

4-1-1968

## Evidence—Medical Treatises to Be Admitted as Independent Evidence as an Exception to the Hearsay Rule

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### Recommended Citation

Charles Sawyer, *Evidence—Medical Treatises to Be Admitted as Independent Evidence as an Exception to the Hearsay Rule*, 17 Buff. L. Rev. 946 (1968).

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clusionary rule was formulated in order to discourage police from engaging in searches in the absence of probable cause. By ruling that evidence so obtained could not be admitted at a trial against the person from whom it was seized, the Supreme Court effectively curtailed such police conduct. Similarly, if the courts, where a search pursuant to section 180-a is involved, were to limit the objects which could be admitted into evidence to weapons only, as Judge Van Voorhis suggested,<sup>62</sup> they would eliminate much of the incentive to misuse the powers granted by the statute. Without this limitation, the fourth amendment will be denied effect.<sup>63</sup>

HARVEY M. PULLMAN

EVIDENCE—MEDICAL TREATISES TO BE ADMITTED AS INDEPENDENT EVIDENCE AS AN EXCEPTION TO THE HEARSAY RULE

Plaintiff and defendant were the drivers of two automobiles involved in an accident. As a result of the accident, an operation known as ankylosis had to be performed on the plaintiff at which time two ruptured discs from his spine were removed and the vertebrae fused together with bone from the hip. The plaintiff brought an action to recover damages for the personal injuries sustained. At the trial, plaintiff's medical expert testified on direct examination that in his opinion the operation resulted in a permanent twenty per cent impairment of the spine and ten per cent disability of the whole body generally. On cross examination, plaintiff's expert was asked if he were familiar with the American Medical Association's *Guide to the Evaluation of Permanent Impairment of the Extremities and Back*.<sup>1</sup> He replied in the affirmative, but that he had not consulted the *Guide* in making his own estimate of the disability and that he was not familiar with what the *Guide* set for the operation. Defense counsel then asked his own medical expert if he knew what standard of disability the *Guide* set for ankylosis of two vertebrae. Plaintiff's objection to this question was sustained on the ground that to admit the contents of the *Guide* directly would violate the hearsay rule, and since plaintiff's medical expert testified that he had not consulted the *Guide* in making his estimate of disability, the proper basis for admitting the contents of the *Guide* to impeach plaintiff's expert did not exist. There was a verdict and judgment for plaintiff on the negligence issue and the defendant appealed, assigning the trial court's refusal to allow defendant's expert to answer the disputed question as one source of error. *Held*, by the Wisconsin Supreme Court, it was

62. *People v. Taggart*, 20 N.Y. at 344, 229 N.E.2d at 587, 283 N.Y.S.2d at 9 (concurring opinion of Van Voorhis, J.).

63. *Silver Rome Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.).

1. J.A.M.A. (spec. ed. Feb. 15, 1958) [hereinafter cited as *Guide*]. The *Guide*, a collection of percentage disability tables based on objective measurements of restriction of motion, sets limits of 3 to 7 per cent spinal impairment and 2 to 4 per cent overall bodily impairment for ankylosis of any two cervical vertebrae. *Guide* 89, 103.

not error to refuse to admit the contents of the *Guide* under the established rule of law in that state.<sup>2</sup> For the future, however, the court held that “[a] published treatise, periodical or pamphlet on a subject of history, science or art” should be admitted as an exception to the hearsay rule “to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.”<sup>3</sup> *Lewandowski v. Preferred Risk Mut. Ins. Co.*, 33 Wis. 2d 69, 146 N.W.2d 505 (1966).

The rule followed in the overwhelming majority of states is that learned treatises on subjects of inductive sciences, such as medicine, are inadmissible as substantive evidence to prove the truth of statements contained therein.<sup>4</sup> The primary reason they are held not to be admissible is that they are hearsay, *i.e.*, they are comprised of statements made out of court which are offered testimonially by someone other than the declarant to prove the truth of those statements.<sup>5</sup> The reason hearsay is not admissible is that the declarant of the extra-judicial testimonial assertion is not present in the courtroom and therefore not available for cross examination, which is considered to be the best method of exposing weaknesses and inconsistencies in the testimony of a witness.<sup>6</sup> Thus, the hearsay rule does not allow the bare, untested assertions of a learned treatise to be admitted in evidence to prove the truth of those assertions because the absent author cannot be questioned regarding the methods and reasoning employed by him in reaching his conclusions.<sup>7</sup> Aside from this argument, which is directed toward the hearsay nature of learned treatises, there are other objections which are raised against admitting learned treatises.<sup>8</sup> Among them is the fear that the

2. Prior to the principal case, the Wisconsin rule had long been that a medical book was not admissible as independent, primary evidence because of its hearsay nature, *Waterman v. Chicago & Alton R.R.*, 82 Wis. 613, 52 N.W. 247 (1892), and could be used during cross-examination only to test the qualifications of a medical expert or impeach him if he based his opinion on that particular book or stated what it contained, *City of Ripon v. Bittel*, 30 Wis. 614 (1872).

3. Uniform Rule of Evidence 63(31), 9A Uniform Laws Ann. 591, 640 (1965). Model Code of Evidence, r. 529A is substantially the same but requires that the author of the work be recognized as authoritative rather than the work itself. While three jurisdictions have adopted the Uniform Rules of Evidence, none have adopted the Model Code of Evidence. See *infra* note 27.

4. See, *e.g.*, *United States v. One Device*, 160 F.2d 194 (10th Cir. 1947); *Rice v. Clement*, 184 So. 2d 678 (Fla. D. Ct. App. 1966); *Dabroe v. Rhodes Co.*, 64 Wash. 2d 431, 392 P.2d 317 (1964). See generally *C. McCormick*, Evidence § 296 (1954) [hereinafter cited as *McCormick*]; 3 *B. Jones*, Evidence § 621 (5th ed. 1958); 6 *J. Wigmore*, Evidence § 1691 (3d ed. 1940) [hereinafter cited as 6 *Wigmore*]; Annot., *Medical Books or Treatises as Independent Evidence*, 65 A.L.R. 1102 (1930), supplemented by 84 A.L.R.2d 1388 (1962). Learned treatises on subjects of so-called “exact sciences” such as mathematics and chemistry, however, are generally held to be admissible. See, *e.g.*, *United States v. Two Cases of Chloro Naphtholeum Disinfectant*, 217 F. 477 (D. Md. 1914) (chemistry book); *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959) (mortality table).

5. See 5 *J. Wigmore*, Evidence § 1361 (3d ed. 1940) [hereinafter cited as 5 *Wigmore*]; *McCormick* § 225; 2 *B. Jones*, Evidence § 268 (5th ed. 1958).

6. 5 *Wigmore* § 1362; *McCormick* § 224; 2 *B. Jones*, Evidence § 269 (5th ed. 1958).

7. See *Hallworth v. Republic Steel Corp.*, 153 Ohio St. 349, 91 N.E.2d 690 (1950).

8. See 6 *Wigmore* § 1690; *McCormick* § 296; *Dana*, *Admission of Learned Treatises in Evidence*, 1945 Wis. L. Rev. 455; Note, *Learned Treatises*, 46 Iowa L. Rev. 463 (1961).

technical language of specialized publications will, without explanation, tend to confuse the jury. Another asserts that since one can almost always find an authoritative treatise to support one's position, the trial is likely to become little more than a "battle of the books." Furthermore, it is argued that in a rapidly developing field of science, such as medicine, that which was accepted as authoritative yesterday may be outdated today. Finally, it is alleged that scientific treatises may not be based entirely on the personal observation and experience of the author, and to the extent they are based on another's work they raise a multiple hearsay problem.

The courts have been more permissive in allowing the use of learned treatises on cross examination.<sup>9</sup> They may be used for the purpose of impeaching an expert witness whose opinion, assuming that one qualification of an expert is a knowledge of the literature in his field, must necessarily depend to some extent on that literature. When treatises are used for this purpose, the hearsay rule is not violated because, in theory at least, they are not being offered as substantive evidence but rather as an attack on the expert's opinion by reference to sources the same as or similar to those from which it is drawn. The ever present fear, of course, is that the jury, notwithstanding a special instruction from the judge, may not grasp the distinction between the use of a treatise as substantive evidence and its use in impeaching an expert and thus the hearsay rule may be circumvented. The circumstances under which learned treatises may be used in impeaching an expert vary greatly from state to state and reflect how strong each state's policy is against admitting them as direct evidence, *i.e.*, how determined it is to see that the hearsay rule is not circumvented by the use of treatises in cross-examination. In some states, including Wisconsin (prior to the instant case),<sup>10</sup> a learned treatise may be used in impeaching an expert only when he has testified that he specifically relied on that treatise in forming his opinion.<sup>11</sup> This is the purest form of impeachment—comparison with the specific source which the expert has held out as supporting his opinion. This rule reflects a very strong policy against admitting treatises as substantive evidence because if the expert's reliance on the treatise is justified, it allows no more to get before the jury than what was put before it by the expert's testimony on direct examination. If his reliance is not justified, however, then this rule allows an opinion expressed by the treatise, different from the expert's, to be put before the jury. Even though the opinion of the treatise is apt to be taken to some extent as substantive evidence by the jury, fundamental fairness requires that the impeaching party be entitled to bring this difference out. While all states permit impeachment of an

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9. See generally 6 Wigmore § 1700; Willens, *Cross-Examining the Expert Witness With the Aid of Books*, 41 J. Crim. L.C. & P.S. 192 (1950); Note, *Medical Treatises as Evidence—Helpful but too Strictly Limited*, 29 U. Cinc. L. Rev. 255 (1960); Annot., *Use of Medical or Other Scientific Treatises in Cross-Examination of Expert Witnesses*, 60 A.L.R.2d 77 (1958).

10. See *supra* note 2.

11. See, *e.g.*, *Barks v. Herzberg*, 206 A.2d 507 (Del. 1965); *Eckleberry v. Kaiser Foundation N. Hosps.*, 226 Ore. 616, 359 P.2d 1090 (1961).

expert by the use of a treatise which he has specifically relied on, some also allow it under more lenient circumstances. Thus there is authority for using learned treatises in impeaching an expert when he has relied on treatises in general, or particular treatises other than those used in cross-examination.<sup>12</sup> An even more liberal view permits impeachment of an expert by the use of treatises which he recognizes as authoritative whether or not he has relied on them in forming his opinion.<sup>13</sup> The broadest view allows authoritative treatises to be used on cross-examination for the somewhat different purpose of testing the qualifications of an expert, whether or not he has relied on the treatises or recognized them as authoritative.<sup>14</sup> The effect of using treatises to this extent is practically indistinguishable from using them as primary evidence. Finally, where learned treatises are admissible as substantive evidence directly, there are of course no restrictions on their use on cross-examination which would not apply equally to an expert.<sup>15</sup>

The rule that learned treatises on subjects of inductive sciences are not admissible as independent evidence of the truth of the statements contained therein is deeply rooted in the common law and has stubbornly resisted change despite general disfavor by prominent legal commentators and the drafters of the Uniform Rules of Evidence. They urge that such treatises, when properly authenticated, be admitted as substantive evidence as an exception to the hearsay rule.<sup>16</sup> As Wigmore points out, "the purpose and theory of the hearsay rule are the key to the exceptions to it."<sup>17</sup> The problem which the court must analyze in making an exception to the hearsay rule is whether to admit the hearsay or to lose it, or the chance of getting equally competent evidence, altogether. Thus before the possibility of making an exception arises, the necessity for admitting the hearsay or else losing it altogether must be shown.<sup>18</sup> The necessity for admitting learned treatises becomes apparent when it is realized that it may frequently be impossible to find a qualified expert, *i.e.*, one qualified by personal experience to speak on the topic of the treatise, within the jurisdiction and even when there is one available, the cost of obtaining his services would probably be prohibitive.<sup>19</sup> The necessity is particularly acute in medical malpractice actions where it is extremely difficult for the plaintiff to obtain an expert to testify on his

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12. See, *e.g.*, *Reilly v. Pinkus*, 338 U.S. 269 (1949); *Briggs v. Chicago G.W.R. Co.*, 238 Minn. 472, 57 N.W.2d 572 (1953); *Stone v. Proctor*, 259 N.C. 633, 131 S.E.2d 297 (1963).

13. See, *e.g.*, *Roveda v. Weiss*, 11 A.D.2d 745, 204 N.Y.S.2d 699 (2d Dep't 1960); *McComish v. De Soi*, 42 N.J. 274, 200 A.2d 116 (1964).

14. See, *e.g.*, *Darling v. Charleston Community Mem. Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966); *Superior Ice & Coal Co. v. Belger Cartage Service, Inc.*, 337 S.W.2d 897 (Mo. 1960).

15. Uniform Rule of Evidence 63(31), Official Comment, makes it clear that this is the result of admitting learned treatises as independent evidence.

16. See McCormick § 296, 621; 6 Wigmore § 1691, 5; Uniform Rule of Evidence 63(31).

17. 5 Wigmore § 1420.

18. *Id.* § 1421.

19. 6 *id.* § 1691.

behalf.<sup>20</sup> Presumably, however, no one would attempt to use hearsay evidence unless there was a necessity for it and thus if necessity were the only requirement for making an exception to the rule, all hearsay would be admissible. Therefore there is another requirement imposed on the hearsay to qualify it to be admitted as an exception: the hearsay must be of the kind that makes the reason for excluding it not so persuasive. The reason for excluding it being the lack of opportunity to cross-examine the author of the hearsay, it ceases to be so compelling when the hearsay is surrounded by circumstances which give it a guaranty of trustworthiness that is ordinarily acquired by cross-examining the author.<sup>21</sup> There are several factors surrounding the writing and publishing of a learned treatise which give it this circumstantial guaranty of trustworthiness. Since a treatise is not ordinarily written with a view toward litigation, the author has no motive to misrepresent the subject matter in favor of either litigant. Furthermore a premium is placed on the accuracy and reliability of a scientific treatise because the author's professional reputation is staked on the quality of his work. Another check on the trustworthiness of a learned treatise is that a work which is recognized as authoritative has necessarily survived rigorous cross-examination within the author's own profession.

Similarly, persuasive arguments may be raised against the objections directed at learned treatises apart from their hearsay nature. Just as an expert witness must explain his testimony so that a jury of laymen can understand it, so can an expert be used to explain the technicalities of a learned treatise. And if the courtroom is to become a "battle of the books," that certainly would be no worse than the present battle of the experts.<sup>22</sup> Furthermore, as Wigmore points out, the objection that rapid medical progress will render medical treatises outdated ignores the large body of long established medical knowledge and if carried to its logical conclusion would prohibit any medical expert from testifying on a certain topic unless he was familiar with all the latest advances.<sup>23</sup> Finally, Uniform Rule of Evidence 66 offers a possible solution to the multiple hearsay problem by providing that a treatise properly within the exception of rule 63(31) is not inadmissible because it contains a statement by someone other than the author if such statement itself meets the requirements of the exception.

Despite the arguments for admitting learned treatises directly as an exception to the hearsay rule, Alabama and now Wisconsin are the only states which have by judicial decision departed from the general rule of inadmissibility.<sup>24</sup>

20. For an insight to the pressures brought to bear upon a doctor who is called to testify on behalf of the plaintiff in a malpractice action see Note, *Malpractice and Medical Testimony*, 77 Harv. L. Rev. 333 (1963).

21. See 6 Wigmore § 1692.

22. For criticism of the abuses of modern expert testimony, see Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence*, 14 Vand. L. Rev. 725 (1961).

23. 6 Wigmore § 1690.

24. The Alabama rule was first enunciated in *Stoudenmeier v. Williamson*, 29 Ala. 558 (1857), when the court said that "medical authors, whose books are admitted or proven to be standard works with that profession, ought to be received in evidence." *Id.* at 567. See

Several states have enacted statutes which on their face would seem to make learned treatises admissible as substantive evidence, but by narrow judicial construction such laws have been reduced to codifying the common law rule admitting works of exact sciences.<sup>25</sup> Massachusetts and Nevada have enacted statutes which specifically allow medical treatises to be used as substantive evidence in malpractice cases only.<sup>26</sup> In addition, three jurisdictions have adopted the Uniform Rules of Evidence in toto and thus follow the rule adopted by the court in the instant case.<sup>27</sup>

In the instant case, the Wisconsin Supreme Court followed its long-standing rule which excludes learned treatises as substantive evidence and admits them on cross-examination only on the most restricted basis.<sup>28</sup> At the same time, however, the court completely reversed this rule by adopting for future use rule 63(31) of the Uniform Rules of Evidence which permits learned treatises, whose authority is properly established, to be admitted in evidence as an exception to the hearsay rule to prove the truth of the statements contained therein. Considering the abruptness of this reversal, it is somewhat surprising that the court did little more than announce the new rule. None of the arguments for or against using learned treatises as primary evidence are discussed. Nevertheless, the court, without explicitly making the point, seems to indicate by several of its statements that it recognized that learned treatises possess both qualifications for admitting them as an exception to the hearsay rule, *i.e.*, necessity and a circumstantial guaranty of trustworthiness. Thus it apparently recognized the necessity for admitting them when it noted the hardship the old rule had worked, particularly

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*also Smarr v. State*, 260 Ala. 30, 268 So. 2d 6 (1953). Alabama has now codified its rule. *See infra* note 25.

25. *See, e.g.*, Ore. Rev. Stat. § 41.670 (1965) which provides that "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are primary evidence of facts of general notoriety and interest." *See also* Ala. Cod. tit. 7, § 413 (1960); Cal. Evid. Code § 1341 (West 1966); Idaho Code Ann. § 16-403 (1948); Iowa Code Ann. § 622.23 (1950); Mont. Rev. Code § 93-1101-8 (1947); Neb. Rev. Stat. § 25-1218 (1943); Utah Code Ann. § 78-25-6 (1953). The courts have consistently held that these statutes do not change the common law rule excluding learned treatises on subjects of inductive sciences because the facts contained in such treatises are not of general notoriety and interest. *See, e.g.*, *Eckleberry v. Kaiser Foundation N. Hosps.*, 226 Ore. 616, 359 P.2d 1090 (1961).

26. Mass. Ann. Laws ch. 233, § 79c (Supp. 1966); Nev. Rev. Stat. § 51.040 (1963). These statutes recognize the particularly acute need for a substitute for expert medical testimony in malpractice cases and abrogate the hearsay rule in this limited class of cases. *See supra* note 20. For other examples of statutes specifically making learned treatises admissible in a certain type of case, *see* Pa. Stat. Ann. tit. 31, § 700j-801 (1958) (milk price hearings), and S.C. Code Ann. § 26-142 (1962) (sanity hearings).

27. C.Z. Code § 2962(31) (1963); Kansas Gen. Stat. Ann. § 60-459(cc) (1964); V.I. Code tit. 5 § 932(31) (1957). The New Jersey Supreme Court has adopted most of the Uniform Rules of Evidence as rules of the court. N.J. Sup. Ct. § 63(31) (1965). *See supra* note 3.

28. An argument can be made that the *Guide* should have been admitted under the exception for "exact" sciences since it resembles a compilation of scientific data more than a treatise of abstract medical theory, *see supra* notes 1, 4. The measurements of the *Guide* however, fall far short of the accuracy and reproducibility of measurements of scientific phenomena in the fields of chemistry and physics which have traditionally been admitted under this exception.

due to the difficulty of obtaining expert medical testimony.<sup>29</sup> The court also seemed to recognize the second qualification when pointing out that the scientific process by which learned treatises are produced is at least as strong a guaranty of trustworthiness as reliance upon the efficacy of an oath.<sup>30</sup> Whether or not the court made these statements with the intention of demonstrating the requisite qualifications of treatises, in adopting the Uniform Rule it has put itself on record as approving the reasoning which admits hearsay with these qualifications into evidence as an exception to the hearsay rule.

By the decision in the instant case, Wisconsin becomes only the second state to admit learned treatises as substantive evidence in the absence of express statutory authority.<sup>31</sup> The possible reasons for the reluctance of the judiciary of other states to carve out of the hearsay rule an exception for learned treatises are twofold: either they are not convinced that learned treatises on subjects of inductive sciences have attained that degree of trustworthiness which makes cross-examination of the author dispensable, or they believe that the rule excluding learned treatises as substantive evidence has become so firmly fixed that any change at this late date should be made by the legislature. The decision of the Wisconsin Supreme Court is defensible against attack by either of these lines of reasoning. The wisdom of the rationale underlying the majority rule has been put in doubt by the arguments of those who urge adoption of the contrary rule.<sup>32</sup> And it should be no criticism of the court that it took the initiative to change its longstanding rule without waiting for legislative action. The admissibility of hearsay has always been governed by judicially-created exceptions to the general rule, and the fact that the exception created in this case happened to be provided for in a proposed legislative act<sup>33</sup> does not imply any usurpation of law-making power by the courts. While there is no doubt that the legislature has the power to prescribe rules of evidence for the courts, in the absence of such action the courts should be free to formulate their own rules and change them when a better policy will be served by such a change.

The court's specific adoption of rule 63(31) is beneficial in two ways. By this method, it is possible to salvage some of the best sections of the Uniform Rule of Evidence whose enactment in the entirety by the legislature is jeopardized by other less desirable sections. In addition, by adopting the Uniform Rule the court has clearly defined the scope of its new rule. Under rule 63(31), once the authority of the treatise is established, it may be used as direct evidence to the same extent as an expert's testimony. Similarly, according to the official comment to the section, all restrictions on the use of treatises on cross-examination which would not apply equally to an expert have been lifted. The fact that the

29. *Lewandowski v. Preferred Risk Mut. Ins. Co.*, 33 Wis. 2d 69, 76, 146 N.W.2d 505, 509 (1966).

30. *Id.* at 76-77, 146 N.W.2d at 509.

31. *See supra* note 24.

32. *See supra* note 16.

33. Uniform Rule of Evidence 63(31).

Wisconsin Supreme Court has not been called on to interpret the new rule in any subsequent case may attest to its clarity. The only question which may cause difficulty is whether or not the judge should have any discretion to exclude a treatise notwithstanding proper establishment of its authority. Wigmore's conception of the better rule is to allow the judge this discretion in order to meet exceptional circumstances.<sup>34</sup>

More importantly, the decision in the principal case is in line with the primary goal of our judicial system—the fair, speedy and economical resolution of disputes. Since we cannot expect an expert witness to testify from personal experience on all subjects, we must allow him to base his opinion to some extent on his study of the literature in his field. When this is realized, it would seem to be in the interests of accuracy and impartiality to admit the literature itself rather than depend upon the second-hand version of an interested—and compensated—expert witness. It is also repugnant to the concept of due process that a plaintiff should be denied recovery on a meritorious cause of action because of the difficulty, if not impossibility, of obtaining expert medical testimony in a malpractice case. Finally there is no reason why the cost of a law suit, which can be inflated tremendously by the use of expert testimony, should be a drain on a litigant's financial resources when equally competent and trustworthy evidence is as near at hand as the library.

The rule adopted in the principal case is very similar to the one that has been followed in Alabama since the middle of the nineteenth century.<sup>35</sup> If the workability of the Uniform Rule can be measured by past experience with an almost identical one, then it is significant to note that all the horrors surmised to be attendant to adopting a rule admitting learned treatises as substantive evidence have failed to materialize in practice.<sup>36</sup> Many states which still follow the majority rule have seriously undermined that rule by permitting liberal use of treatises during cross-examination.<sup>37</sup> As a practical matter, the effect on the jury of the almost unrestricted use of treatises in cross-examining an expert witness for the ostensible purpose of impeaching his credibility or testing his qualifications is indistinguishable from using treatises as independent, primary evidence. In many instances this practice has become in fact a devious way of "getting around" the hearsay rule excluding learned treatises.<sup>38</sup> Presumably the courts would not continue to condone such a subterfuge if they were determined to give full effect to the hearsay rule. If the courts are not determined to give full effect to the rule excluding learned treatises as substantive evidence, then the judicially forthright action would be to change the rule to allow them to be

34. 6 Wigmore § 1691.

35. See *supra* note 24.

36. Over eighty years after the adoption of its rule, the Alabama Supreme Court said "[w]e have not found the ends of justice defeated by our rule, nor the difficulties of its application very great." *City of Dothan v. Hardy*, 237 Ala. 603, 607, 188 S. 264, 266-67 (1939).

37. See *supra* notes 12-14 and accompanying text.

38. Dana, *Admission of Learned Treatises in Evidence*, 1945 Wis. L. Rev. 455.

admitted directly rather than continuing to sanction the same result achieved by less respectful means.

CHARLES SAWYER

TAXATION—"OVERNIGHT RULE" OF COMMISSIONER OF INTERNAL REVENUE SERVICE IS VALID UNDER § 162(a)(2) OF INT. REV. CODE OF 1954

Respondent was a traveling salesman for a wholesale grocery company in Tennessee. He lived in Fountain City, Tennessee, about 450 miles from his employer's place of business. The respondent would customarily leave his residence about 5 a.m. in order to be in his sales territory at the start of the business day. He ordinarily traveled a total of 150 to 175 miles daily, returning home by 5:30 p.m. The respondent ate breakfast and lunch on the road in customers' restaurants. On his income tax returns for 1960 and 1961 he deducted the cost of these meals as traveling expenses "while away from home" under section 162(a)(2) of the Internal Revenue Code of 1954.<sup>1</sup> The Commissioner disallowed the deduction and the respondent paid the tax. Suing for a refund in the District Court, the taxpayer received a verdict in his favor, which was affirmed by the Court of Appeals for the Sixth Circuit.<sup>2</sup> On certiorari to the Supreme Court of the United States, it was *held* that the "sleep or rest" rule of the Commissioner of Internal Revenue, allowing a deduction for the cost of meals only when the taxpayer is away from home overnight, is valid under section 162(a)(2). *United States v. Correll*, 389 U.S. 299 (1967).

The Revenue Act of 1918 allowed a deduction for ordinary and necessary business expenses.<sup>3</sup> At first, this provision was strictly construed as denying any deduction for "traveling expenses" such as meals and lodging, unless these expenses could be deemed within the "ordinary and necessary" language of the Act.<sup>4</sup> Later, however, taking a more liberal view, the Treasury Department allowed a deduction of such traveling expenses "in excess of any expenditure ordinarily required for such purposes at home."<sup>5</sup> In a further liberalization

1. Int. Rev. Code of 1954, § 162(a)(2) reads in part:

(a) In General: There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business;

2. 369 F.2d 87 (6th Cir. 1966).

3. Rev. Act of 1918, § 214(a)(1), 40 Stat. 1066, reads in part:

(a) That in computing net income there shall be allowed as deductions:

(1) all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . .

4. Treas. Reg. 45, art. 292 (1920 ed.).

5. T.D. 3101, 1920-3 Cum. Bull. 191.