

THE MISSOURI LAW RELATIVE TO THE USE OF TESTIMONY GIVEN AT A FORMER TRIAL

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There are four ways in which testimony given at a former trial may figure in a pending trial: first, in impeachment; second, as an admission; third, as the testimony of a non-available witness offered under an exception to the hearsay rule; and fourth, in refreshing recollection.¹

I. IMPEACHMENT

This phase of the subject does not call for extended treatment. It is mentioned primarily for the sake of completeness. The fact that the prior contradictory statement of the witness was made in a judicial proceeding renders it neither more nor less admissible for impeachment purposes. The necessity for and method of laying a foundation during the cross-examination are not affected. No question of hearsay is involved. The method of proving the former testimony does not differ from the method of proof where it is admissible for any other purpose.²

¹ The use by a witness of prior testimony for purposes of refreshing recollection will be dealt with in a later article.

² This last generalization is probably subject to one exception, *viz.*, that R. S. Mo. 1919, sec. 5401, which permits the use of a bill of exceptions to prove prior testimony, does not in terms apply where the testimony is for the purpose of impeachment. No cases have been found dealing with the question. The following cases approve the use of prior testimony for impeachment purposes: *Hays v. Waller* (1830), 2 Mo. 222; *Garret v. State* (1839), 6 Mo. 1, prior statement before committing magistrate; *State v. Phillips and Ross* (1857), 24 Mo. 475, prior statement contained in deposition before magistrate and coroner; *State v. Cooper* (1884), 83 Mo. 698; *State v. Matthews* (1885), 88 Mo. 121, prior testimony before grand jury; *Taussig v. Shields* (1887), 26 Mo. A. 318, "It is utterly immaterial on what previous occasion, whether on oath or not"; *State v. Parker* (1888), 96 Mo. 382, 9 S. W. 728; *Kreibohm v. Yancey* (1899), 154 Mo. 67, 55 S. W. 260; *State v. Gatlin* (1902), 170 Mo. 354, 70 S. W. 885, former testimony before coroner; *State v. Ripey* (1910), 229 Mo. 657, 129 S. W. 646, testimony taken at preliminary hearing; *State v. Eastham* (1912), 240 Mo. 241, 144 S. W. 492; *Farrar v. Met. St. Ry.* (1913), 249 Mo. 210, 155 S. W. 439; *Peppers v. St. Louis-San Francisco Ry. Co.* (1927), 316 Mo. 1104, 295 S. W. 757, dealing with special procedure in examination where former testimony contained in deposition; *Shull v. Kallauner* (1927), 300 S. W. 554; *Showen v. Met. St. Ry. Co.* (1915), 191 Mo. A. 292, 177 S. W. 791; *Burgess v. Garvin & Price*

II. ADMISSIONS

The application of the law of admissions to the use against a party of statements made by him in a prior trial presents no novel problems. In *State v. Glahn*,³ wherein the defendant was tried for murder, the court presents the issue and its decision, as follows: "A witness was allowed to give evidence as to what defendant testified to on the first trial. We can see no valid objection to such evidence. Had the defendant made the statements out of court, evidence of them would be admissible. They are none the less admissible because made by defendant under oath." And in *Schlicker v. Gordon*,⁴ in which the plaintiff was interrogated with a view to bringing out the fact that he had given testimony at a former trial in conflict with his present statements, it is said: "Being a party to the record, and the party in interest, the admissions and statements of the plaintiff against his interests, and in conflict with his present claim or attitude, are admissible in evidence against him whenever and wherever made."⁵

Merc. Co. (1925), 219 Mo. A. 162, 272 S. W. 108; *State v. Hutchens* (1925), 271 S. W. 525; *Troxell v. De Shon* (1926), 279 S. W. 438, as to method of examination when former testimony contained in deposition; *Whitlow v. St. Louis-San Francisco Ry. Co.* (1926), 282 S. W. 525; *Vanausdol v. Bank of Odessa* (1928), 5 S. W. (2nd) 109; *Williamson v. Frank* (1928), 5 S. W. (2nd) 462.

³ (1888), 97 Mo. 679, 11 S. W. 266.

⁴ (1885), 19 Mo. A. 479.

⁵ See, accord, *Charleson v. Hunt* (1858), 27 Mo. 34, but compare, *Mulliken v. Greer* (1838), 5 Mo. 489; *Glenn v. Lehn* (1873), 54 Mo. 45; *Prewitt v. Martin, Adm.* (1875), 59 Mo. 325; *Pomeroy v. Benton* (1882), 77 Mo. 64, 82; *State v. Jefferson* (1882), 77 Mo. 136; *State v. Eddings* (1880), 71 Mo. 545; *State ex rel. v. Chatham Nat'l Bank* (1883), 80 Mo. 626, "A party's deposition, as a written statement of facts, is admissible, although he may be present to testify or has testified."—defendant having offered the deposition of plaintiff; *Bogie v. Nolan* (1888), 96 Mo. 85, 9 S. W. 14, overruling *Priest v. Way* (1885), 87 Mo. 16, which had held that a deposition of a party to a cause may be read in evidence against him in another cause as an admission, but not in the same cause in which it is taken; *State v. Young* (1889), 99 Mo. 666, 12 S. W. 879, a dissenting opinion contending that a foundation should be laid as in case of impeachment of ordinary witness, thereby failing to recognize the fundamental difference between admissions of a party to the action and the impeachment of a witness by proof of contradictory statements; *Branahl v. Watson*, 13 Mo. A. 596; *Wiseman v. St. L., Ark. & Tex. Ry. Co.* (1888), 30 Mo. A. 516; *Padley v. Catterlin* (1896), 64 Mo. A. 629, 640; *Cramer v. Harmon* (1907), 126 Mo. A. 54, 103 S. W.

III. ADMISSIBILITY OF PRIOR TESTIMONY OF A NON-AVAILABLE WITNESS

The basic and likewise the simplest situation in which this question arises is as follows: Action by A against B, A being a private person or the State. W testifies on behalf of A. There is an appeal and a reversal and a retrial. W, in the meantime has died. Through X, A offers W's former testimony. A number of variants of these facts which involve the same principle will appear in the discussion.

The problem here presented lies definitely in the field of hearsay, since the evidence "does not derive its value solely from the credit to be given to the witness who is before" the present tribunal.⁶ The admissibility of such evidence as an exception to the hearsay rule is everywhere conceded, subject, however, to certain limitations. If any exception to hearsay is to be justified, this one is clearly unassailable, for it dispenses with only one of the safeguards set up for the testing of the credibility of

1086; *Chalmers v. United Rys. Co. of St. Louis* (1910), 153 Mo. A. 55, 131 S. W. 903.

Dempsey v. Lawson (1898), 76 Mo. A. 522, 527, sustains the trial court in its refusal to let defendant read a copy of the stenographer's report of plaintiff's testimony at a former trial, the decision is based upon three points—(1) that plaintiff was in court, (2) that a proper foundation was not laid, and (3) that defendant was using a copy and not the original report—points 1 and 2 are wholly without merit since they apply to prior testimony of a mere witness and not to admissions of a party, and are not supported by any other Missouri authority with the exception of *Byrd v. Hartman* (1897), 70 Mo. A. 57, which is cited and relied upon. The third point is probably well taken for it does not appear that the rules relative to refreshing recollection were complied with.

In *Roberts v. Weber Motor Car Co.* (1921), 232 S. W. 224, the holding is that the testimony of the defendant as given at a former trial was properly excluded because "competent only for the purpose of impeachment" is difficult to understand. The point is not developed and the decision is not officially reported. It is not to be supported.

State v. Miller (1915), 264 Mo. 441, 175 S. W. 191, holds testimony of defendant as given at coroner's inquest admissible. The court says: "the test as to the admissibility of this character of testimony is no longer whether it was made in a judicial proceeding under oath, but, was it voluntary? If so, then it is admissible, otherwise not. This rule is clearly announced in *State v. Wisdom*, 119 Mo. l. c. 551, in which earlier cases declaratory of the same doctrine are cited and discussed."

⁶*State v. McO'Blenis* (1857), 24 Mo. 402, 414; *Leeser v. Boekhoff* (1889), 38 Mo. A. 445, 454.

the percipient witness, *viz.*, the chance to observe his demeanor. And the free use of depositions today reveals the relatively slight importance attached to this procedural element. In other words it is testimony given under oath and subject to cross-examination.

Before taking up in detail the general conditions of admissibility such as the nonavailability of the witness and the sameness of the issues and of the parties, a special objection which has been lodged against its use in criminal cases will be disposed of, *viz.*, that it violates the constitutional right of confrontation. The courts have declined to sustain this objection and have assigned two grounds. The first is that the constitution is to be construed in the light of the common law which existed at the time of its adoption. At that time hearsay evidence, such as dying declarations and testimony of the type here under consideration, was freely admitted in criminal cases. The right invoked has not been assumed to control the kind of evidence that the witness on the stand can give. This argument seems unanswerable. No one thinks of the hearsay exceptions as constituting a violation of the right of confrontation.⁷ The second ground assigned is that the defendant was confronted at the former trial by the witness whose statements are now offered. This point seems less conclusive but has been stressed in addition to the other one by a number of courts.⁸

A. Non-Availability

In most of the exceptions to the hearsay rule the percipient

⁷ *State v. McO'Blenis* (1857), 24 Mo. 402. At page 416 the court says: "It may as well be the boast of an Englishman living under the common law, as of a citizen of this state living under our constitution, that in a criminal prosecution he has a right to meet the witnesses against him face to face; and yet it was never supposed in England, at any time, that this privilege was violated by the admission of a dying declaration, or of the deposition of a deceased witness, under proper circumstances; nor, indeed, by the reception of any other hearsay evidence established and recognized by law as an exception to the general rule." There is a vigorous dissenting opinion in the case by Judge Ryland. The two sides of this question are nowhere better presented. In *State v. Houser* (1858), 26 Mo. 431, the question was reexamined and the *McO'Blenis* case approved. However for a more modern decision see *State v. Heffernan* (1909), 24 S. D. 1, 123 N. W. 87.

⁸ *U. S. v. Macomb* (1851), 5 McLean 286; *State v. Hefferman* (1909), 24 S. D. 1, 123 N. W. 87.

witness must be non-available, but the decisions are far from uniform in their determination of what will constitute legal non-availability. The factual test has not been the exclusive one. In Missouri it is necessary to place criminal cases, at least where the State is offering the evidence, and civil cases in separate categories.

The first criminal case to consider evidence of a witness given at a prior trial (in the particular cases at a preliminary hearing) was *State v. McO'Blenis*.⁹ In that case the witness had thereafter died. His testimony was held admissible. In *State v. Houser* a witness who had testified against the defendant before the examining magistrate could not be found. The admission of her testimony was held reversible error both on the basis of authority, English and American, and on principle. "Upon principles of public policy the admission of such depositions, testimony in the mere absence of the witness, is extremely questionable, so that both principle and precedent concur in excluding them."¹⁰ The question is examined again in *State v. Nicholas*¹¹ and the court concludes: "The question in this State was settled in the affirmative that such evidence is competent only when the witness is dead, and in the negative that the evidence is incompetent when the witness is living although beyond the jurisdiction of the State."

It will be observed that these are all cases in which the evidence was sought to be introduced by the State. *State v. Rose*,¹² however, carries the inference that if the evidence is offered by the defendant, absence from the jurisdiction may be put in the same legal category as death. This distinction is recognized as sound in *State v. Nicholas*,¹³ wherein in reference to *State v. Rose, supra*, it is said: "It will be seen, however, that the question presented in that case was where the defendant offered the evidence, and not the State, and hence the question of constitutional right did not arise."¹⁴

⁹ (1857), 24 Mo. 402.

¹⁰ *State v. Houser* (1858), 26 Mo. 431, 440. The court adds however that "If the absence of the witness was procured by the prisoner the rule would be different."

¹¹ (1910), 149 Mo. A. 121, 125-127, 130 S. W. 96.

¹² (1887), 92 Mo. 201, 206, 4 S. W. 733.

¹³ (1910), 149 Mo. A. 121, 126, 130 S. W. 96.

¹⁴ See, also, *State v. Coleman* (1906), 199 Mo. 112, 119, 97 S. W. 574, and

The rules evolved in criminal cases may then be summarized as follows:

1. If the evidence is offered by the State, it may be received, if the witness is dead. It will not be received if he is absent from the jurisdiction unless by procurement of the defendant. *A fortiori* it will not be received if he is in hiding or otherwise undiscoverable within the states, unless at the instance of the defendant. The question of insanity or other permanent disability has not been raised. The reasons assigned for restricting the rule are not subject to complete approval. Sound principle does not support the limitations. This is admitted in *State v. Houser*.¹⁵ If the person is for any reason beyond the reach of the court he might just as well be dead. The only reason in policy that can be assigned is that the state might prefer the record to the use of a witness of unlikely mien and for that reason spirit the witness away. But this is too unlikely to warrant a general rule of exclusion. One cannot avoid the feeling that the Missouri court is after all placing an arbitrary restriction because of lingering feelings that there is considerable force in the point which divided the court in the *McO'Blenis* case, that at least the spirit of the constitutional right of confrontation is being violated. This is definitely conveyed in the reference made in *State v. Nicholas*¹⁶ to *State v. Rose*.¹⁷ There is abundant authority in other states for a liberal acceptance of excuses other than death in criminal as well as in civil cases.

2. If the evidence is offered by the defendant it may be received whether the witness be dead or absent from the State, and, *a fortiori*, when he is for any other reason definitely unavailable.

In civil cases, nonavailability because of death was first offered as an excuse and accepted.¹⁸ Thereafter the rule was broadened as follows: ". . . where there is a proper showing of diligence,

State v. Riddle (1904), 179 Mo. 287, 78 S. W. 606. *State v. Butler* (1913), 247 Mo. 685, 153 S. W. 1042, has put the matter fully at rest by reversing the trial court for excluding evidence offered by defendant, it appearing that the witness was out of the state.

¹⁵ (1858), 26 Mo. 431, 439.

¹⁶ *Supra*, note 13.

¹⁷ *Supra*, note 12.

¹⁸ *Breeden's Adm. v. Feurt* (1879), 70 Mo. 624.

and it is impossible to have the living witness, and without any fault, his deposition has not been taken, the rule as to admitting the testimony of a witness given at a former trial applies. We do not think it is to be confined exclusively to the case of the death of the witness. Where he might have been had, however, or his testimony should, with proper diligence, have been taken by deposition, the other side may well object to the replacing testimony in the ordinary form by the record of statements of the witness at a former trial."¹⁹ And two years later the St. Louis Court of Appeals said: "Where a witness is beyond the jurisdiction, and after every effort has been exhausted, it is found impossible to take his deposition, it is within the sound discretion of the trial judge to admit testimony as to his evidence at a future trial of the same case."²⁰

Breadth of doctrine was again set up in *Scoville v. The Hannibal & St. Joseph R. R. Co.*²¹ as follows: "It is laid down by Mr. Greenleaf, that, on the trial of the same cause of action between the same parties, the testimony of a witness given on a former trial may be received, if the witness is dead, or out of the jurisdiction of the court, or cannot be found after diligent search, or is insane, or sick and unable to testify, or has been summoned, but appears to have been kept away by the adverse party."²²

This marks the development under the common law. The only limitation to be noted is that set up in the two appellate court cases, *viz.*, that absence from the jurisdiction must be supplemented by proof of inability to secure the witness' disposition. This qualification of the rule of absence has little, if anything, to justify it, since the prior testimony and a deposition are essentially on a par. The gain in any event by securing a deposition hardly justifies the multiplication of the administrative machinery involved. Moreover the limitation does not obtain under the statutory procedure set up in 1899 to which attention is not directed.

Today, two statutes control most of the situations which arise.

¹⁹ *Franklin v. Gumersell* (1881), 11 Mo. A. 306, 314.

²⁰ *Augusta Wine Co. v. Weippert* (1883), 14 Mo. A. 483.

²¹ (1887), 94 Mo. 84, 86, 6 S. W. 654, loss of speech through stroke of paralysis.

²² See, also, *Showen, Adm. v. Met. St. Ry. Co.* (1912), 164 Mo. A. 41, 51, 148 S. W. 135.

The first provides that it is proper to read evidence as preserved in a bill of exceptions "in the same manner and with like effect as if such testimony had been preserved in a deposition in said cause."²³ The second provides that a deposition may be read under the following conditions:²⁴ "First, if the witness resides or is gone out of the state; second, if he be dead; third, if by reason of age, sickness or bodily infirmity he be unable to or cannot safely attend court; fourth, if he reside in a county other than that in which the trial is held, or if he be gone to a greater distance than forty miles from the place of trial without the consent, connivance or collusion of the party requiring his testimony; fifth, if he be a judge of a court of record, a practicing attorney or physician, and engaged in the discharge of his official or professional duty at the time of the trial."

The cases reveal no problems of serious import arising under the various subdivisions of this section of the statute. A few points, however, have been made a matter of decision. The first provision is not to be qualified by requiring proof of diligence to secure the return of a witness who is out of the state.²⁵ Where it is sought to introduce the former testimony on the ground that the witness resides in another county, no presumption of such residence will be indulged based upon the fact that the former trial was held in such other county, but proof thereof must be presented.²⁶

One question suggests itself which the statute and the cases do not answer. Suppose the testimony given at the former trial is not preserved in a bill of exceptions and the witness is a physician, let us say, engaged in his professional duty. The point of difficulty obviously is that on one hand the case does not fall specifically within the statute because the statute refers only to proof by means of the bill of exceptions, and that, on the other hand, the common law, which would have no difficulty in allowing a different method of proof, has not determined whether such

²³ R. S. Mo. 1899, sec. 3149, now R. S. Mo. 1919, sec. 5401.

²⁴ R. S. Mo. 1899, sec. 2904, now R. S. Mo. 1919, sec. 5467.

²⁵ *Ratliff Bros. v. Quincy, Omaha & K. C. R. R. Co.* (1908), 131 Mo. A. 118, 110 S. W. 606; *Fowler v. Cavitt* (1927), 294 S. W. 731. See, also, *Bender v. Bender* (1917), 193 S. W. 294; *Scott v. Am. Ins. Co.* (1920), 222 S. W. 1047.

²⁶ *O'Brien v. St. Louis Transit Co.* (1908), 212 Mo. 59, 110 S. W. 705, 15 Ann. Cas. 86.

a witness should be considered nonavailable. A decision in favor of admissibility in such cases can be reached therefore only by expanding the common law definition of non-availability to include the categories enumerated in the statute. In reaching such a result there is nothing of course to prevent the court from considering the statutory provision as determining the scope of wise policy. The prior testimony is the same no matter whether proved by a bill of exceptions or by any other acceptable means, and it is the practical non-availability of the witness, within the limits of sound policy, that constitutes the necessity for resorting to it.

B. Sameness of Issues

The courts agree that testimony given at the former trial is not admissible unless the issues are essentially the same. Perhaps it would be more accurate to say, unless the issue or issues as to which the testimony in question is offered entered in substantially the same way in the two proceedings. The following test is given in *Jaccard v. Anderson*:²⁷ "The principle upon which the distinction turns is the right of cross-examination, and where the issues are so nearly the same that it is apparent that there was an opportunity to cross-examine the witness as to the same matter in both cases, the issues will be considered as sufficiently identical."

A more recent case accepts this test, but seems open to serious question in its application thereof. In *Haglage v. Monark Gasoline & Oil Co.*²⁸ the action was by the husband for loss of services due to personal injuries to his wife. She had previously sued defendant in her own right for her injuries. Plaintiff offered a deposition taken in the action by his wife against defendant. The trial court admitted the deposition. The decision was reversed by the appellate court on the ground that the issues were not the same.²⁹ The result was reached by the following chain of reasoning:

"The issues to be determined in the case brought by respondent's wife against appellant were whether or not she

²⁷ (1865), 37 Mo. 91.

²⁸ (App., 1927), 298 S. W. 117.

²⁹ Reference is also made to the fact that the parties were not the same but this point is not stressed.

had been injured as a result of defendant's negligence and the character, extent and result of such injuries. The issues to be determined in the case at bar are: (1) The same issues as were involved in the wife's case; (2) loss to respondent of services of his wife resulting from said injuries; (3) the amount expended by respondent in an attempt to cure his wife of said injury; (4) the injury to respondent's automobile. It is true that the issues involved in the wife's case are also involved in appellant's case. It is also true that the deposition here in question bore upon an issue involved in both cases, to-wit, the cause of the collision and plaintiff's injury, but there are other issues involved in appellant's suit, and we can readily see that, if the deposition taken in the wife's case may be used in appellant's case, appellant was deprived of the right to cross-examine the witness as to his knowledge, if any, relative to the damage to respondent's car, the amount paid out by respondent in an attempt to cure his wife of the injuries she received, her condition since said injury, her ability to perform her household duties or any other fact he might know relevant to such issues."

This reasoning will not hold. There was no lack of opportunity to cross-examine the witness as to the issues which were the same in both cases and it was only upon these issues that the deposition bore. In stressing the making it the basis of the decision that the defendant lacked opportunity to cross-examine as to the new and entirely distinct issues which were added in the second case, the court missed the whole point of the test laid down in *Jaccard v. Anderson*,³⁰ and ignored the rationalization underlying exceptions to the hearsay rule. Subjecting the witness to cross-examination on the issue to which his examination in chief is directed tests the worth of the evidence which he has assumed to give and it is the worth of that evidence that is in question, not the further uses to which such witness might be put in the case. It is an exception to the hearsay rule that we are dealing with. The witness is not available. His statement made upon another occasion is offered in his stead. The whole course of the development of the hearsay rule favors its acceptance if made under circumstances which reasonably guarantee its trustworthiness and assure us that it will shed a reasonably true light on the phase of the pending case to which it relates.

³⁰ *Supra*, note 27.

In all other exceptions to the hearsay rule the party against whom it is offered is without any opportunity to cross-examine the declarant even on the matter covered directly by his statement.

C. Identity of Parties

The usual statement is that evidence given at the prior trial is not admissible in the later trial unless the parties in the two actions are identical or in privity.³¹ The fundamental purpose of this requirement is essentially the same as that which underlies the rule as to identity of issues, *viz.*, that the testimony shall have passed the scrutiny of one who had "the same interest and motive in his cross-examination" that the present opponent would have. It is this factor that establishes its present worth. Too often this purpose or objective has been overlooked by the courts. The well-known English case of *Morgan v. Nicholl*³² is in point. A previous action had been brought by the plaintiff's son against the defendant's father, to recover certain premises, it being supposed at the time that the plaintiff was dead. In the former proceeding a witness had testified on behalf of the claimant, but had since died. The admissibility of this testimony on behalf of the plaintiff in the principal case was denied. The reasoning was as follows: ". . . evidence cannot be admissible against one party and not against the other; and it is clear that, if this evidence had been tendered by the defendant, the plaintiff would have said that he was not present at the former trial, and did not claim under the former plaintiff." This line of reasoning is utterly unsound, and has twice been repudiated in Missouri.³³ If the issue of fact to which the evidence is addressed is the same in both cases and the party

³¹ *Leslie v. Rich Hill Coal Mining Co.* (1892), 110 Mo. 31, 19 S. W. 308. First action by A against B, second action by A against B and C; *Heyworth v. Miller Grain & Elevator Co.* (1903), 174 Mo. 171, 73 S. W. 498; *Central Bank of K. C. v. Thayer* (1904), 184 Mo. 61, 99, 82 S. W. 142; *Queatham v. Modern Woodmen of America* (1910), 148 Mo. A. 33, 127 S. W. 651.

³² L. R. 2 Com. Pl. 117, (1866).

³³ *Harrell v. Quincy, O. & K. C. R. R. Co.* (1916), 186 S. W. 677 (not officially reported); *Lampe v. St. Louis Brewing Ass'n* (1920), 204 Mo. A. 373, 380, 221 S. W. 447. In the latter case the effort to find privity seems gratuitous. See to same effect *Minea v. St. Louis Cooperage Co.* (1913), 179 Mo. A. 705, 162 S. W. 741.

against whom the evidence is offered is the same, or is in privity with the party against whom it was offered in the previous case, the full purpose of the rule is served. All argument as to reciprocity is beside the point.³⁴ A further complaint against *Morgan v. Nicholl* seems permissible. Is the assumption well founded that evidence given by a deceased witness for the former defendant would have been inadmissible if it had been offered by the latter defendant? It is true that privity on the plaintiff's side in the technical sense is lacking. But if substance rather than form were to prevail, it would not seem unreasonable to infer that the evidence would have been subjected to quite as careful scrutiny as if actual privity of estate had existed.

Another Missouri case calls for critical discussion. In *State v. Eastham*³⁵ the defendant was being tried for the murder of one Stacey. Prior to this trial defendant's brother had been tried and acquitted of the same charge. Defendant offered to prove the testimony of W, since deceased, given at the previous trial. On the objection of the State the evidence was excluded. In a decision of affirmance the Supreme Court said: "It is a well-known fact that a great many witnesses in criminal cases shade or color their evidence in proportion to the degree of their sympathy for or hatred of the person on trial. For this reason alone, the testimony given by the deceased witness in the trial of George Eastham was properly excluded at the trial of defendant. It is only when a witness has testified in a former trial of the same criminal case that evidence of such witness, if dead, becomes admissible."

It will be noted that there is complete identity on the plaintiff's side of the two cases and it is against the plaintiff that the evidence is offered. So far as the mere question of identity of parties is concerned therefore the reason for exclusion fails by authority of *Harrell v. R. R.*³⁶ and *Lampe v. St. Louis Brewing Ass'n.*³⁷ Lack of identity of issues, which would have offered a much stronger ground on which to rest the decision, is not mentioned. However it is doubtful if that ground would suffice.

³⁴ 3 Wigmore, EVIDENCE (2d Ed.), sec. 1388; *Ray v. Henderson* (1914), 44 Ok. 174, 144 P. 175, (note thereon in 28 HARV. L. REV. 429).

³⁵ (1912), 240 Mo. 241, 144 S. W. 492.

³⁶ *Supra*, note 33.

³⁷ *Ibid.*

There was much overlapping of the issues. One might say that there was substantial identity, due to the fact that the prosecutions both grew out of a general encounter between the deceased on one side and the present defendant, the former defendant, and a third brother on the other side. The line of reasoning moreover, must utterly fail, else it will prove necessary to exclude such evidence in all cases unless there is absolute identity of parties in the two proceedings on both sides.

D. Proof of the Former Testimony

It is not necessary to prove the exact language of the witness at the former proceeding. Proof of the "substance" of the testimony will suffice.³⁸ In upholding this practice, the Supreme Court of the United States, with much point, says:

"Where a stenographer has not been employed, it can rarely happen that anyone can testify to more than the substance of what was testified by the deceased, . . . It has been well said that if a witness in such case, from mere memory, professes to be able to give the exact language, it is reason for doubting his good faith and veracity."³⁹

In *State v. Able*⁴⁰ the Missouri Court takes the wise precaution to point out the necessity for distinguishing between the "substance" and the "effect" of the former testimony. The court says:

"In applying the rule that the substance of what the deceased witness testified to, may be given in evidence, the distinction between narrating the statement made by the witness and giving the effect of his testimony should be observed. This distinction may be illustrated thus: If a witness state that A, as a witness on a former trial, proved the execution of a written instrument by B, that would be giving the effect of his testimony, which is nothing else than the result or conclusion. But if the witness states that A testified that he had often seen B write, that he was acquainted with his hand writing, and that the name subscribed to the instrument of writing exhibited was B's signature, that

³⁸ *State v. Able* (1877), 65 Mo. 357, 367; *State v. Hammond* (1882), 77 Mo. 157; *Davis v. Kline* (1888), 96 Mo. 401, 9 S. W. 724; *State v. Barnes* (1918), 274 Mo. 625, 631, 204 S. W. 267.

³⁹ *Ruch v. Rock Island* (1878), 97 U. S. 693.

⁴⁰ (1877), 65 Mo. 357, 372.

would be giving the substance of A's testimony, though it might not be in the exact words."

The courts have permitted proof of the prior testimony by a variety of methods. It may be proved (1) by any person who heard it and who can swear to it from memory;⁴¹ (2) by notes taken by anyone who will swear to their accuracy—this includes, of course, the record of the official court reporter identified and verified in court by himself;⁴² or (3) by the bill of exceptions.

The rules with reference to proof by means of the bill of exceptions fall into periods—those prior to 1891 when a statute was passed relative to the use of the bill of exceptions, and those arising under the statute.

In 1867, in *Morris v. Hammerle*⁴³ the plaintiff offered the testimony of a deceased witness given upon a former trial as preserved in the bill of exceptions. The evidence was excluded on the ground that a proper foundation had not been laid. The court said: "If notes of the testimony of such deceased witness are relied upon, then there must be a witness competent to testify and able to swear to their accuracy."⁴⁴

The method of introducing former testimony by means of a bill of exceptions was simplified by statute in 1891. The statute provides: "Whenever any competent evidence shall have been preserved in any bill of exceptions in a cause, the same may be thereafter used in the same manner and with like effect as if such testimony had been preserved in a deposition in said

⁴¹ *Breeden's Adm. v. Feurt* (1879), 70 Mo. 624; *Davis v. Kline* (1888), 96 Mo. 401, 407, 9 S. W. 724 (dictum).

⁴² *Sevier v. Allen* (1899), 80 Mo. A. 187; *Miller v. Geeser* (1915), 193 Mo. A. 1, 22, 180 S. W. 3; *Vessels v. Kansas City Light & Power Co.* (1920), 219 S. W. 80; *State v. Barnes* (1918), 274 Mo. 625, 204 S. W. 267; *Welp v. Bogy* (1925), 218 Mo. A. 414, 277 S. W. 600.

⁴³ (1867), 40 Mo. 489.

⁴⁴ In *State v. Able* (1877), 65 Mo. 357, the accuracy of the bill of exceptions was established by the testimony of one of defendant's counsel, who testified that he kept minutes of the testimony on the former trial and prepared the bill of exceptions from the notes kept by himself and by one of his associates, and that when the bill of exceptions was being settled interlineations were made both on behalf of plaintiff and defendant, and that the bill was agreed upon by counsel for plaintiff and defendant in the presence of the judge. The judge who presided and signed the bill of exceptions also testified that it was correct and the bill was held admissible. See, also, *Davis v. Kline* (1888), 96 Mo. 401, 9 S. W. 724.

cause. . . ."⁴⁵ The procedural simplification introduced by the statute arises from the fact that the official certification provides sufficient authentication and proof of correctness of the prior testimony.

However, by linking the record of testimony preserved in the bill of exceptions to a deposition an incidental problem of some difficulty is presented. The difficulty has its inception in the case of *Samuel v. Withers*⁴⁶ in which it was held that where a deposition, taken in another suit, is to be used "notice of its intended use should be given, or it should be filed anew in the suit, so that the party against whom it was intended to be read may have knowledge thereof." The question next arose in *Cabanne v. Walker*⁴⁷ where the court in reversing the trial court which had excluded a deposition taken at a prior trial said:

"It is obvious that the rule requiring depositions taken in another cause to be filed before they are read, is not an inflexible one, and may be dispensed with when the ends of justice require it. When the evidence can be met and would operate as a surprise on the opposite party, it would not be proper to depart from the rule but on terms which would effect justice between the parties, . . ."

Thus the court recedes from its unequivocal requirement of filing of notice as set out in *Samuel v. Withers*.⁴⁸ *Parsons v. Parsons*⁴⁹ reverts to the language of *Samuel v. Withers*, citing the latter case but adding, "see, however, *Cabanne v. Walker*." In *Adams v. Raigner*⁵⁰ the court reaches its decision by the following route:

"It is true that in *Samuel v. Withers*, 16 Mo. 532, it was said that the deposition should be filed in the case where it was proposed to use it, or notice should be given of its in-

⁴⁵ Mo. Laws 1891, p. 138. The same provision will be found in R. S. Mo. 1919, sec. 5401. See *Bruce Lumber Co. v. Hoos* (1896), 67 Mo. A. 264; *Remick, Adm. v. Am. Ins. Co.* (1917), 195 S. W. 1049. It is important to observe that the statute is not assuming to provide an exclusive method of proving former testimony. *Welp v. Bogy* (1925), 218 Mo. A. 414, 277 S. W. 600.

⁴⁶ (1852), 16 Mo. 532, 541.

⁴⁷ (1860), 31 Mo. 274.

⁴⁸ *Supra*, note 46.

⁴⁹ (1870), 45 Mo. 265.

⁵⁰ (1879), 69 Mo. 363.

tended use, but in *Cabanne v. Walker*, 31 Mo. 285, this rule was not considered indispensable, and was thought to be merely intended to guard against surprise. That there was no surprise in the present case is obvious. . . . The case of *Parsons v. Parsons*, 45 Mo. 265, seems to be conclusive on the point in this case . . ."

More recently the question has had an inning in the Supreme Court of Missouri in the case of *Gaty v. United Railways Co.*⁶¹ in which the evidence at the prior trial was offered as preserved in a bill of exceptions under section 5401 of the Revised Statutes. In upholding the admission of the evidence the court said:

"It is further contended that Dr. Turley's testimony, as preserved, could only be read after notice of intention to use the same. It was so held in the early case of *Samuel v. Withers*, 16 Mo. 632; but in *Cabanne v. Walker*, 31 Mo. 285, the rule was held not to be indispensable, its purpose being merely to guard against surprise. Dr. Turley's deposition⁶² was taken by the defendant, his direct examination having been conducted by the same counsel who represented the defendant in the trial of the instant case. While defendant's counsel may have been disappointed at the result of the examination, it cannot be said that he was unfamiliar with the testimony, and hence there is no ground for surprise."⁶³

And thus the court still pays homage to the doctrine of *Samuel v. Withers*, in the modified form given to it by *Cabanne v. Walker*. In *Cabanne v. Walker* counsel in his brief⁶⁴ indicated that the trial court had based its exclusion of the prior deposition on the ground that it had not been filed in the pending case "according to the requirements of the thirteenth section of the seventh article of the practice act of 1849." The act provided that "If either party shall reply upon any record, deed, or other writing, he shall file with his pleading an authenticated copy of such record, and the original deed or writing if within his power."

⁶¹ (1923), 251 S. W. 61.

⁶² Another statement in the case is to the effect that Dr. Turley "had testified at a former trial of this case, and his testimony was preserved in a bill of exceptions," so the word "deposition" is used inadvisedly.

⁶³ See, also, *Harris v. Quincy, O. & K. C. Ry. Co.* (1907), 124 Mo. A. 45, 49, 101 S. W. 601.

⁶⁴ See *Cabanne v. Walker* (1860), 31 Mo. 274, 279.

This rule both in its original and in its altered form is in its origin without foundation and on evidential analogies is wholly illogical. It is doubtful if the statute of 1849 had reference to all mere documentary methods of proof, and, if applicable to the present problem, under no circumstances could it be satisfied by anything other than filing as prescribed therein. The alternative of notice, which in turn might be dispensed with, finds no support in it but is rather precluded by it. Later this statute was so altered as by its terms to apply only to cases where the action is based upon the document.⁵⁵

The rule cannot be supported by analogies. In the use of evidence given at a prior trial, as previously stated, we are dealing merely with an exception to the hearsay rule. Common law decisions have rendered it admissible, within limits. In the present connection we are dealing with a method of proof merely. It is not even an exclusive method. One is not confined to the bill of exceptions as a method of proof. One may call the reporter, for example, and prove the prior testimony through him, by his notes. No one has ever thought of requiring notice of such intention. In no other exception to the hearsay rule has there been any requirement of notice of intent to use it or of the particular method of proving it, even though it be a documentary method. Surprise may be quite as common in all these other situations as in the present set up. Nor should anything turn upon the fact that the testimony introduced in the former trial was in the form of a deposition, if that happens to be the case. After a deposition has been read into the record, it is, *per se, functus officio*. It is the record of the testimony from that point forward that counts in quite the same way that it does as to the testimony of a witness who has testified in person.

This rule as to filing and notice is an encumbering excrescence. The statute does not require it. It has no support in principle. It complicates procedure. It should be discarded at the first opportunity.

The reference in section 5401 of the Revised Statutes to a deposition has involved the court in one further difficulty. In *State v. Speyer*⁵⁶ it is said that the statute "has no application

⁵⁵ R. S. Mo. 1855, Chap. 128, sec. 60.

⁵⁶ (1907), 207 Mo. 540, 548, 106 S. W. 505.

to a defendant in any case, criminal or civil." The reasoning in support of this statement, which incidentally is dictum, is in part as follows: "The deposition of a defendant in a felony case is never taken, because the law requires his presence during the entire trial." As a method of construction this is open to serious question. Is not the real aim of the statute to make the bill of exceptions authentic evidence of testimony given at a prior trial? If this is true, it will be quite as authentic in proving what the defendant said, where that is admissible, as it will in proving what any witness said. The statute is not dealing primarily with admissibility but rather with method of proof. It has given the bill of exceptions the evidentiary force of a public record. The reference in this connection to a deposition is incidental, rather than vital.

A further collateral question of procedure in proving prior testimony arises in connection with the best evidence rule, in the handling of which, it is believed, the court has gone somewhat astray. The question was presented in a typical manner in *Turner v. Railroad*:⁵⁷ Defendant offered to prove by a witness the evidence of plaintiff on a former trial. Plaintiff's testimony had been taken by the reporter and the notes were still in existence. The court excluded the testimony on the ground that the notes were the best evidence and that the defendant had not shown diligent effort to obtain them. In affirming the trial court, the appellate court cited with approval an earlier appellate court decision⁵⁸ and reasoned as follows:

"It requires no argument to support the view, that the statements of a witness taken down in writing at the time by a skilful official under oath are more reliable for accuracy than the recollection of a witness and especially so after a long lapse of time. It is true, as contended by defendant, that the notes of an official stenographer are not infallible, but that is no reason why they should be accepted in preference to that which in all instances is much more fallible."

The reasoning is in itself plausible and not without force but it is based upon a misconception of the best-evidence rule. That rule provides only that a writing is the best evidence of what it

⁵⁷ (1909), 138 Mo. A. 143, 120 S. W. 128.

⁵⁸ *Estes v. Mo. Pac. Ry. Co.* (1905), 111 Mo. A. 1, 85 S. W. 909.

contains. It is better evidence in the same chain, not better evidence generally, that makes certain evidence secondary. There is no general rule or principle of evidence that requires one to resort to the best evidence in his power in preference to evidence that may be relatively weaker or less satisfactory. In such cases the law has gone no further than to say that if one uses poorer evidence when better evidence is available he may be subject to the imputation that the facts as revealed by the better evidence would not be so favorable to him or might even be against him. Suppose one wishes to prove what A said on a certain occasion. X and Y were present on the occasion. X made a memorandum then and there as to what A said. Y did not. The best evidence rule has no application to Y's testimony. His testimony is not secondary but direct as to what A said. Indeed the rule would not require X to use or introduce his memorandum, if he could recall without it what A said. Only in case of past recollection recorded would the best evidence rule come into operation. This illustration does not differ, of course, from the set up where the point in issue is the proof of what a witness testified to at a former trial.⁵⁹

⁵⁹ Some support for the Missouri doctrine is to be found in Jones, EVIDENCE (3d ed.), sec. 335, where in discussing proof of a dying declaration the writer declares the following rule: "When the declarations are reduced to writing and signed by the declarant, it is generally held that the writing is the best evidence and must be produced." The cases cited, however, contain support only in dicta, and *People v. Vernon* (1868), 35 Cal. 49 is squarely *contra*. Moreover the cases cited by Jones make it clear that the best evidence rule has no application unless the written memorandum of the dying declaration was signed by the declarant. See *Dunn v. People* (1898), 172 Ill. 582. Even with this limitation we take issue with the soundness of the rule.