logical conclusion.

There was another part of the law of competency concerning which the federal courts followed their own precedents, in this instance even after 1906. In 1915, in *McDonald v. Pless*,[112] the Supreme Court decided that a juror was incompetent to impeach his own verdict but said that the decision must be made without regard to the law in North Carolina where the federal trial court was held. In 1947 the United States Court for the District of Maryland received testimony of a juror concerning an occurrence in the jury room.

107. See Cush v. Allen, 13 F.2d 299, 301 (D.C. Cir. 1926).
108. *Id.* at 300.
109. 154 F.2d 616 (3d Cir. 1946).
110. *Id.* at 619.
111. *Id.* at 617.
112. 238 U.S. 264, 35 Sup. Ct. 783, 59 L. Ed. 1300 (1915).

In his published opinion the district judge indicates that Rule 43(a) does not require an adherence to Maryland law on this question. However, it appears from the opinion that the Maryland and the United States decisions reach the same result on the question before the court.[113]

Scope of Rule 43(a)

Obviously there are some limitations on the scope of the Rule which are not set forth in its language. The Constitution of the United States provides for the privilege against self-incrimination in the federal courts.[114] The abolition or restriction of the privilege by a state would have no effect upon the practice of the United States district courts sitting in the state.[115] The rule excluding evidence obtained by federal officers through an illegal search and seizure is also sanctioned by the Constitution. In *United States v. Wallace & Tiernan Co.*,[116] the Supreme Court said, "That rule stems from the Fourth Amendment." The rule applies to evidence offered in a civil case, if illegally obtained by the Government.[117] There are other Constitutional provisions which restrict the scope of Rule 43(a).[118]

The Federal Rules of Civil Procedure cannot change substantive rights.[119] Doctrines placing and regulating the burden of proof are usually treated as a part of the law of evidence. They are not controlled by Rule 43(a), however, because they are substantive; and, therefore, the law of the forum state will apply when state-given rights are involved.[120] The so-called parol evidence rule is not a rule of evidence but one of substantive law.[121] Questions of sufficiency and relevancy often depend upon substantive law and in such instances would not be subject to Rule 43(a).[122] Whether other doctrines will be held to be artifices which substantially affect the outcome of the case[123] or mere procedural devices, remains to be seen.

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113. Liggett & Myers Tobacco Co. v. Imbraguglia, 73 F. Supp. 909, 919 (D. Md. 1947). Consult also United States v. 120,000 Acres of Land, 52 F. Supp. 212 (N.D. Tex. 1943).

114. U.S. Const. Amend. V.

115. Rule 43(a) cannot alter a rule of evidence sanctioned by the Constitution. See 1 Wigmore, Evidence § 7 (3d ed. 1940).

116. 336 U.S. 793, 798, 69 Sup. Ct. 824, 93 L. Ed. 1042 (1949).

117. Chow Fook Hong v. Ward, 24 F. Supp. 776 (D. Mass. 1938).

118. 1 Wigmore, Evidence § 7 (3d ed. 1940).

119. 48 Stat. 1064 (1934), 28 U.S.C.A. § 2072 (Supp. 1951).

120. Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 60 Sup. Ct. 201, 84 L. Ed. 196 (1939).

121. Wootton Hotel Corp. v. Northern Assur. Co., 155 F.2d 988 (3d Cir. 1946), *cert. denied*, 329 U.S. 758 (1946); American Crystal Sugar Co. v. Nicholas, 124 F.2d 477 (10th Cir. 1941).

122. Mattox v. News Syndicate Co., 176 F.2d 897 (2d Cir. 1949), *cert. denied*, 338 U.S. 858 (1949).

123. Under test of Guaranty Trust Co. v. York, 326 U.S. 99, 65 Sup. Ct. 1464, 89 L. Ed. 2079 (1945); *cf.* Franzen v. E. I. Du Pont de Nemours & Co., 51 F. Supp. 578, 584 (D.N.J. 1943).

Before 1938 the federal courts had their own rule as to the scope of cross-examination. It was in force even in those circuits which followed the conformity principle. The Supreme Court's Advisory Committee recommended a change from the strict federal rule to the liberal rule of the orthodox common law. The Supreme Court rejected the recommendation. Due to this history of Rule 43 it has been held that the federal courts must still apply their earlier rule limiting cross-examination more or less to questions seeking to impeach or to make the witness retract or contradict something testified to during direct examination.[124]

Rules 1 and 81 of the Federal Rules of Civil Procedure deal with scope and applicability of the Rules in general. They should be consulted on the coverage of Rule 43(a).[125] The latter applies to bankruptcy[126] but not to proceedings in admiralty.[127] Coming now to the language of subdivision (a) itself, we find that in addition to form of testimony and competency of witnesses it deals with admissibility of evidence. Dean Wigmore doubted whether privilege and judicial notice were matters of admissible evidence.[128] Professor Moore thinks both are covered by Rule 43(a).[129] The cases give support to his view concerning judicial notice[130] but do not cite Rule 43 when dealing with privilege. No attempt to apply the Rule to presumptions has come to light.[131]

CONCLUSION

The scope of Rule 43(a) cannot be determined solely from its language and from the provisions of other subdivisions and Rules. Its relation to the Constitution and the *Erie* doctrine must be considered also. On the face of the Rule the provision as to competency of witnesses appears to be the same as for admissibility of evidence, but the application of the language is complicated by the existence of statutes which prior to 1938 required conformity to state law in many matters of competency in equity as well as at law.

Rule 43(a) directs the United States district courts to admit all evidence which is admissible under any one or more of the following (1) United States

124. Moyer v. Aetna Life Ins. Co., 126 F.2d 141 (3d Cir. 1942).

125. Of course Rule 43(a) does not apply to criminal proceedings. Compare FED. R. CRIM. P. 26.

126. GEN. ORDER IN BANKRUPTCY 37, 11 U.S.C.A., following § 53 (1943).

127. FED. R. CIV. P., 81(a) (1).

128. 1 WIGMORE, EVIDENCE 201 (3d ed. 1940).

129. 5 MOORE, FEDERAL PRACTICE 1332, 1340 (2d ed. 1951).

130. Hagen v. Porter, 156 F.2d 362, 365 (9th Cir. 1946), *cert. denied*, 329 U.S. 729 (1946); Green, *Evidence of Unfair Labor Practices under the Taft-Hartley Act*, 26 N.C.L. REV. 253, 266 (1948).

131. Howard v. United States, 125 F.2d 986, 993 n.30 (5th Cir. 1942) merely raised the question without answering it. For a collection of some of the cases dealing with presumptions during 1939-1940, see Green, *The Admissibility of Evidence under the Federal Rules*, 55 HARV. L. REV. 197, 208 (1941).

statutes, (2) the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, (3) the decisions,[132] statutes, or rules of court applying to courts of general jurisdiction of the state in which the district court is held. In making use of precedents under (2) the courts have not limited themselves to decisions in suits seeking equitable relief but have cited cases growing out of actions at law also. If all three sources of authority require the evidence to be excluded, the first, the statute of the United States, is not repealed and governs; the evidence must be excluded. If (2) or (3) furnishes clear authority for admitting the evidence it must be admitted; any prior statute of the United States which would exclude in this situation is inconsistent with the Rules of Civil Procedure and is repealed. Of course, if a statute of the United States makes the evidence admissible, it is to be received. When no act of Congress requires exclusion but both (2) and (3) do point toward exclusion the courts assume they must exclude. Their interpretation is rather superficial. Rule 43(a) does not say that evidence, which is not admissible under those sources, must be excluded. Since no definite guide for this situation is given in the Rules, it seems that the common law should govern, but not necessarily the prior federal decisions. The Supreme Court has recognized that the decisional law of evidence must change with the times. The federal court should follow the best view found in Anglo-American authority.

Not only are the courts apparently unwilling to use other authorities to admit the testimony when both federal and forum-state decisions would exclude it, but when the question of admissibility has not been decided by two of the sources designated in Rule 43(a) and there are exclusionary precedents in the federal decisions or the state law, the courts frequently fail to treat the case as one of first impression. They exclude the evidence instead of looking for liberal precedents in other jurisdictions to fill the gap in the local or federal decisions as the case may be.

Although the district courts and courts of appeals[133] have mentioned the liberal tone of Rule 43(a), it is difficult to find a case in which they have held evidence admissible by reversing their stand on conformity or nonconformity to state law. They seem to apply the same precedents they would have followed before the adoption of the Rules of Civil Procedure. This result should have been anticipated. In the field of evidence judges always have been either indifferent to reform or timid about putting progressive ideas to work.[134] Only clear and positive language in statutes or rules of

132. Rule 81(e) does not apply because Rule 43(a) deals with state "rules of evidence" not state "law."

133. Rule 43(a) seldom has been mentioned in the opinions of the Supreme Court.

134. 1 WIGMORE, EVIDENCE 243, 253 (3d ed. 1940).

court will materially change the law of evidence.[135] Subdivision (a) of Rule 43, if justified at all, is acceptable only as a temporary expedient. The Advisory Commitee to the Supreme Court should begin to consider amendments designed to give the Federal Rules of Civil Procedure a position of leadership in relation to evidence similar to the place they hold in pleading and trial practice. Aid can probably be derived from the Model Code of Evidence prepared by the American Law Institute, the Uniform Rules of Evidence being drafted by the Commissioners on Uniform State Laws, and the proposed Missouri Evidence Code.[136] It is time to heed the admonition of Mr. William D. Mitchell:

> "There was a tremendous pressure brought on the Advisory Committee by those familiar with the subject of evidence insisting that there was a need for reform, which we did not meet, and some day, some other advisory committee should tackle the task of revising the rules of evidence and composing them into a new set of rules to be promulgated by the Supreme Court."[137]

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135. McCormiek, *Tomorrow's Law of Evidence*, 24 A.B.A.J. 507, 581 (1938); Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 923, 924, 933 (1937).

136. Falknor, *Evidence* in 1949 ANNUAL SURVEY OF AMERICAN LAW 975, 977 (N.Y.U. 1950); HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 17, 100 (1950).

137. PROCEEDINGS OF CLEVELAND INSTITUTE ON FEDERAL RULES 186 (1938); *accord*, 5 MOORE, FEDERAL PRACTICE 1316, 1317 (2d ed. 1951).