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Indiana Law Journal

Volume 35 | Issue 4 Article 4

Summer 1960

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Recommended Citation

(1960) "Objections to Former Testimony," *Indiana Law Journal*: Vol. 35 : Iss. 4 , Article 4.
Available at: http://www.repository.law.indiana.edu/ilj/vol35/iss4/4

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OBJECTIONS TO FORMER TESTIMONY

Testimony given in a prior trial may be admissible in evidence as either an exception to the hearsay rule[1] or not hearsay at all.[2] This theoretical difference of opinion, however, does not control the admissibility of former testimony if certain conditions precedent are fulfilled. The conditions which must be met before former testimony will be admitted fall into two groups; one, those having to do with the witness's availability; and two, those establishing the relevance of the former testimony to the present proceeding.

Before any part of his former testimony is admissible, the witness must be dead, insane, so disabled as to be unable to testify,[3] a nonresident not subject to process,[4] absent by procurement of the opposing party,[5] or a resident whom counsel in the exercise of due diligence cannot locate.[6] The same conditions for admissibility appear to apply in both criminal

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1. McCord v. Strader, 227 Ind. 389, 86 N.E.2d 441 (1949); McCormick, Handbook of the Law of Evidence 480 (1954).
2. 5 Wigmore, Evidence § 1370 (3rd ed. 1940); see also Smith v. U.S., 106 F.2d 726 (1939).
3. See, *e.g.*, Pittman v. State, 272 P.2d 458 (Okla. Cr. 1954). The witness was in an advanced stage of pregnancy. The court considered her unable to attend and admitted her former testimony.
4. See, *e.g.*, Aetna Life Ins. Co. v. Koonce, 233 Ala. 265, 171 So. 269 (1936).
5. Reynolds v. U.S., 98 U.S. 145 (1878).
6. *E.g.*, N.Y. Cent. R.R. v. Pinnell, Adm'r, 112 Ind. App. 116, 40 N.E.2d 988 (1942); United Tel. Co. v. Barva, 83 Ind. App. 61, 147 N.E. 716 (1925); Wilson v. State, 175 Ind. 458, 93 N.E. 609 (1911).

and civil proceedings.[7] In criminal cases the constitutional question of the right to confront witnesses was resolved early by a holding that confrontation once during the proceedings with opportunity to cross-examine satisfied the constitutional guarantee so the witness's absence does not bar the use of his former testimony in later trials.[8]

Relevancy to the present proceeding is established by comparing parties and issues. In general the parties in the proceeding in which the former testimony is offered must be substantially identical with those in the proceeding in which the testimony was originally taken.[9] A nominal change of parties is immaterial if there is privity in blood, estate, or law;[10] and the issues on which the former testimony is offered must be substantially the same as those on which it was originally accepted.[11] There must have been either actual cross-examination of the witness in the original proceeding[12] or the opportunity to cross-examine.[13] The kind of proceeding at which the former testimony was elicited does not control its admissibility at a subsequent proceeding as long as there is substantial identity of issues and parties and the opportunity to cross-examine was present at the original proceeding.[14]

Objections to former testimony can be classified as objections to the whole testimony or to specific parts of it. In the first class lie objections based on privileges, relevancy, materiality, and competency of the whole body of the testimony; in the second class, the total gamut of objections that can be made to specific parts of any testimony. The purpose here is to investigate whether the failure to raise these objections at the time the testimony was first taken prohibits raising them when the former testimony is offered at a subsequent proceeding.

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7. See Zimmerman v. State, 190 Ind. 537, 130 N.E. 235 (1921); and State v. Steadman, 216 S.C. 579, 59 S.E.2d 168 (1950), *cert. denied,* 340 U.S. 850 (1950).

8. Wilson v. State, 175 Ind. 458, 93 N.E. 609 (1911); Mattox v. U.S., 156 U.S. 237 (1895). In the latter case it was said that the right to confrontation was meant only to prevent the introduction of *ex parte* affidavits or depositions.

9. *E.g.,* Lake Erie & W. R.R. v. Huffman, Adm'r, 177 Ind. 126, 97 N.E. 434 (1912).

10. Indianapolis & St. Louis R.R. v. Stout, Adm'r, 53 Ind. 143 (1876).

11. *E.g.,* Traveler's Fire Ins. Co. v. Wright, 322 P.2d 417 (Okla. 1958). The former testimony from a criminal prosecution for arson on the point of the defendant's procuring the arson was admitted in a subsequent civil action by the acquitted defendant against the insurer.

12. *E.g.,* Stearsman v. State, 237 Ind. 149, 143 N.E.2d 81 (1957). Here the witness died of a heart attack during cross-examination. On a subsequent trial the state was allowed to introduce only that part of the former testimony on which defendant's counsel had actually cross-examined.

13. State v. Logan, 344 Mo. 351, 126 S.W.2d 256 (1939); People v. Green, 152 Cal. App. 2d 886, 313 P.2d 955 (1957); State v. Stewart, 85 Kan. 404, 116 P. 489 (1911); People v. Redstone, 139 Cal. App. 2d 485, 293 P.2d 880 (1956).

14. Traveler's Fire Ins. Co. v. Wright, 322 P.2d 417 (Okla. 1958); Wellden v. Roberts, 37 Ala. App. 1, 67 So. 2d 69 (1952).

The introduction of former testimony where the witness is dead, insane, disabled, or cannot be found rests on the fact that the witness is physically unavailable to testify *vive voce* at the proceeding in which the former testimony is offered. Logically, if the witness is available and competent to testify his former testimony should be excluded simply because one of the primary conditions for its admission has not been met.[15] Yet a situation may arise in either a civil or criminal trial where the witness is both available and competent but seeks refuge in a privilege. In criminal cases it is generally held that if a presently available witness (not a party) takes refuge in his privilege against self-incrimination his testimony given in a prior proceeding may be introduced in evidence.[16] The reasons given in these cases for admitting the former testimony are: first, by refusing to testify, the witness has made himself "unavailable";[17] and second, even though the witness is physically available, the unavailability of his *vive voce* testimony permits admission of the former testimony.[18] The second ground is only a technical refinement of the first. But, regardless of the rationale upon which the decisions are based, the rule admitting former testimony has been extended to permit the admission of former testimony despite a witness's claim of the privilege against self-incrimination by simply extending the concept of unavailability. It should be noted that the witness has not waived his present privilege not to testify; only his former testimony is admitted.

In criminal prosecutions, too, the defendant's former testimony has been admitted after the defendant exercised his privilege against self-incrimination.[19] It is questionable whether such admission of the defendant's former testimony should be considered an extension of the former testimony rule even though functionally parallel to the situation as to witnesses. When the criminal defendant refuses to testify he does so as a matter of privilege. Although this may make his *vive voce* testimony unavailable it would seem a perversion to use the exercise of the privilege as the reason for introducing the defendant's possibly incriminating former testimony. A better reason for the admission of the defendant's

15. Rio Grande So. Ry. v. Campbell, 55 Col. 493, 136 P. 68 (1913), supports this proposition.

16. *E.g.,* Woodward v. State, 21 Ala. App. 417, 109 So. 119 (1926); State v. Reidie, 142 Kan. 290, 46 P.2d 601 (1935); People v. Pickett, 339 Mich. 294, 63 N.W.2d 681 (1954); Exelton v. State, 30 Okla. Cr. 224, 235 P. 627 (1925). *Contra,* Pleau v. State, 255 Wis. 362, 28 N.W.2d 496 (1949).

17. People v. Pickett, *supra* note 16; State v. Reidie, *supra* note 16.

18. Exelton v. State, 30 Okla. Cr. 224, 235 P. 627 (1925); Woodward v. State, 21 Ala. App. 417, 109 So. 119 (1926).

19. State v. Simmons, 78 Kan. 852, 98 P. 277 (1908); U.S. v. Grunewald, 164 F. Supp. 644 (1938).

former testimony would be to consider it as a voluntary admission.[20] The voluntary admission basis for admissibility is broader than the former testimony rule as to defendants and has been used, by at least one court, to secure the admission of prior testimony held excludable under the former testimony rule.[21] Consistent with considering the defendant's prior testimony as an admission rather than as former testimony is the limitation that if the testimony in a preliminary criminal hearing had been given without knowledge of the privilege, it is excludable.[22]

Parallel to the self-incrimination privilege of a witness is the privilege of a spouse to refuse to testify against the marriage partner. Testimony given by a spouse in a previous proceeding is admissible later even though the spouse claims his privilege.[23] By analogy one may say that the same result should obtain for other privileges as well. For example, the former testimony of a doctor or lawyer, following the pattern established for other privileges in relation to former testimony, would be admissible over the claim of a privileged communication by a patient or client.

The preceding discussion as to the unavailability of the witness or of the *vive voce* testimony as permitting the admission of former testimony over a claim of privilege does not bear directly on the problem of objections to the merits of former testimony. Thus, once the foundation is laid for the admission of former testimony by showing that the parties and issues are the same, that there was opportunity for cross-examination in the original proceeding, and that the witness is now unavailable for some reason other than the exercise of a privilege, is the former testimony open to objections going to its evidentiary merits?

It is clear that portions of the testimony properly related to the parties and issues to which objections were sustained at the first proceeding are not admissible at the second.[24] If the objection is made and overruled during the first trial can the objecting party successfully raise the same objection to the former testimony during the second trial? In the one case found on point[25] an objection to competency was overruled

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20. In U.S. v. Grunewald, *supra* note 19, the court states three grounds for the admission of the defendant's former testimony: one, voluntary waiver of privilege (but as noted in the text the witness did not have to testify *vive voce*); two, the witness was "unavailable"; and three, the testimony was a voluntary admission.

21. West v. State, 24 Ariz. 237, 208 P. 412 (1922).

22. State v. Harriot, 248 Iowa 25, 79 N.W.2d 332 (1956); People v. Mora, 120 Cal. App. 2d 896, 262 P.2d 594 (1953).

23. Wyatt v. State, 35 Ala. App. 147, 46 So. 2d 837 (1950); McCoy v. State, 221 Ala. 466, 129 So. 21 (1930); State v. Stewart, 85 Kan. 404, 116 P. 489 (1911).

24. Illinois Bankers Life Ass'n v. Theodore, 47 Ariz. 312, 55 P.2d 806 (1936).

25. Garrett v. Weinberg, 54 S.C. 127, 31 S.E. 341, *reargument denied*, 34 S.E. 70 (1898).

at the first trial and again at the second when the former testimony was offered. The ruling was not appealed until after the second trial. On the appeal it was held to have been error to admit the incompetent testimony over objection in the second proceeding. In this instance there was clearly no waiver of objection since an objection was made at the first trial. The primary area of confusion in regard to former testimony lies, however, in the circumstances when no objection to the admissibility was taken at the first proceeding.

In reference to evidentiary merit a distinction must be made between the concepts of materiality and relevancy and the concept of competency. Materiality and relevancy appear functionally related to the criteria of similarity of issues and parties in the former testimony rule; competency is not so related to similarity of issues and parties, but rather refers to the personal trustworthiness and testimonial qualification of a witness. The problem of objections to former testimony reflects this basic distinction. Thus the problem of objections to materiality would appear to be partially controlled by the determinations as to similarity of parties and issues. Obviously if the issues upon which the testimony was originally taken differ substantially from those on which it is later offered the testimony would be immaterial in the subsequent proceeding. If the issues were the same or substantially alike and the testimony originally material it would also be material in the later proceeding. But, even if the issues were the same, if the testimony were immaterial in the first proceeding and not objected to or excluded, is it excludable when offered as former testimony? No cases have been found on this last point. It can be assumed, perhaps, that rarely if ever would an attorney either attempt to introduce or fail to object to testimony in general immaterial.

Identity of issues also partially controls relevancy. If the offered testimony is immaterial to the issues it is also likely to be irrelevant to any proposition requiring proof. However, testimony may be material as within the issues yet irrelevant as not probative of the proposition to which it is directed. If material but irrelevant testimony is given at the first proceeding and not objected to can it be successfully objected to when offered as former testimony? Again, no cases have been found with holdings specifically answering this question. Perhaps, as with materiality, the question may be moot.

The cases are split on the general question of whether new objections, either to the whole of the testimony or only to a part of it, should be sustained if meritorious, or overruled because waived in an earlier proceeding. In England and in some American jurisdictions such new objections have been sustained and the testimony excluded in a second

proceeding. In England the rule is that former testimony is open to the same objections as if the witness were personally present and testifying.[26] This rule would clearly permit new objections of almost every category to be entered against the former testimony.

In the United States, however, such a clear and unanimous rule has not been laid down. The general rule in evidence is that objections not timely taken are waived.[27] The major exception to this in regard to former testimony appears in favor of objections to the general or specific competency of a witness, although the latter may be doubtful. The few cases on record which treat the specific problem do not present a clear rationale for either sustaining or overruling new objections. In *Petrie v. Columbia & G. Ry.*[28] the record testimony admitted without objection at the first trial was the testimony of a witness taken at a coroner's inquest and incompetent as hearsay. On the second trial the same testimony was excluded on objection as incompetent. The offeror argued that the admission of the testimony at the first trial without objection constituted a waiver of any objection to competency and thus the testimony should have been admitted also at the second trial. On appeal the argument was rejected. The court stated that a second trial is a trial *de novo*[29] and should be conducted as if a previous trial had not occurred. Therefore, the former testimony should be open to any new objection. Similarly in *Meekins v. Norfolk & S. Ry.*[30] incompetent hearsay was admitted in the first trial without objection and was admitted over objection as former testimony in the second trial. On appeal it was held to be error to admit the former hearsay testimony on the ground that if the witness were alive and testifying *vive voce* such hearsay could be objected to successfully.

In *Arsnow v. Red Top Cab Co.*[31] no question was raised during the first trial as to the plaintiff's competency to testify. After a mistrial the plaintiff (Arsnow) committed suicide. His wife, as substituted plaintiff, sought in the second trial to introduce the deceased's testimony from the prior trial; at the same time the wife alleged that Arsnow was insane at the time of the first trial and that the insanity was caused by injuries allegedly due to the defendant's negligence. The defendant objected to the introduction of the former testimony on the ground of the incom-

26. PHIPSON, EVIDENCE 458 (9th ed. 1952).
27. 1 WIGMORE, EVIDENCE § 18 (3rd ed. 1940).
28. 29 S.C. 303, 7 S.E. 515 (1888).
29. Similarly, in Garrett v. Weinberg, 54 S.C. 127, 31 S.E. 341; *reargument denied,* 34 S.E. 70 (1898) the court appeared to base its decision on the concept of a new trial proceeding as if there had not been a prior trial.
30. 136 N.C. 1, 48 S.E. 501 (1904).
31. 159 Wash. 137, 292 P. 436 (1930).

petency of the witness; specifically, the insanity of Arsnow as alleged by his wife. On appeal it was held that the former testimony should have been excluded. If the plaintiff-wife's allegation of insanity was taken as true, then Arsnow's testimony was incompetent when first given. This incompetency was not waived by a failure to object since it was not in issue at the first trial. In this analysis the *Arsnow* case is consistent with the *Petrie, Meekins,* and *Garrett* cases in holding that there is no waiver of objection to the competency of former testimony when the witness was incompetent originally. *Calley v. Boston & M. Ry.*[32] supports an extension of this rule where only the witness's competency to answer a particular question is first challenged on the introduction of his former testimony.

Analyzed in another manner the *Arsnow* case would support the proposition that former testimony can be objected to as incompetent on the second trial even if the witness were competent at the time of the first. The fundamental inconsistency of the plaintiff's position in alleging Arsnow to have been insane at the time of the first trial and also using his testimony to prove important parts of the case operated against her. She could not both urge the insanity of Arsnow and the competency of his testimony at the same time after his death when there was no opportunity to appraise his capacity. A similar situation in *Louisville & N. Ry. v. Scott*[33] led to the exclusion of former testimony at the second trial which had been competent at the first. There the plaintiff impeached a witness for the defense at the first trial. Subsequently the witness died. At the second trial when the plaintiff attempted to introduce the witness's testimony from the first trial the defendant's objection to it was sustained. It was held to be no error to exclude the former testimony impeaching the witness since the plaintiff by introducing it made the witness his own and he could not be allowed to impeach his own witness. In this and in the *Arsnow* case the party inroducing the former testimony supplied the ground for exclusion. Both cases appear unusual, but if taken broadly would support the conclusion that former testimony is open to objection on a ground of incompetency arising between the time of the two trials.

Most of the cases which appear to take the contrary position—that objections not made when the testimony was first taken are waived for future proceedings, whether the objection existed at the first trial or arose later—can be distinguished. Among these cases are those where the in-

32. 93 N.H. 359, 42 A.2d 329 (1945). Objection to competency of expert to testify to fact not in his knowledge not waived. *Contra,* State v. White, 61 N.M. 109, 295 P.2d 1019 (1956). Objection to competency of neurosurgeon to testify as to defendant's sanity held waived.

33. 232 Ala. 284, 167 So. 572 (1936).

competency is imposed by a dead man statute. Where the administrator failed to object to the capacity of the adversely interested party to testify on the first trial, he waived his objection to the former testimony of the party in any subsequent proceeding.[34] Waiver is the obvious basis of this holding. The administrator was a party in both trials and his initial waiver of objection to the witness's incompetency under the dead man statute carried over to the second trial. In a similar case[35] the plaintiff testified fully in his own behalf at the first trial. After a verdict for the plaintiff the defendant secured a new trial but died before it took place. Under the dead man statute the plaintiff was considered personally incompetent to testify in the new trial, but it was held error to exclude his former testimony as well. Here the incompetency was imposed by the intervening death of a party. There was no waiver of the incompetency of the witness by the administrator and although the witness was not permitted to testify, his former testimony was admissible, apparently because the witness was considered unavailable. The result appears illogical; the witness was incompetent but his testimony was not. There was no violation, however, of the dead man statute at the time the testimony was taken and the technicality of the former testimony rule permitted the court to avoid the effect of the statute in the later trial. The cases are so rare in which former testimony is used to subvert the policy of a dead man statute that they should be distinguished on that ground and not used as sources to formulate the common law of objections to former testimony.

Other cases which appear to support the proposition that objections to former testimony are waived if not taken at the first trial can be limited in that the objections waived were to form alone; specifically that the answer in the former testimony was not responsive to the question,[36] or that the objections were made to leading questions in the transcript of the former testimony.[37] In these instances the questions could have been reframed, or the answers recast, if the objections had been made in the first proceeding.

The distinction between objections going only to the form of the former testimony as opposed to those going to its substantive competency has been suggested as a basis for rationalizing all the divergent cases and for furnishing a general rule on objections to former testimony.[38] This distinction has some merit. It suffers primarily from an absence of sub-

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34. *In re* Harris' Estate, 154 Ohio St. 367, 95 N.E.2d 769 (1950).
35. Habig v. Bastion, 117 Fla. 864, 158 So. 508 (1934).
36. Sherman Gas & Elec. Co. v. Belden, 103 Tex. 59, 123 S.W. 119 (1909).
37. People v. Britt, 62 Cal. App. 674, 217 P. 767 (1923).
38. Annot., 159 A.L.R. 119, at 120 (1945); 8 Minn. L. Rev. 629.

stantiating cases decided on waiver of objections to form only from those jurisdictions which have permitted objections to the substantive competency of the former testimony. Furthermore, in the cases cited for the proposition that objection to competency is not waived, there is also much dicta paralleling the English rule that there is no waiver of any objections to former testimony.[39] It is still questionable how these jurisdictions would treat objections to form only. And, finally, although text writers have stated that new objections going to materiality, relevancy, and competency may be made against former testimony,[40] the cases support the proposition only insofar as the competency of the former witness may be challenged.

THE STANDARD FAMILY COURT ACT APPRAISED

For the last few years literature has abounded with articles discussing and proposing solutions to one of our country's gravest problems—how to curtail the breakdown of homes through divorce and the lowering of moral standards as manifested by increased crime and delinquency. A family court has received the largest countenance of the numerous proposals and is operative in parts of a few states.[1] The National Probation and Parole Association Journal for April, 1959 presents a Standard Family Court Act[2] for consideration by the states. The function of this paper is to evaluate this proposal in light of the many social and legal implications which it seeks to resolve and which it creates.

Perhaps a brief digression laying the proper concept of the family court will be helpful to those unfamiliar with this topic. A family court is "a court with jurisdiction plus facilities to handle all manner of justiciable family problems."[3] The jurisdiction of a family court in-

39. Meekins v. Norfolk & S. Ry., 136 N.C. 1, 48 S.E. 501 (1904); Petrie v. Columbia & G. Ry., 29 S.C. 303, 7 S.E. 515 (1888); Garrett v. Weinberg, 54 S.C. 127, 31 S.E. 341, *reargument denied,* 34 S.E. 70 (1898). These three cases state the English general rule, but in all three only competency of the witness was in issue. In Calley v. Boston & M. Ry., 93 N.H. 359, 42 A.2d 329 (1945) the pertinent dictum is that former testimony is open to all objections as though it were the witness's deposition.

40. McCormick, Evidence 497 (1954); Annot., 159 A.L.R. 119 at 120 (1945).

1. See Chute, *Divorce and the Family Court,* 18 Law and Contemporary Problems 49 (1953), for a brief history.

2. The act was prepared by the Committee on the Standard Family Court Act of the National Probation and Parole Association in cooperation with the National Council of Juvenile Court Judges and the U. S. Children's Bureau. An appendix following this note contains the text of the act.

3. Alexander, *What is a Family Court, Anyway?,* 26 Conn. B.J. 243, 245 (1952).