

The Admissibility of Former Testimony in Civil and Criminal Trials

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The Admissibility of Former Testimony in Civil and Criminal Trials

By Act 87 of 1956¹ the Louisiana legislature instructed the Louisiana Law Institute to prepare a projet for a Code of Evidence for both criminal and civil cases. The purpose of this Comment is to discuss what disposition should be made in the new code with regard to the admissibility of former testimony. Broadly speaking, former testimony is testimony from a former trial or proceeding sought to be admitted in a subsequent trial or proceeding to show the truth of the matters asserted therein. Although there is a difference of opinion as to whether former testimony is an exception to the hearsay rule, the Uniform Rules of Evidence treat it as an exception and this is the prevailing view.² Whether former testimony does or does not constitute an exception depends in large measure upon the definition of hearsay, for under either approach former testimony is admissible in evidence, assuming the presence of certain requirements hereafter discussed.

This Comment will not deal with the problem of former testimony which may be admissible under another exception to the hearsay rule,³ or which may be used for some non-hearsay purpose.⁴ Although the use of depositions, both those taken for admission in the instant case and those taken at a preliminary trial, present many problems similar to those connected with former testimony, a discussion thereof is beyond the scope of this Comment. In determining what Louisiana should do with regard to former testimony in the proposed Code of Evidence, it will be helpful to discuss the present Louisiana law and to compare it with that of other states and the proposed Uniform Rules.⁵

1. "Section 2. The Louisiana State Law Institute is instructed to prepare a comprehensive projet for a Louisiana Code of Evidence, covering the rules of evidence for both criminal and civil cases."

2. UNIFORM RULES OF EVIDENCE 63 defines hearsay as "evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated."

3. For example, former testimony given by the defendant in a criminal trial may be considered an admission and be admissible under that exception to the hearsay rule.

4. If the purpose was merely to show what was said in the former testimony for the purpose of proving perjury, it would be admissible for a non-hearsay purpose.

5. The Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association was the result of a request by the American Law Institute to review and revise the Model Code of Evidence drafted by the Law Institute. It was later decided

Louisiana and the Common Law

Prior to the adoption of the Code of Criminal Procedure in 1928, it appears that in general Louisiana followed the common law rules of evidence in both civil and criminal cases.⁶ With the adoption of the Code of Criminal Procedure there was a codification and to some extent a modification of the rules of evidence applicable in criminal cases. The extent of the application of this code in civil cases is a matter of some doubt.⁷ Although the Code of Criminal Procedure provides that hearsay evidence is inadmissible, "except as otherwise provided in this code,"⁸ no provision is made with respect to the admissibility of former testimony. Although it can be argued that this omission excludes former testimony in criminal cases, this contention has never been considered in the opinions and decisions of the appellate courts. In

that the project should go ahead as an independent undertaking, using the Model Code as the basis for the preparation of the Uniform Rules. It was felt by the Commissioners that the Model Code in its departures from tradition and generally prevailing common law and statutory rules of evidence was too far reaching and drastic for present day acceptance and should be modified to present an acceptable and uniform set of rules. It should be noted that no special effort has been made to relate the rules of admissibility to all possible limitations arising out of constitutional requirements of due process, personal security, and the like.

Rule 511 of the American Law Institute Model Code of Evidence provides: "Evidence of a hearsay statement which consists of testimony given by the declarant as a witness in an action is admissible for any purpose for which the testimony was admissible in the action in which the testimony was given, unless the judge finds that the declarant is available as a witness and in his discretion rejects the evidence." Under this rule identity of issues and identity of parties are eliminated because the testimony is admissible for any purpose for which it was admissible in the prior action. Where the witness is available the judge may or may not reject the evidence. The discretion of the judge and the relevancy of the testimony seem to be the only safeguards to prevent any testimony taken under oath from being used.

6. See Comment, 14 LOUISIANA LAW REVIEW 568 (1954), wherein it is stated that from the delivery of Louisiana to the United States in 1803, until 1805, the complete body of Spanish law of evidence was theoretically in force. In 1805 the crimes act and the code act came into effect and in 1808 the Civil Code was adopted. These acts and the code contained certain rules of evidence, some of which were based on the common law, but there were still no express provisions for such matters as the exclusion of hearsay, cross-examination, and the various privileges. In 1811, the court was considering common law evidence authorities in a civil case without any discussion as to the appropriateness of the common law in this field. In 1819 in *Planters Bank v. George*, 6 Mart.(O.S.) 670 (La. 1819), the Louisiana Supreme Court held that the Spanish law had been repealed by common consent and that the common law rules of evidence should be followed in civil cases. Livingston's proposed Code of Evidence, in 1833, was based on the common law rules of evidence, although he did not state that these rules were then in use in Louisiana nor did he disagree with the *Planters Bank* case. The courts continued to apply common law evidence rules until the adoption of the Code of Criminal Procedure in 1928. Since common law rules of evidence are in general the same for civil and criminal actions, and our Supreme Court so held, it seems certain, then, that prior to 1928, Louisiana civil and criminal evidence rules were generally the same.

7. See Comment, 14 LOUISIANA LAW REVIEW 568, 582 (1954).

8. LA. R.S. 15:434 (1950).

view of the acceptance of this exception in other jurisdictions, plus the recognition by Louisiana courts of many more exceptions than those in the code, it seems doubtful that the court would consider this position tenable. It appears that in both criminal and civil cases the courts of Louisiana are in general looking to the common law with regard to the admissibility of former testimony, notwithstanding the adoption of the Code of Criminal Procedure.

In dealing with former testimony there is always the problem of proof of this testimony. Generally a copy of the stenographic report of the entire testimony from a former trial, certified by the stenographer as being a true and correct transcript of his notes, is competent evidence.⁹ The notes are inadmissible if the stenographer is unable to testify that the notes are substantially correct.¹⁰ However, stenographic notes, whether official or private, are neither exclusive nor preferred evidence of the former testimony.¹¹ A judge, juror, witness, stenographer, attorney, or any first hand observer who heard the former testimony may testify to its substance from his unaided memory. The witness need not give the exact words, but must be able to testify to the substance of the testimony.¹² If needed, this observer may also use the judge's notes, counsel's notes, or stenographer's notes to refresh his present memory.¹³

Elements for Admissibility

Availability. Before former testimony may be introduced the witness must be proven to be unavailable for production in person at the subsequent trial.¹⁴ A re-examination of the witnesses

9. See *State v. Bolden*, 109 La. 484, 33 So. 571 (1903); *State v. Banks*, 106 La. 480, 31 So. 53 (1901); *Conway v. Erwin*, 1 La. Ann. 391 (1846); *Rierdon v. Thompson*, 5 La. 364 (1833).

10. See *Phares v. Barker*, 1 Ill. 271 (1871); *Baltimore v. State*, 132 Md. 113, 103 Atl. 426 (1918). See also 5 WIGMORE, EVIDENCE 671, § 1669 (3d ed. 1940); 79 A.L.R. 1408 (1932); 15 A.L.R. 541 (1921); 20 AM. JUR. 597, § 712 (1939).

11. See *Maxwell v. Wilmington City Ry.*, 40 Atl. 945 (Del. Super. 1893); *State v. Bixby*, 27 Wash.2d 144, 177 P.2d 689 (1947). See also McCORMICK, EVIDENCE 498, § 237 (1954); 5 WIGMORE, EVIDENCE 671 (3d ed. 1940); 20 AM. JUR. 596, § 710 (1939).

12. See *Ruch v. Rock Island*, 97 U.S. 693 (1878); *State v. Banks*, 111 La. 22, 35 So. 370 (1903); *Scoville v. Hannibal & St. J.R.R.*, 94 Mo. 84, 6 S.W. 654 (1830). See also McCORMICK, EVIDENCE 498, § 237 (1954); 20 AM. JUR. 596, § 710 (1939).

13. *Ruch v. Rock Island*, 97 U.S. 693 (1878); *Carpenter v. Tucker*, 98 N.C. 316, 35 S.E. 831 (1887); McCORMICK, EVIDENCE 499, § 237 (1954).

14. *State v. Scarborough*, 167 La. 484, 119 So. 523 (1928); *State v. Britton*, 131 La. 877, 60 So. 379 (1912); *State v. Wheat*, 111 La. 860, 35 So. 955 (1903); *Succession of Lampton*, 35 La. Ann. 418 (1883); *State v. Granville*, 34 La. Ann.

before the jury whenever possible is preferred. This permits the opponent to confront and cross-examine the witnesses against him. In addition the court is able to observe the demeanor of the witness. Differences in the skill of cross-examiners and the possibility of discovering new evidence also may make re-examination of the witness desirable.

Louisiana, along with the common law, has recognized the following grounds of unavailability: (1) death;¹⁵ (2) loss of memory because of failure of faculties through disease or senility;¹⁶ (3) insanity;¹⁷ (4) severe illness or great physical infirmity;¹⁸ and (5) permanent or indefinite residence outside the state.¹⁹ Two problems may arise as to the continued applicability of the fifth ground of unavailability. In criminal cases, under certain circumstances, it might be possible to force an out-of-state witness to come and testify. Revised Statutes 15:152(1)²⁰

1088 (1882); State v. McNeil, 33 La. Ann. 1332 (1881); State v. Harvey, 28 La. Ann. 105 (1876); Hunter v. Smith, 6 Mart. (N.S.) 351 (La. 1827); Williams v. Jahneke Service, 38 So.2d 400 (La. App. 1949); Citizens Bank v. Jones, 167 So. 511 (La. App. 1936). These cases uniformly hold that for evidence from a former proceeding to be admitted in a subsequent suit, the witness must be unavailable. This is also the position of the majority of other states. See, e.g., Burns v. Leath, 236 Ala. 615, 184 So. 176 (1938); Schofield v. Rideout, 233 Wis. 550, 290 N.W. 155 (1940); McCORMICK, EVIDENCE 492, § 234 (1954).

15. State v. Wheat, 111 La. 860, 35 So. 955 (1903); State v. McNeil, 33 La. Ann. 1332 (1881); McCORMICK, EVIDENCE 492 *et seq.*, § 234 (1954).

16. State v. Wheat, 111 La. 860, 35 So. 955 (1903); State v. New Orleans Waterworks Co., 107 La. 1, 31 So. 395 (1901); Citizens Bank v. Jones, 167 So. 511 (La. App. 1936); McCORMICK, EVIDENCE 492 *et seq.*, § 234 (1954).

17. State v. Scarborough, 167 La. 484, 119 So. 523 (1928); State v. Wheat, 111 La. 860, 35 So. 955 (1903); McCORMICK, EVIDENCE 492 *et seq.*, § 234 (1954).

18. State v. Wheat, 111 La. 860, 35 So. 955 (1903); McCORMICK, EVIDENCE 492 *et seq.*, § 234 (1954).

19. State v. Scarborough, 167 La. 484, 119 So. 523 (1928) (sheriff was informed that the witness had permanently departed); State v. Britton, 131 La. 877, 60 So. 379 (1912) (if the witness is found out of the state, it must be shown he is out permanently; here there was no evidence to show the out-of-state witness, whose new location was known, might not be procured); State v. Granville, 34 La. Ann. 1088 (1882) (sheriff reported the witness could not be found); State v. Harvey, 28 La. Ann. 105 (1876) (witness could not be found); McCORMICK, EVIDENCE 492 *et seq.*, § 234 (1954).

20. L.A. R.S. 15:152(1) (1950): "If a person in any state, which by its laws has made provisions for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations commenced or about to commence, in this state is a material witness in a prosecution pending in a court of record in the county (parish) in which the witness is found.

under the seal of the court stating these facts and specifying the number of days the witness shall be required. This certificate shall be presented to a judge of a court of record in the county (parish) in which the witness is found.

"If the certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, the judge may direct that the witness be forthwith brought before him. The judge being satisfied of the desirability of custody and delivery, for which determination the certificate shall be prima facie proof, may order the witness be forthwith taken into custody and delivered to an officer of this state. The

provides in effect that a material witness to a criminal trial in Louisiana, who is presently in another state, may be required to come to Louisiana and testify, if the state in which the witness is residing is one which has adopted a similar law. Upon certification of the court having jurisdiction over the criminal case, the court having jurisdiction over the witness may order his return. A Louisiana judge might in his discretion require that the application to return the witness be made prior to admission of former testimony unless the witness cannot be found in his resident state. In *Citizens Bank v. Jones*,²¹ decided subsequent to the adoption of 15:152(1), the court listed permanent residence without the state as a ground for unavailability. However, in that case the witnesses were actually present in court, and the former testimony was not admitted. In view of the statute, it seems that the only situations where absence from the state makes a witness unavailable in a criminal trial are where the witness cannot be found outside the state or where he is located in a state not requiring compulsory attendance of witnesses.

In civil cases, those states adopting the Uniform Foreign Deposition Law, including Louisiana,²² can require the nonresident witness to give a deposition. Thus it seems that under such circumstances the witness' deposition could be taken and there would be no need for the former testimony. This presupposes the witness could be found in the other state. No cases could be found which considered the problem of whether depositions should be used in preference to former testimony. However, assuming the deposition would be used whenever possible, to allow present cross-examination of the witness, the former testimony seems necessary only where the out-of-state address of the witness is unknown, or where the state in which the witness resides has no provision for taking out-of-state depositions.

Some of the common law cases recognize the following additional grounds of unavailability which have never been passed

order shall be sufficient authority for the officer to take the witness into custody and hold him unless and until he may be released on bail, recognizance, or order of the judge issuing the certificate."

21. 167 So. 511 (La. App. 1936).

22. See LA. R.S. 13:3821 (1950): "Whenever any mandate, writ or commission is issued out of any court of record in any other state or territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceedings as may be employed for the purpose of taking testimony in proceedings in this state." Today practically every state has adopted such a law.

on by the Louisiana courts: (1) exercise of a privilege or supervening disqualification²³ as the privilege of the accused in a criminal case; (2) residence within the state but beyond the jurisdiction of the particular court.²⁴ The latter seems inapplicable in Louisiana because Revised Statutes 15:152²⁵ requires compulsory attendance of witnesses at all criminal proceedings, from anywhere in the state, thus eliminating the necessity of former testimony in criminal cases where the witness is in the state. In civil cases, Revised Statutes 13:3742²⁶ provides for compulsory taking of depositions in the parish where the witness resides or such other convenient place fixed by order of the court. This means the deposition could be taken any time the witness can be found in the state and used in lieu of former testimony in civil cases. This presupposes that the deposition is taken in compliance with law for use as testimony in a trial. With these two provisions there seems to be no necessity for using former testimony of a witness who can be found anywhere in the State of Louisiana.

The Uniform Rules of Evidence would qualify the element of unavailability. Section 63(1)²⁷ provides that *hearsay* statements are admissible when the witness is present in the courtroom and can be examined. A literal reading of the section would seem to make *former testimony* admissible where the witness is present in the courtroom and can be examined. On the other hand Section 63(3)²⁸ allows former testimony only when

23. See *Woodward v. State*, 21 Ala. App. 417, 109 So. 119 (1926); *Habig v. Bastian*, 117 Fla. 864, 158 So. 508 (1935). See also 5 WIGMORE, EVIDENCE 163-65, §§ 1409-1410 (3d ed. 1940).

24. See *Toledo Traction Co. v. Cameron*, 137 Fed. 48 (Ohio Cir. 1905); *Giverson v. Mills Co.*, 187 Pa. 513, 41 Atl. 525 (1898). See also McCORMICK, EVIDENCE 492, § 234 (1954).

25. LA. R.S. 15:152 (1950): "In all prosecutions, witnesses may be compelled to attend the session of the court from any parish of the state, if the prosecuting attorney, or any citizen, or the accused, shall state on oath what it is expected to prove by said witness, and if the judge, upon examination of the case and the affidavit, shall, in his discretion, determine that the attendance of the witness is indispensable to the trial; and for that purpose the court before which the prosecution is pending may cause to be issued subpoenas and attachments to its officers, as the case may require."

26. LA. R.S. 13:3742 (1950): "A witness who is a resident of this state may be required to attend an examination to take his deposition only in the parish in which he resides or is employed or transacts his business, or at such other convenient place as may be fixed by order of court."

27. UNIFORM RULES OF EVIDENCE 63(1): "A statement previously made by a person who is present at the hearing and available for cross-examinations with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness, is available."

28. *Id.* at 63(3): "Subject to the same limitations and objections as though the declarant were testifying in person — (b) if the judge finds that the declarant

the witness is unavailable. The Uniform Rules do not specify the grounds for availability and presumably the same requirements of unavailability presently accepted in Louisiana could be used under that statute.

Type of Tribunal. In Louisiana generally, in order that former testimony may be admissible at a subsequent proceeding, it must have been introduced in the regular course of a trial or proceeding before a tribunal capable of enforcing the attendance of witnesses, administering oaths, and employing cross-examination as a part of its procedure.²⁹ It does not appear to be a prerequisite that the tribunal be a court of law. The Louisiana Supreme Court in *State Bar Assn. v. Sackett*³⁰ held that testimony before the Committee on Professional Ethics and Grievances of the Louisiana State Bar Association was admissible in a disbarment proceeding because the defendant was under oath, was represented by counsel, had the opportunity for cross-examination, and had the right to subpoena witnesses at the committee hearing. Former testimony from a coroner's inquest has been admitted in evidence at a subsequent trial³¹ when there had been an opportunity for cross-examination. The court in *State v. McNeil*³² rejected the contention espoused by the district attorney that the preliminary criminal hearing or coroner's inquest does not have the "dignity nor respect" of a trial. It is submitted that the desirability of these holdings with regard to former testimony is open to doubt. At a preliminary hearing all that is involved is the sufficiency of evidence for an indictment. Counsel at many of these hearings has not had adequate time to prepare his defense and thus the cross-examination may not have been sufficient. The Uniform Rules of Evidence contain no provisions as to the type of tribunal before which the former testi-

is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his behalf on the former occasion, or against the successor in interest of such party or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered, is admissible."

29. *Louisiana State Bar Association v. Sackett*, 234 La. 762, 101 So.2d 661 (1958).

30. 234 La. 762, 101 So.2d 661 (1958).

31. See *State v. Parker*, 181 La. 635, 160 So. 123 (1935) (the court held that where there was no opportunity for cross-examination at a coroner's inquest such testimony was inadmissible in a subsequent trial); *State v. McNeil*, 33 La. Ann. 1332 (1881).

32. 33 La. Ann. 1331, 1332 (1881).

mony must have been given to qualify for admission and presumably would neither change nor clarify the present law.

Oath. In Louisiana,³³ as well as the majority of other states,³⁴ the former testimony must have been given under the sanction of an oath or affirmation. The requirement of an oath is necessary for the assurance it gives that the unavailable witness was telling the truth at the former proceeding. It is usually a simple matter to determine whether the testimony was given under oath or legally sufficient affirmation. The Uniform Rules of Evidence would not change the law in this respect.

Cross-Examination. In Louisiana, for former testimony to be admissible, there must have been an adequate opportunity at the prior proceeding to cross-examine the witness.³⁵ Since cross-examination is generally regarded as the highest safeguard for testing the truth of a witness' testimony, it is frequently stated that for former testimony to be admissible, it is essential that there had been opportunity for cross-examination in the prior proceeding. There is a presumption that the opponent who declines to cross-examine does so due to belief that the testimony could not or need not be disputed.³⁶ Difficult problems arise as to the adequacy of the opportunity for prior cross-examination. Whether the opportunity for cross-examination was adequate is intertwined with the frequently stated elements of identity of issues and identity of parties, and will be treated under those sub-headings.

Identity of Issues. Courts frequently talk of identity of parties and issues in the same breath, and they are difficult to separate. In many Louisiana cases the courts have stated that there must be identity of issues.³⁷ However, in no case has the court refused to admit former testimony for a lack of sufficient identity in this regard nor have they given any criteria for determining the sufficiency of identity of issues. In *Williams v.*

33. *State v. Scarborough*, 167 La. 484, 119 So. 523 (1928); *Morace v. Avoyelles Wholesale Gro.*, 39 So.2d 105 (La. App. 1948).

34. *Habig v. Bastian*, 117 Fla. 864, 158 So. 508 (1935); *Monahan v. Clemons*, 212 Ky. 504, 279 S.W. 974 (1926).

35. *State v. Scarborough*, 167 La. 484, 119 So. 523 (1928); *Williams v. Jahncke Service*, 38 So.2d 400 (La. App. 1949); *Morace v. Avoyelles Wholesale Gro.*, 39 So.2d 105 (La. App. 1948).

36. 5 WIGMORE, EVIDENCE 51, § 1371 (3d ed. 1940).

37. *Williams v. Jahncke Service*, 217 La. 1078, 48 So.2d 93 (1950); *Williams v. Jahncke Service*, 38 So.2d 400 (La. App. 1949); *Morace v. Avoyelles Wholesale Gro.*, 39 So.2d 105 (La. App. 1948); *Young v. Reed*, 157 So. 809 (La. App. 1934).

*Jahncke Service*³⁸ it was contended that the former testimony should not have been admitted because there was not identity of issues. The court of appeal held that although there were different incidental issues, the only important issue, i.e., whether the deceased was intoxicated and attempted to injure or threaten the witness, was the same in both suits. The case was reversed by the Supreme Court³⁹ on other grounds which are discussed hereafter under "Identity of Parties." In other states the issue on the occasion when the former testimony was given must have been substantially the same,⁴⁰ for otherwise it cannot be supposed that the former statement was sufficiently tested by cross-examination upon the point then at issue. Without sufficient identity of issues the cross-examination might have been mainly to establish some point not at issue at the subsequent proceeding.

Identity of Parties

Reciprocity. At one time both Louisiana⁴¹ and the other states⁴² held that for former testimony to be admissible there must have been reciprocity, that is, that both the party offering the former testimony in the present suit and the party against whom the testimony is offered must have been parties in the prior proceeding or in privity with such parties. Thus the Louisiana court of appeal in *Mathes v. Gaines*⁴³ said that only testimony of a witness in a previous suit between the same parties can be used. At common law, in *United States v. Aluminum Co. of America*⁴⁴ the plaintiff in the former suit had been the Federal Trade Commission and in the second was the United States Government. The court held there was no reciprocity and thus the former testimony was inadmissible. The reason for this doctrine was that if the party against whom the testimony was offered were seeking to use the same testimony he could not do so, because the present opponent was not a party to the former suit. This rule was embedded in the adversary system and apparently

38. 38 So.2d 400 (La. App. 1949).

39. *Williams v. Jahncke Service*, 217 La. 1078, 48 So.2d 93 (1950).

40. See *Davis v. State*, 17 Ala. 357 (1851); *Woodruff v. State*, 61 Ark. 157, 325 S.W. 102 (1895); *McGivern v. Steele*, 197 Mass. 164, 83 N.E. 405 (1908); *Jonescu v. Orlich*, 220 Mich. 89, 189 N.W. 919 (1922); *Taft v. Little*, 178 N.Y. 127, 70 N.E. 211 (1904). See also 5 WIGMORE, EVIDENCE 83-85, § 1387 (3d ed. 1940).

41. *Mathes v. Gaines*, 127 So. 408 (La. App. 1930).

42. *McInturff v. Insurance Co. of North America*, 248 Ill. 92, 93 N.E. 369 (1910); *Hartis v. Charlotte Elec. Ry.*, 162 N.C. 236, 78 S.E. 164 (1913); *Concordia Fire Ins. Co. v. Wise*, 114 Okla. 254, 246 Pac. 595 (1926).

43. 127 So. 408 (La. App. 1930).

44. 1 F.R.D. 48 (S.D.N.Y. 1938).

reflected a desire for fairness to all parties involved.⁴⁵ This requirement of reciprocity has been modified in many jurisdictions so that at present it is only the party against whom the former testimony is now offered whose presence as a party in the previous suit is significant. The Louisiana Supreme Court in *Young v. Reed*⁴⁶ held that complete mutuality or identity of all parties is not necessary. It suffices if the party against whom it is offered had full power of cross-examination. Other Louisiana cases are in accord with this position.⁴⁷ Some cases in other states hold that only the party against whom the testimony is offered must be the same in both suits.⁴⁸ The Uniform Rules of Evidence would do away with the requirement of reciprocity.⁴⁹

Meaning of Identity. In interpreting what is meant by identity Louisiana courts follow the majority of other state courts. The rule in Louisiana is that testimony taken in a former proceeding cannot be admitted in evidence against a party who did not have full power to cross-examine the witness. Although the phrase "identity of parties" is used, this has been held to mean there must be privity between the present and prior parties. The courts in Louisiana, as in many other states, have attached different meanings to the term privity. In *Fuentes v. Gaines*⁵⁰ the Louisiana Supreme Court held that although the two trials were not between the same parties, yet if the second trial is between those who represent the parties to the first by privity in blood, in law, or in estate, the evidence is admissible. Other Louisiana courts have discussed privity in terms of identity of interest, saying that the test is substantial identity of parties, and that the test is met where both parties had substantially the same interest and motive in cross-examining.⁵¹ This is the position recently taken by the Missouri court in *Bartlett v. Kansas City Public Service Company*,⁵² which held that the person against

45. See *McInturff v. Insurance Co. of North America*, 248 Ill. 92, 93 N.E. 369 (1910). See also *McCORMICK, EVIDENCE* 488, § 232 (1954).

46. 157 So. 809 (La. App. 1934).

47. See *Williams v. Jahncke Service*, 217 La. 1078, 48 So.2d 93 (1950); *Morace v. Avoyelles Wholesale Gro.*, 39 So.2d 105 (La. App. 1948).

48. See *Wool Insulation Corp. v. Home Insulation*, 176 F.2d 502 (10th Cir. 1949); *School District v. Sachse*, 274 Mich. 245, 264 N.W. 396 (1936).

49. *UNIFORM RULES OF EVIDENCE* 63(3): "Testimony given as a witness in another action — is admissible where the issue is such that the adverse party on the former occasion had the right and opportunity of cross-examination."

50. 25 La. Ann. 85 (1873).

51. *Morace v. Avoyelles Wholesale Gro.*, 39 So.2d 105 (La. App. 1948); *Young v. Reed*, 157 So. 809 (La. App. 1934) (if full opportunity of cross-examination is afforded there does not have to be exact identity of parties).

52. 349 Mo. 13, 160 S.W.2d 740 (1942).

whom the evidence was offered had an opportunity to cross-examine the witness with the same interest and motive as the person against whom the former testimony is now offered. The latest case in Louisiana is that of *Williams v. Jahnecke Service Co.*⁵³ In that case the deceased was killed on the premises of his employer and his concubine brought suit as beneficiary of a life insurance policy. A witness for the insurance company testified that the deceased was intoxicated and provoked the night watchman who killed him. This testimony established that the deceased was violating the law at the time of his death, which prevented collection on the insurance policy. Subsequently the concubine filed suit under the workmen's compensation laws as tutrix of the illegitimate child of the concubine and the deceased. In the meantime the witness who had given the previous damaging testimony had died. The defendant sought to introduce the witness' former testimony. The court of appeal, using the same reasoning as the Missouri court in *Bartlett v. Kansas City Public Service Co.*⁵⁴ said, "the principle is that when the interest of the person against whom the testimony was offered was calculated to induce equally as thorough a testimony by cross-examination, then the present opponent has had adequate protection for the same end and the parties are in privity. It ought then to be sufficient to inquire whether the former testimony was given upon such an issue that the party opponent in that case had the same interest and motive in his cross-examination that the present opponent has." Thus privity was used in terms of identity of interest. However, the Louisiana Supreme Court reversed the decision,⁵⁵ and held that the former testimony was inadmissible as it was a suit between two different parties and there was no privity of interest between the minor and her mother. The reason given was that in one case the mother was trying to recover as a life insurance beneficiary, and in the other the minor was seeking compensation under the workmen's compensation laws. The minor did not have the benefit of cross-examining the witness. Therefore the Supreme Court seems to have adopted the position that privity does not include substantial interest and motive.

The Uniform Rules of Evidence provide that it will be sufficient if the issues and parties are such that the adverse party

53. 38 So.2d 400 (La. App. 1949).

54. 349 Mo. 13, 17, 180 S.W.2d 740, 745 (1942).

55. *Williams v. Jahnecke Service*, 217 La. 1078, 48 So.2d 93 (1950).

on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that of the later opponent.⁵⁶ Thus the Uniform Rules seem to follow the *Bartlett* case, extending privity to include similar interest and motive.

It is submitted that the present Louisiana position with respect to identity of parties should be retained. This position seems to better safeguard the opportunity for cross-examination.

Confrontation. The Sixth Amendment to the United States Constitution⁵⁷ requires that "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." The question of the application of this provision to the states has not been finally settled by the United States Supreme Court.⁵⁸ However, the Louisiana Constitution⁵⁹ provides that "the accused in every instance shall have the right to be confronted with the witnesses against him." Nevertheless, the cases both in Louisiana and at common law allow former testimony without present confrontation. The Louisiana court in *State v. Banks*⁶⁰ announced that the right of confrontation is satisfied if the right, coupled with the opportunity of cross-examination, is extended during a preliminary hearing or former trial. The fact that at a subsequent trial the witnesses are unavailable does not render their prior testimony inadmissible.

The Uniform Rules of Evidence contain no provision on confrontation, but the comments thereto make it clear that the commissioners wish the rules to have the widest possible effect consistent with constitutional provisions.⁶¹ Of course any Louisiana statute on the admissibility of former testimony would have to recognize the constitutional requirement of confrontation. How-

56. See UNIFORM RULES OF EVIDENCE 63(3). The Uniform Rules also treat identity of parties and identity of issues as the same.

57. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial — and to be confronted with the witnesses against him."

58. See *Howard v. Kentucky*, 200 U.S. 164 (1906); *Schwab v. Berggren*, 143 U.S. 442 (1892). See also U.S. CONST. — REVISED AND ANNOTATED BY GOVERNMENT PRINTING OFFICE 1126 (1952).

59. LA. CONST. art. I, § 9: "In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him."

LA. R.S. 15:365 (1950): "The accused shall have the right to be confronted with the witnesses against him."

60. 111 La. 22, 35 So. 370 (1903).

61. ULA UNIFORM RULES OF EVIDENCE — OFFICIAL TEXT WITH COMMENTS 63 (1953).

ever, it seems that this requirement would be satisfied if the defendant actually confronted the witnesses at some former trial or preliminary hearing and had the right of cross-examination.

Conclusion

Former testimony is admissible as an exception to the hearsay rule when certain elements are present. These elements may be briefly summarized as follows: (1) unavailability of the witness; (2) a former tribunal with the power to subpoena witnesses, administer oaths, and allow cross-examination; (3) testimony under oath or a legally sufficient affirmation; (4) opportunity for cross-examination at the former proceeding; (5) identity of issues; and (6) identity of parties. Complete reciprocity of parties is not required in Louisiana and generally at common law. In a criminal case the accused must be confronted with the witnesses against him, but the courts hold that this requirement is satisfied when the accused was confronted by the witnesses at the former proceedings. The only one of the above elements which appears to present a substantial problem is identity of parties. The Louisiana Supreme Court still requires that the person against whom the testimony was offered must have been the same in both suits or there must have been privity in blood, law, or estate. Recent common law cases and the Uniform Rules of Evidence require only that the person against whom the testimony was offered in the prior proceeding have an interest and motive similar to that of the opponent in the subsequent proceeding.

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