Case Western Reserve Law Review

Volume 11 | Issue 3

1960

Use of Reported Testimony in Subsequent Cases

John H. Wilharm Jr.

all the states, will accomplish a solution. But there are measures which, while not ideal, are more desirable than blind adherence to the domicile theory. One of these has been suggested in this note: sanctioning divorce jurisdiction based upon a reasonable residence period of the plaintiff and personal jurisdiction over both parties.

Insistence upon proof of domicile in states such as Nevada has not changed the realities of the situation. Persons go to these jurisdictions, establish a fictitious domicile there, obtain their divorce, and subsequently return home or go elsewhere. The suggested statute removes these elements of fraud and deception and provides protection for the rights of the defendant. In the words of Mr. Justice Clark, such a statute's "only vice . . . is that it makes unnecessary a choice between bigamy and perjury."[59]

JAMES AMDUR

Use of Reported Testimony in Subsequent Cases

INTRODUCTION

Normally, when counsel desires to present evidence in open court he will call a witness and elicit the testimony directly from him. However, there are times when a named witness is not available and counsel may desire to introduce recorded testimony given by him at a prior hearing or trial. The successful prosecution of a lawsuit may depend upon whether counsel can introduce this testimony.[1]

Reported testimony given in a former action may be competent in a subsequent trial, or in a subsequent proceeding in the same action, when there is a valid reason for the nonproduction of a witness and a sufficient identity of issues and parties.[2] The rules governing the admissibility of such evidence were originally a part of the common law. Many states now have statutes in this area and generally it is said that they are merely declaratory of the common law.[3]

The common-law rule, applied to both civil and criminal cases, consisted of four general requirements. The proponent of the testimony had to show that:

1. The witness was unavailable.
2. There was identity of parties.
3. There was identity of issues.
4. There had been an adequate opportunity to cross-examine the witness at the first trial.

There is a definite split of authority on whether former testimony is admissible as an exception to the hearsay rule or whether it satis-

59. Granville-Smith v. Granville-Smith, 349 U.S. 1, 28 (1955) (dissenting opinion).

fies the rule itself. Most courts and writers conclude that such evidence is an exception to the hearsay rule.[4] However, Wigmore and a few courts contend that the statements are not hearsay because

> the chief objections to hearsay evidence are the want of the sanction of an oath, and of any opportunity to cross-examine, neither of which applies to testimony given on a former trial.[5]

While this question is primarily academic, it is helpful to understand this conflict of authority when working out problems of admissibility. For the sake of simplicity, this writer shall adhere to the "majority" rule and refer to the use of prior reported testimony as an exception to the hearsay rule.

It should be borne in mind that there are situations where testimony will be admissible even though the common-law requirements cannot be met. As a general rule, the requirements must be met when the evidence is introduced to prove the facts about which the witness testified. However, in a situation where the purpose is other than to prove the truth of the facts, the prior testimony rule need not be satisfied. In *State v. Wykert,*[6] although there had been no opportunity to cross-examine the witness at the first trial, the court reporter was permitted to read testimony from the earlier case to show perjury. Similarly, where a witness was present in court, his prior testimony was admissible as an admission against interest although it clearly would not have been admissible to prove the substance of the witness' testimony.[7] Prior testimony may also be used to impeach witnesses. In *People v. Ferraro,*[8] because all of the witnesses' testimony before the grand jury was not available, none was admissible as evidence of guilt. However, fragments were admissible for impeachment purposes.

This survey is not exhaustive, but merely illustrative. The foundation necessary to have the proffered testimony admitted for a purpose other than to prove the facts testified about may, in many cases, be more easily laid than the foundation needed to satisfy the prior testimony rule; therefore, the trial lawyer should explore each prob-

---

1. Industrial Comm'n v. Bartholome, 128 Ohio St. 13, 190 N.E. 193 (1934).

2. 20 AM. JUR. *Evidence* § 686 (1939).

3. Gates v. Pendleton, 71 Cal. App. 752, 236 Pac. 365 (1925); Lake Erie & W. R.R. v. Huffman, 177 Ind. 126, 97 N.E. 434 (1912); Reynolds v. Fitzpatrick, 28 Mont. 170, 72 Pac. 510 (1903).

4. MCKELVEY, EVIDENCE § 227 (5th ed. 1944); 3 JONES, EVIDENCE § 1177 (2d ed. 1926), and cases cited therein.

5. Habig v. Bastian, 117 Fla. 864, 158 So. 508 (1935); Minneapolis Mill Co. v. Minneapolis & St. L. Ry., 51 Minn. 304, 315, 53 N.W. 639, 642 (1892); 5 WIGMORE, EVIDENCE § 1370 (3d ed. 1940).

6. 198 Iowa 1219, 199 N.W. 331 (1924).

7. Bogie v. Nolan, 96 Mo. 85, 9 S.W. 14 (1888); Tuttle v. Wyman, 146 Neb. 146, 18 N.W.2d 744 (1945).

8. 293 N.Y. 51, 55 N.E.2d 861 (1944).

lem thoroughly. The rules governing the admission of prior testimony to prove the facts contained therein are in some jurisdictions, notably Ohio, quite restrictive. Severe restrictions only add emphasis to the need for careful analysis of possible alternative means of having such proffered testimony admitted.

OHIO RULE

Ohio has enacted separate code provisions dealing with the admissibility of prior reported testimony in civil[9] and criminal[10] cases. Ohio's first statute was not enacted until 1892,[11] but the common-law rule was recognized many years before.[12] This note will be confined to civil cases in an effort to survey the Ohio law and compare it with the judicial attitude of other jurisdictions.[13] The relevant part of the Ohio Revised Code section 2317.06 is:

> When a party or witness, after testifying orally, dies, is beyond the jurisdiction of the court, cannot be found after diligent search, or is insane, or, through any physical or mental infirmity, is unable to testify, or has been summoned but appears to have been kept away by the adverse party [and] . . . the evidence of such party or witness has been taken by an official stenographer, the evidence so taken may be read in evidence by either party on the further trial of the case and shall be prima facie evidence of what such deceased party or witness testified to orally on the former trial. . . .

The Ohio courts have construed this statute to include the common-law requirements for the admissibility of prior reported testimony even though they are not specifically mentioned therein.

Unavailability of the Witness

Initially, the proponent of former testimony must lay the proper predicate for its admission by showing that the witness is unavailable. In *New York Central Railroad v. Stevens*,[14] the plaintiff failed to show that the attendance of the witnesses could not have been procured; the Ohio Supreme Court held the admission of their prior testimony was prejudicial to the defendant. It should also be noted that the court held that the burden of showing unavailability is clearly on the proponent. The court of appeals in *Lockwood v. Aetna Life*

9. OHIO REV. CODE § 2317.06.

10. OHIO REV. CODE § 2945.49.

11. 89 Ohio Laws 143 (1892).

12. Wagers v. Dickey, 17 Ohio 439 (1848); Bliss v. Long, Wright 351 (Ohio 1833).

13. In some jurisdictions the use of depositions in subsequent cases is controlled by the same rule as governs admissibility of prior reported testimony; however, this is not the rule in Ohio. Gorman v. Columbus & Southern Ohio Elec. Co., 144 Ohio St. 593, 60 N.E.2d 700 (1945). This was an action for wrongful death wherein the court held that the use of depositions from prior cases was controlled by the specific deposition statutes. Therefore, only Ohio cases involving reported testimony will be discussed.

14. 126 Ohio St. 395, 185 N.E. 542 (1933).

Insurance Company[15] held that it was error to admit former testimony "without any reason for so doing being stated to the court."[16] The court refused to assume that the witnesses were unavailable at the second trial merely because they were beyond the jurisdiction[17] of the court at the former trial, six years before.

The requirement that the witness be unavailable is also applicable to other exceptions of the hearsay rule. In order to admit declarations against interest, dying declarations, or declarations relating to family history, a showing of unavailability must be made.[18]

The reason for nonproduction must be a ground specified in the statute, *i.e.*, death, insanity, without the jurisdiction, physical or mental disability, or restraint by the adverse party. Although Wigmore says the statutes were not intended to forbid admission where the common law was more liberal,[19] there are no Ohio cases reflecting this attitude. Where the witness is dead,[20] or insane,[21] there is little dispute as to unavailability. However, where the basis for admitting prior testimony was that the witnesses were outside of the jurisdiction, the Ohio Supreme Court[22] held that it was not sufficient to show that the witnesses were merely outside the forum *county,* since their attendance might be compelled under Ohio General Code section 11506 (Ohio Revised Code section 2317.16). There does not appear to have been any litigation under the other grounds set forth in the statute.

Identity of Parties

In addition to the requirement of unavailability, the courts have held that there must be an identity of parties.[23] It is generally held that revival of an action by an administrator or executor is not such a change of parties as will prevent the admission into evidence of prior testimony.[24] However, a substantial change of parties will prevent admission even though the testimony might go to the same issue. In *Werk Company v. Martin,*[25] an action for malicious prosecution,

15. 8 Ohio App. 444 (1917).

16. *Id.* at 449.

17. The facts reported do not reveal just where the witnesses were at either time. Ohio Revised Code § 2317.16 provides that generally witnesses may be subpoened only from an adjoining county.

18. MCCORMICK, EVIDENCE § 234, n. 3 (1954).

19. 5 WIGMORE, EVIDENCE § 1387, at 92 (3d ed. 1940).

20. *In re* Harris' Estate, 95 N.E.2d 769 (Ohio Ct. App. 1950); Bonnett v. Dickson, 14 Ohio St. 434 (1863) (per curiam).

21. Sherlock v. Globe Ins. Co., 7 Ohio Dec. Reprint 17 (Cincinnati Super. Ct. 1876).

22. New York Central R.R. v. Stevens, 126 Ohio St. 395, 185 N.E. 542 (1933).

23. Lord v. Boschert, 47 Ohio App. 54, 189 N.E. 863 (1934); Wagers v. Dickey, 17 Ohio 439 (1848).

24. Sheets v. Hodes, 142 Ohio St. 559, 53 N.E.2d 804 (1944); Smith v. Cincinnati Traction Co., 24 Ohio N.P.(n.s.) 565 (C.P. 1924).

25. 18 Ohio L. Abs. 81 (Ct. App. 1934), *motion to certify denied,* Dec. 26, 1934.

the trial court admitted reported testimony which had been given at a preliminary hearing in a criminal case where the defendant, the plaintiff in this action, was charged with embezzlement. The court of appeals held that the testimony was not admissible because the parties in the first case were the State and Martin, and in the second, Martin and the Werk Company. The court did suggest that counsel might have offered the prior testimony as an admission against interest.

Identity of Issues

Even where the required identity of parties is present, the subject matter must also be the same.[26] Similarity of subject matter will be discussed under the "further trial of the case" section, as the two subjects are very closely allied.

Opportunity for Cross-Examination at the First Trial

Another fundamental requisite for the admission of prior testimony is that there must have been an *opportunity* to cross-examine the witness at the former trial. The underlying reason for the requirement that the parties and issues be at least substantially the same is to insure that counsel at the first trial has developed generally the same points as counsel at the second trial would have developed, since, at the second trial, no opportunity to cross-examine exists. The Ohio courts have stressed the importance of the opportunity to cross-examine. In *Industrial Commission v. Bartholome*,[27] the claimant testified before a referee of the Industrial Commission and was subjected to cross-examination. Thereafter he died and his wife brought an action claiming an award as a dependent. The Supreme Court of Ohio, in sustaining the admissibility of his testimony, said:

> The Industrial Commission was present by counsel and subjected Bartholome to cross-examination. The questions in issue in Emma Bartholome's case were the same as in her deceased husband's. . . .[28]

Further Trial of the Case

An indispensable requirement for admissibility in Ohio is that the second proceeding be a "further trial of the case."[29] Even though this provision appears to make the Ohio rule narrower in scope than

26. Toledo Traction Co. v. Cameron, 137 Fed. 48 (6th Cir. 1905); Summons v. State, 5 Ohio St. 325 (1856); Werk Co. v. Martin, 18 Ohio L. Abs. 81 (Ct. App. 1934), *motion to certify denied*, Dec. 26, 1934.

27. 128 Ohio St. 13, 190 N.E. 193 (1934).

28. *Id.* at 26, 190 N.E. at 198. The statute then in effect (General Code § 11496) was not mentioned in the opinion. Eight months later, in a very similar case, a court of appeals held the same way on the basis of the statute. Industrial Comm'n v. Glick, 49 Ohio App. 415, 197 N.E. 372 (1934).

29. OHIO REV. CODE § 2317.06.

the common-law rule, it has been closely followed by the Ohio courts. A significant example of the restrictive nature of this portion of the statute is found in *Lord v. Boschert*.[30] Bertha Lord was injured in an automobile accident involving cars driven by her husband, Irvin, and defendant, Boschert. In her suit for personal injuries one August Noelcke testified. Noelcke died shortly thereafter and before Irvin Lord brought the principal case for loss of services. The only question before the court of appeals was whether the trial court erred in refusing to admit the testimony given by Noelcke at Bertha Lord's trial. The court held the testimony not admissible because it was not the same case. Her case was for personal injuries, while his was for loss of services. It was not a further trial of the case even though the same accident was the basis of both suits. The fact that the testimony of Noelcke may have been directed to the same issue, *i.e.*, defendant's negligence, not damages, is irrelevant under the court's interpretation of the Ohio statute.

The statute has received a somewhat different interpretation in the workmen's compensation area. *Schomer v. State ex rel. Bettman*[31] involved an action by the state to force an employer to pay an award. John Conover sustained injuries while working for Schomer and the commission made an award to Conover which his employer refused to pay. In the instant case, brought by the state to enforce the award, evidence which had been given before the commission by two witnesses was admitted, the witnesses then being beyond the jurisdiction of the court. Defendant argued that the action instituted by the state to enforce the award was not a "further trial of the case," and, therefore, it was error to admit the testimony. The court held that the Workmen's Compensation Act treated the pursuit of an award as one matter from the filing of a claim to suit against a noncomplying employer; therefore, the testimony was admissible. It should be noted that the parties in these proceedings were not the same. In the first proceeding the parties were the employee and the Industrial Commission; in the second proceeding the parties were the state and the employer.

It appears from the *Lord* case that in other than workmen's compensation cases, the Ohio courts will adhere to the strict wording of the statute. At times the courts have expressed their dissatisfaction with the restriction. In a child custody proceeding,[32] testimony from a divorce proceeding between the children's mother and a third party, not the father, had been admitted. The court of appeals reversed on the ground that the admission of the testimony was prejudicial and added,

30. 47 Ohio App. 54, 189 N.E. 863 (1934).

31. 47 Ohio App. 84, 190 N.E. 638 (1933); the holding of the Schomer case was endorsed a year later in Industrial Comm'n v. Glick, 49 Ohio App. 415, 197 N.E. 372 (1934).

32. Bachtel v. Bachtel, 97 Ohio App. 521, 127 N.E.2d 761 (1954).

> it is recognized that the application of the rule of exclusion to the instant proceedings is technical and unrealistic. . . .[33]

Although the testimony that was introduced had definite relevance to the issue of the mother's fitness, even if all other requirements of the rule were satisfied, it was not a "further trial of the case."

It appears that as the statute is now worded the Ohio courts are correct in interpreting the code as they do. An analysis of the approach to the problem of admissibility of prior testimony in other jurisdictions might suggest the need for a change in Ohio's statute.

Comparison with the Judicial Attitude in Other Jurisdictions

The Missouri case of *Bartlett v. Kansas City Public Service Company*[34] typifies the more modern approach to this problem. The facts were nearly identical with the *Lord* case discussed earlier.[35] Adda Bartlett was injured while stepping from a bus. Her husband, George, sued first for loss of services, and in the principal case Adda sued for her personal injuries. In the second suit, defendant introduced the testimony of two witnesses in the first trial, because they were outside the court's jurisdiction. The Supreme Court of Missouri, without mentioning any statute, held that it was not error to admit the testimony. The court discussed several cogent arguments in favor of its decision. It emphasized that the issue of negligence litigated at the husband's trial was exactly the same as the negligence issue in the instant case, and that the testimony of the two absent witnesses went only to that issue, not to the damage issue. The court also pointed out that the same motive and interest existed for cross-examination in each case; therefore, it was not necessary that the parties be identical. Twice, the court mentioned that one of plaintiff's attorneys was the same person who had tried the earlier case. This made the cross-examination argument even stronger. On the matter of privity, which is required by some courts, the Missouri court followed Wigmore's views;[36] that is, the privity needed to satisfy this evidentiary requirement is not privity in the property-right sense. The mere fact that the parties occupied the same legal relationship to a third party does not guarantee an adequate motive for cross-examination. Thus, privity of *interest or motive* is paramount, and here it was the same, for both plaintiffs had to prove the same negligence to recover.

Another leading case in this area is *In re Dougherty's Estate*.[37]

33. *Id.* at 527, 127 N.E.2d at 765.
34. 349 Mo. 13, 160 S.W.2d 740 (1942).
35. See note 30 *supra* and accompanying text.
36. 5 Wigmore, Evidence § 1388 (3d ed. 1940).
37. 27 Wash. 2d 11, 176 P.2d 335 (1947).

Plaintiff petitioned for appointment as administrator of his wife's estate. One of the basic issues was the ownership of certain property. The entire testimony of the wife, given in a 1944 divorce action between the same two parties, was admitted. The court pointed out that the purpose of the prior testimony statute[38] was to assist the trier of facts in determining the truth. In the divorce action, the wife had testified under oath and was cross-examined. Her testimony in that action went to the same issue as presented in the later case — the ownership of certain property. The admission of her testimony also served another purpose. It permitted the petitioner (husband) to testify, whereas if the wife's testimony were not admitted in evidence, the petitioner's testimony would have been barred by the deadman statute. The Washington statute permitted the court to exercise its discretion; however, sound reasons were presented to justify their decision.

The reasoning in *Lyon v. Rhode Island Company*[39] is very similar to that of the last two cases. In the first action the father sued as next friend of his minor daughter for injuries she had received as a result of defendant's negligence. The motorman of the street car, who had testified on the negligence question, died prior to the principal action wherein the father sued for his injuries. Plaintiff objected to the introduction of the motorman's testimony on the ground that the parties were not the same. The trial court excluded the evidence and the Supreme Court of Rhode Island reversed on the basis of the common-law rule admitting prior reported testimony. It emphasized several salient points. First, the father had controlled the earlier suit and had employed the same counsel in both cases. Second, the plaintiff's counsel had cross-examined the witness. Third, the defendant was the same company and the substantive issue of negligence was identical.

There are other cases which could be discussed but they would only serve to reiterate the same view.[40] Three arguments have been used by the courts in the cases discussed. The first, and primary point stressed, was the issue to which the testimony went. If the issue in both cases is the same, there is strong reason for the admission of the evidence. The identity of issues is also important in regard to the second point, the cross-examination requirement. The courts are very zealous in their protection of this right, but, generally, where the issues are the same, the compelling motive for cross-examination will have existed. The third point, which two courts stressed, was the

38. WASH. REV. CODE § 5.20.060 (1951).

39. 38 R.I. 252, 94 Atl. 893 (1915).

40. McDougald v. Imler, 153 Fla. 619, 15 So. 2d 418 (1943); Cox v. Selover, 171 Minn. 216, 213 N.W. 902 (1927); Proulx v. Parrow, 115 Vt. 232, 56 A.2d 623 (1948); see cases collected in Annot., 142 A.L.R. 673 (1943).

identity of attorneys.[41] This is undoubtedly a good make-weight factor although it would not seem to be an essential. Of course, the benefit that the triers of fact can derive from the use of reported testimony must be weighed against the desire of each counsel to cross-examine each witness himself and not to have to accept the cross-examination made by another attorney in a prior case. In view of the conflicting interests of the litigants and the possible substantial value of the prior testimony to the triers of fact, greater discretionary power should be left to the courts; they should not be foreclosed by statute.

CONCLUSION

Before proposing any recommendations, it seems appropriate to look at the rules adopted by the Model Code and the Uniform Rules. The Model Code[42] suggests two major changes. First, it would abandon the unavailability requirement. Discretion would be vested in the trial judge to call a witness for cross-examination if the witness were available and if he felt it were necessary. It should be pointed out that many of the other exceptions to the hearsay rule do not require a showing of unavailability, for example: admissions against interest, declarations showing a state of mind, and spontaneous exclamations. Thus, under the Model Code rule it is possible to have *both* the former testimony and the witness' *viva voce* testimony. Second, the Model Code would, in effect, dispense with the requirement of identity of issues and parties. This would greatly decrease the protection of cross-examination. However, the right to cross-examine is not a requisite for the admission of evidence under other exceptions to the hearsay rule. In those cases, even the safeguard of the oath is generally lacking.

The Uniform Rules[43] present a more moderate solution. If a witness were unavailable and had "given testimony as a witness in another action," such testimony would be admissible if it were offered against the party who had elicited it in the former action, or if the issue were such that there was a right and opportunity to cross-examine, and the proper motive to do so.

It must be kept in mind that when the common-law rule was developed and the first statutes passed, the methods of reporting were not as accurate as they are today. With the use of stenotype machines or shorthand, the record can, and should, be very accurate. This evidence is often useful and necessary to a complete and just determination of issues.

The Ohio statute, with its "further trial of the case" clause, places an unnecessary restriction on the courts. The purpose of a

41. See notes 34 and 39 *supra* and accompanying text.

42. MODEL CODE OF EVIDENCE rules 503 and 511 (1942).

43. UNIFORM RULES OF EVIDENCE rule 63 (3) (1953).