Florida Law Review

Volume 10 | Issue 3 Article 2

September 1957

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FORMER TESTIMONY UNDER THE UNIFORM RULES OF EVIDENCE AND IN FLORIDA*

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The Model Code of Evidence, a project of the American Law Institute, was approved by that group in 1942. Although the Code was a far-reaching step in the direction of law reform, it has never been favorably accepted by the legal profession.

In an attempt to remedy the unfavorable aspects of the Model Code the Conference of Commissioners on Uniform State Laws undertook to draft a set of uniform rules that would prove more acceptable to the profession. The project resulted in the Uniform Rules of Evidence, which received the approval of the Conference on August 22, 1953. The Rules also received the approval of the American Bar Association in 1953 and the American Law Institute in 1954. Neither the Model Code nor the Uniform Rules have been enacted into law in any jurisdiction.[1] Nevertheless, they have generated a great deal of thought and discussion, and they merit the serious consideration of everyone interested in the improvement of the administration of justice.[2]

In view of the widespread interest in the proposed reforms, this article, although it deals with only a small segment of the rules of evidence, may prove helpful in illustrating the provisions of the Model Code and the Uniform Rules in the context of the generally prevailing law. The Uniform Rules are now the center of discussion, but the Model Code provisions will also be analyzed for comparison purposes and as background material.

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*Based on a paper submitted in a Seminar on Problems of Evidence given in the 1956 Summer Law Teachers Program at New York University School of Law by Professor Judson F. Falknor.

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[1]The Uniform Rules of Evidence are being considered for adoption in at least two jurisdictions. See Clark, *Foreword to Symposium on the Uniform Rules of Evidence,* 10 RUTGERS L. REV. 479 (1956).

[2]The background of the Model Code of Evidence and the Uniform Rules of Evidence is discussed in Whinery, *The Uniform Rules of Evidence and the North Dakota Law of Evidence,* 32 N. DAK. L. REV. 205 (1956). See also Chadbourn, *The "Uniform Rules" and the California Law of Evidence,* 2 U.C.L.A.L. REV. 1 (1954).

COMPARISON OF THE MODEL CODE OF EVIDENCE WITH THE UNIFORM RULES OF EVIDENCE

The usual method of presenting verbal evidence during a trial is to question the witness in open court. Sometimes, however, the desired testimony has already been elicited from the witness on a previous occasion, either by way of deposition or in the form of testimony at an earlier trial. This article discusses the use of prior testimony to prove the truth of the matters therein asserted. In so far as depositions taken for use in the trial of an action are treated by the applicable provisions of the Model Code and the Uniform Rules, they also will be discussed.

Testimony taken on a previous occasion may be used at a later trial for several purposes. If used to refresh the memory of a witness or for impeachment, for example, the hearsay rule has no application. When former testimony or depositions taken for use at a prior trial are offered in evidence to prove the truth of the matters stated, however, the general view is that such evidence is hearsay. For this evidence to be admissible the orthodox American rule basically requires that three conditions be met. These conditions relate to identity of parties at both trials, identity of issues, and a sufficient showing that the witness is unavailable at the later trial.

Model Code of Evidence

Under Rule 511, former testimony is admissible for any purpose for which it was admissible in the prior action, thus eliminating any requirement of identity of issues or parties. Rules 9 (f) and 10 of the Model Code, however, make it clear that the evidence must be relevant before it will be admissible. A further safeguard upon abuse of the liberal terms of Rule 511 is contained in Rule 303, which permits the judge, under certain circumstances, to exercise his discretion as to admissibility.

The orthodox rule requires that the witness be unavailable before his deposition or former testimony can be admitted as evidence in the later trial. Although Rule 503 (a) flatly states that evidence of a hearsay declaration is admissible if the declarant is unavailable, subsection (b) of that rule goes on to admit all hearsay declarations if the declarant is present and subject to cross-examination. Rule 511 states that depositions and former testimony are admissible "unless

the judge finds that the declarant is available as a witness and in his discretion rejects the evidence." It can be seen that the two subsections of Rule 503 cover all cases except those in which the witness is available but not present for cross-examination. In this situation Rule 511 will apply, and the judge may admit or reject the evidence in his discretion.

It should also be pointed out that under the Model Code a deposition taken for use at the trial in which it is offered is not hearsay when offered at that trial.[3] Therefore, the provisions of Rule 511 do not apply to such depositions. The corresponding provision of the Uniform Rules of Evidence treats these depositions as falling within the hearsay rule, but admits them under an exception.[4]

Uniform Rules of Evidence

Depositions and prior testimony are among the exceptions to the hearsay rule contained in the Uniform Rules of Evidence. Rule 63 (3), which treats this particular exception, does not go as far as the Model Code in its departure from the prevailing American law. It does, however, liberalize the rather strict orthodox doctrine.

Concerning depositions taken for use at the trial at which they are offered, Rule 63 (3) (a) does not require that the witness be unavailable before the depositions can be admitted in evidence.[5] The main reason for this change in the prevailing rule is probably that depositions are a valuable means of proving facts about which there is no serious dispute but which the other party declines to stipulate.[6] It has been argued that the proposed rule will not result in disuse of oral testimony, because the live witness is so far superior in convincing power to depositions that the parties will prefer oral testimony on the main issues.[7] As a practical matter, if the witness is in fact unavailable the deposition is admissible under the prevailing law. And if the witness is available, but not produced, there is nothing to prevent the other party from calling him, especially in view of

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[3]MODEL CODE OF EVIDENCE Rule 501 (2) (1942).

[4]UNIFORM RULES OF EVIDENCE Rule 63 (3) (1953).

[5]For an argument against this provision of the Uniform Rules, see *A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law*, 49 NW. U.L. REV. 481, 494 (1954).

[6]See McCormick, *Hearsay*, 10 RUTGERS L. REV. 620, 623 (1956).

[7]*Ibid.*

Rule 20 of the Uniform Rules, which permits a person to impeach his own witness. Moreover, since this portion of Rule 63 (3) pertains to depositions taken for use at the trial at which they are offered, adequate safeguards, such as the opportunity for cross-examination by the adverse party, are present at the time the depositions are taken. Thus there is no valid reason for excluding them. It might be said that it is preferable for the judge and jury to observe the witness as he testifies. This is probably true, but, again, any party desiring to give the court the benefit of a personal glimpse can call the witness.

Rule 63 (3) (b) pertains to the admissibility, in a subsequent action, of testimony given in another action, or of a deposition taken for use in another action. This portion of the rule undoubtedly was meant to apply to testimony given not only in another action but also in a prior trial of the same case, although the use of the term "another action" may raise some question as to the applicability of the rule to this situation. The rule, in this regard, might well be rephrased.

Rule 63 (3) (b) requires a finding that the declarant is unavailable as a witness in the subsequent trial before former testimony and depositions taken for use in another action may be admitted. Furthermore, admissibility is dependent upon a finding that

> " (i) the testimony is offered against a party who offered it in his own 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 . . . ."

If the declarant is available and present for cross-examination, the type of evidence under discussion could come in under Rule 63 (1) relating to previous statements.[8] When he is available but not present for cross-examination, however, the previous testimony, although admissible under Rule 511 of the Model Code, would not be admissible under Rule 63 (3) (b) of the Uniform Rules. The declarant must be produced. As soon as he is, however, he is present for cross-examination, and the evidence is then admissible under Rule 63 (1).

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[8]See Powers, *The North Carolina Hearsay Rule and the Uniform Rules of Evidence,* 34 N.C.L. REV. 294, 305 (1956).

HEARSAY?

There is a difference of opinion as to whether depositions and former testimony offered to prove the truth of the facts stated constitute hearsay. The courts generally say that they do,[9] and Professor McCormick has adopted a definition of hearsay that includes this evidence.[10] On the other hand, Wigmore, supported by some cases,[11] states that depositions and former testimony do not constitute hearsay.[12] His view is that an adequate opportunity for cross-examination is necessary before this evidence can be admitted to prove the truth of the facts stated, that this opportunity satisfies the hearsay rule, and that no exception is needed. According to Wigmore the opportunity for cross-examination is not adequate unless the testimony was given upon such an issue that the opponent in the previous case had the same interest and motive in his cross-examination that the present opponent has.[13] An adequate opportunity, however, is all that is required; it need not be exercised.[14] When death or illness of the witness prevents cross-examination, Wigmore states that it would be harsh to exclude the testimony that had been obtained on direct examination; he suggests leaving the admissibility of such evidence to the discretion of the trial judge.[15]

When an adequate opportunity for cross-examination or its equivalent exists it would seem to make little difference whether depositions and former testimony are admitted in evidence under an exception to the hearsay rule or under the view that the rule has been satisfied and no exception is needed. The difference becomes important, however, when there is no equivalent of a present opportunity for cross-examination. In this event the evidence could be admitted under a

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[9]See, *e.g., In re* Cross' Estate, 166 Kan. 318, 323, 201 P.2d 1052, 1056 (1949); Bachtel v. Bachtel, 97 Ohio App. 521, 526, 127 N.E.2d 761, 764 (1954); Lone Star Gas Co. v. State, 137 Tex. 279, 308, 153 S.W.2d 681, 697 (1941).

[10]MCCORMICK, EVIDENCE §230 (1954.)

[11]*E.g.*, Habig v. Bastian, 117 Fla. 864, 868, 158 So. 508, 510 (1935); Minneapolis Mill Co. v. Minneapolis & St. L. Ry., 51 Minn. 304, 316, 53 N.W. 639, 642 (1892); Garner v. Pennsylvania Pub. Util. Comm'n, 177 Pa. Super. 439, 446, 110 A.2d 907, 911 (1955).

[12]5 WIGMORE, EVIDENCE §1370 (3d ed. 1940).

[13]5 *id.* §1388.

[14]5 *id.* §1371.

[15]5 *id.* §1390. See Jaiser v. Milligan, 120 F. Supp. 599 (D. Neb. 1954) (testimony obtained on direct examination admitted although witness died after partial cross-examination); 9 ARK. L. REV. 170 (1955).

liberal exception,[16] whereas it would not fulfill the requirements set forth by Wigmore.

It should be borne in mind that this article is confined to the use of prior testimony to prove the truth of the facts stated. This evidence may also be used for impeachment purposes, or it may fall under some other exception to the hearsay rule, such as that pertaining to the admission of a party. The following discussion and requirements do not apply to these last named situations.

CONFRONTATION

Provisions in the United States Constitution[17] and nearly every state constitution[18] guarantee to the accused in a criminal case the right to be confronted with the witnesses against him. The common law right of confrontation, which had its origin in the establishment of the hearsay rule, merely meant the right to cross-examination.[19] The use of former testimony upon a proper showing that the witness was unavailable was recognized prior to the adoption of these constitutional provisions.[20] The controversy regarding the effect of such constitutional provisions on the admissibility of depositions and former testimony, therefore, hinges on a determination of whether these provisions change the common law requirement or merely put it beyond the possibility of abolition by statute. Professor Wigmore prefers the latter view, stating that at common law it was cross-examination, and not a separate right of confrontation, that was essential. Confrontation secured cross-examination, but it was the cross-examination that was vital. The constitutional provisions merely secure this right.[21] The opposing argument is based on a strict and technical reading of these provisions, giving rise to the conclusion that the witness must actually confront the accused at the trial. This interpretation fails to take into account the historical background of the confrontation provisions.

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[16]See MCCORMICK, EVIDENCE §230 (1954).

[17]U.S. CONST. amend. VI.

[18]*E.g.*, ALA. CONST. art. I, §6; CONN. CONST. art. I, §9; FLA. CONST. Decl. of Rights, §11; ILL. CONST. art. II, §9.

[19]People v. Schwarz, 78 Cal. App. 561, 248 Pac. 990 (1926); State v. Logan, 344 Mo. 351, 126 S.W.2d 256 (1939); People v. Hines, 284 N.Y. 93, 29 N.E.2d 483 (1940); see 5 WIGMORE, EVIDENCE §1397 (3d ed. 1940).

[20]MCCORMICK, EVIDENCE §231 (1954).

[21]See note 19 *supra*.

The right of confrontation serves more than one purpose.[22] In addition to supplying the opportunity for cross-examination, which is essential, it permits the court to observe the demeanor of the witness, and it supposedly makes a false accusation more difficult by affording the accused an opportunity to look the witness in the eye.[23] This third purpose and the opportunity for cross-examination are present when testimony has been taken at a prior hearing or by way of deposition. The only thing lacking in such a case is the opportunity for the court at the subsequent trial to observe the witness's demeanor. This opportunity, however, although desirable, is not required and may be dispensed with in case of necessity.[24]

Neither Rule 511 of the Model Code nor Rule 63 (3) of the Uniform Rules requires cross-examination by the adverse party before depositions or former testimony may be admitted in evidence at a later trial. It would seem that even a liberal interpretation of the constitutional provisions relating to confrontation would result in the requirement that the accused himself be afforded the opportunity to cross-examine the witnesses against him, although not necessarily in the presence of the court before which he was then being tried. As stated by the United States Supreme Court:[25]

> "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . ."

An excellent chance exists, then, that the provisions of the Model Code and the Uniform Rules may violate constitutional provisions pertaining to confrontation. This questionable aspect of Rule 63 (3) was recognized when the Uniform Rules were drafted.[26]

As in the case of former testimony, there should be no objection to the use of depositions by the prosecution in a criminal case. They do not infringe the right of confrontation any more than does prior

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[22]See State v. Heffernan, 24 S.D. 1, 9, 123 N.W. 87, 88 (1909); *accord,* Blache v. Blache, 37 Cal.2d 531, 535, 233 P.2d 547, 549 (1951).

[23]See McCORMICK, EVIDENCE §231 (1954).

[24]Mattox v. United States, 156 U.S. 237, 243 (1895); Smith v. State, 147 Ga. 689, 693, 95 S.E. 281, 283 (1918).

[25]Mattox v. United States, *supra* note 24, at 244.

[26]UNIFORM RULES OF EVIDENCE, Prefatory Note, and Rule 63 (3) Comment (1953).

testimony. Nevertheless, many states do not have statutes authorizing the taking of depositions on behalf of the prosecution. Therefore they are not used, not because courts have held that they violate the constitution but because of the lack of authority in anyone to take them. It is probable that at least some legislatures failed to provide such authority because of doubt created by the confrontation provisions.[27]

IDENTITY OF PARTIES

The orthodox rule requires identity of parties as a prerequisite to the admissibility of depositions and former testimony. The older cases not only required that the party against whom the former testimony is now being offered must have been a party on the former occasion but they also insisted on "reciprocity" or "mutuality," that is, that the party offering the prior testimony must have been a party at the previous trial. The authorities agree that this requirement of mutuality is not based on any sensible or justifiable reason,[28] and the cases seem to be abandoning it.[29] Professor McCormick states that the so-called requirement of identity of parties, together with the requirement based on identity of issues, is merely a means of fulfilling the policy of securing an adequate opportunity for cross-examination by the party against whom the evidence is now offered.[30] Wigmore states that the requirement of identity of parties is only an incident or corollary of the requirement of identity of issues.[31] Accordingly, he formulated his rule as follows:[32]

> "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*

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[27]See McCORMICK, EVIDENCE §231 (1954); 5 WIGMORE, EVIDENCE §1398 (3d ed. 1940).

[28] McCORMICK, EVIDENCE §232 (1954); 2 MORGAN, BASIC PROBLEMS OF EVIDENCE 225 (1954); 5 WIGMORE, EVIDENCE §1388 (3d ed. 1940); Falknor, *The Hearsay Rule and Its Exceptions,* 2 U.C.L.A.L. REV. 43 (1954).

[29]*E.g.,* Rivera v. American Export Lines, 13 F.R.D. 27 (S.D.N.Y. 1952); School Dist. v. Sachse, 274 Mich. 345, 264 N.W. 396 (1936); Briggs v. Chicago G.W. Ry., 248 Minn. 418, 426, 80 N.W.2d 625, 633 (1957) (dictum).

[30]McCORMICK, EVIDENCE §§232-33 (1954).

[31]5 WIGMORE, EVIDENCE §1388 (3d ed. 1940).

[32]*Ibid.*

cross-examination that the present opponent has; and the determination of this ought to be left entirely to the trial judge ...."

This, of course, is a modification of the orthodox rule, and is substantially the rule set forth in the Uniform Rules of Evidence. The Model Code goes further and does away with any need for similarity of issues or parties, except as they bear on the relevancy of the evidence.

The tendency to do away with the strict requirement of identity of parties is reflected in the fairly recent leading case of *Bartlett v. Kansas City Pub. Serv. Co.*[33] The husband of a woman who was injured in a bus accident brought suit for loss of her services. Subsequently, at the trial of the wife's personal injury suit, the defendant attempted to introduce the testimony elicited from two witnesses at the former trial. Both witnesses were out of the jurisdiction at the time. The court admitted the former testimony over the wife's objection, holding that absolute identity of parties in the two cases was not necessary. The court took into account the fact that the husband and wife had the same motive to cross-examine. It should also be noted that the same attorney represented both plaintiffs. This decision has been referred to as "a sensible extension of the established rule."[34]

The argument has been made that in one respect Rule 63 (3) of the Uniform Rules goes too far in rendering depositions and former testimony admissible. Professor Falknor, while agreeing that the idea of identity of parties on both sides cannot rationally be supported, suggests that the requirement of identity of opponent should not be relaxed.[35] Accordingly, he suggests an amendment to Rule 63 (3) that would require the party against whom former testimony is being offered to be the same as, or the successor in interest of, the party against whom such testimony was offered at the prior trial. It should be borne in mind that this amendment, as well as Rule 63 (3), would admit former testimony when offered against a party, or his successor in interest, who introduced it in his own behalf on the prior occasion.

There is forcefulness in the argument advanced by Professor Falk-

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[33]349 Mo. 13, 160 S.W.2d 740, 142 A.L.R. 666 (1942).

[34]Morgan, *The Law of Evidence, 1941-1945*, 59 HARV. L. REV. 481, 552 (1946).

[35]Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A.L. REV. 43 (1954).

nor. It is at its strongest when it is made to someone who is in the position of having to accept cross-examination conducted by another party.[36] It has been contended that insistence upon the equivalent of a present opportunity to cross-examine fails to take into account the other elements of reliability in former testimony, such as the oath, the solemnity of the occasion, and the accuracy of transcribed testimony.[37] This of course is no answer to the party who insists that he wants to cross-examine the witness against him. Admittedly it is highly desirable for a party to be afforded the opportunity to conduct his own cross-examination of an adverse witness. Moreover, the oath and the solemnity of the occasion have lost much of their significance over the years; they undoubtedly do not impress many of the witnesses whose testimony could be damaged materially by cross-examination. Nevertheless, former testimony that has been subjected to the test of cross-examination by another party with a similar interest and motive should be as reliable as any other form of hearsay, if not more so. An insistence upon a present opportunity to cross-examine the witness would keep out such testimony. The prior testimony may be disbelieved; the absent witness can be impeached; and contrary testimony can be introduced, if any is available. These should normally be adequate safeguards in what is admittedly a difficult situation.

The fact that the suggested amendment is in line with the prevailing law may make it more acceptable. Assuming that it is adopted, and taking into consideration the fact that the use of former testimony may often arise in cases involving parties who are related not only in interest but also in other respects, as in the *Bartlett* case, it does not seem unreasonable to suggest that such testimony be admitted against a party who is represented by the same attorney who represented the party against whom the testimony was offered at the prior trial.[38] It is the lawyer and not the party who conducts the cross-

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[36]Professor Wigmore apparently held a different view of human nature, as illustrated by the following statement: "At first sight, indeed, it seems fair enough to argue . . . that a person against whom former testimony is now offered should have to be satisfied with such cross-examination as any other person whatever, in another suit, may have chosen to employ." 5 WIGMORE, EVIDENCE §1388 (3d ed. 1940).

[37]McCORMICK, EVIDENCE §230 (1954).

[38]This could be accomplished by inserting in Professor Falknor's amendment the portion indicated by italics:

[Notwithstanding the general prohibition of hearsay, there shall be exception-

examination. There would seem to be as much reason for admitting former testimony in situations in which different parties with similar interests were represented by the same lawyer at both trials as in cases in which the party was the same on both occasions but his attorney was different. In fact, the difference in attorneys may have been caused by the party's desire for a more effective trial lawyer.

There are, of course, certain disadvantages inherent in the suggested change. It would, for example, make the admissibility of this testimony dependent upon a party's choice of counsel. Furthermore, recognizing the fact that cross-examination may be aided by the client, the party at the second trial may justifiably complain about having to be content with cross-examination conducted by his attorney while representing another party. No argument is being made for the adoption of this change; it is merely set forth as a possible means of bringing Professor Falknor's amendment more in line with the liberal provisions of the Uniform Rules while still satisfying the policy behind the requirement of identity of opponents.

IDENTITY OF ISSUES

Cross-examination, in order to be effective, must be directed to the material points in controversy. The orthodox rule regarding the admissibility of former testimony and depositions seeks to ensure adequate and effective cross-examination by the so-called requirement of identity of issues. Precise identity is not necessary; it is sufficient if there is substantial identity of the issues to which the testimony was directed on the previous occasion and upon which it is offered at the later trial.[39] The Florida Court has held, for example, that

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ally admitted:]

"(b) if the judge finds that the declarant is unavailable as a witness in a hearing, testimony given in another action relating to the same matter or in a deposition taken in compliance with law for use as testimony in the trial of another action relating to the same matter, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the testimony is offered against a party against whom, or against whose predecessor in interest, [*or against a party who is represented by counsel who represented a party against whom,*] it was offered on the former occasion." Falknor, *The Hearsay Rule and Its Exceptions,* 2 U.C.L.A.L. REV. 43, 55 (1954).

[39]*E.g.,* Briggs v. Chicago G.W. Ry., 248 Minn. 418, 80 N.W.2d 625 (1957); State v. Brown, 331 Mo. 556, 56 S.W.2d 405 (1932); Lynch's Adm'r v. Murray, 86 Vt. 1, 83 Atl. 746 (1912); Illinois Steel Co. v. Muza, 164 Wis. 247, 159 N.W. 908

testimony taken at a trial involving simple negligence could be offered at a later trial involving the issue of gross negligence.[40]

The Model Code dispenses with any requirement of identity of issues. The Uniform Rules provide that the issue must be such that the adverse party at the previous trial had the opportunity for cross-examination, with an interest and motive similar to that of the party against whom the testimony is offered at the later trial. The extent to which a state will require identity of issues may well depend on the scope of cross-examination permitted. In a state allowing a wide scope of cross-examination, if all the issues in the second trial were not present in the first, the party against whom the former testimony is offered will be deprived of his right to cross-examine the absent witness on these issues.[41]

UNAVAILABILITY

Unavailability of the witness is a prerequisite to the admissibility of former testimony to prove the truth of the facts stated. Rule 63 (3) of the Uniform Rules adopts this requirement, and Rule 62 (7) sets forth the situations in which a witness is deemed unavailable. Under the Model Code such evidence is admissible without regard to the availability of the witness unless he is available but not present for cross-examination, in which event the judge in his discretion may reject the evidence. The definition of unavailability in the Model Code is set forth in Rule 1 (15); it is basically the same as that of the Uniform Rules.

Some of the commonly accepted grounds of unavailability besides death are absence from the jurisdiction, extreme physical disability, mental incapacity, privilege, failure of memory, and inability to locate the witness.[42]

(1916).

[40]McDougald v. Imler, 153 Fla. 619, 15 So.2d 418 (1943).

[41]See Powers, *The North Carolina Hearsay Rule and the Uniform Rules of Evidence*, 34 N.C.L. REV. 294, 303 (1956); *A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law*, 49 NW. U.L. REV. 481, 483 (1954).

[42]Mattox v. United States, 156 U.S. 237 (1895) (death); Jacobi v. State, 133 Ala. 1, 32 So. 158 (1902) (absence from jurisdiction); Bridges v. State, 26 Ala. App. 1, 152 So. 51 (1933) (privilege); Putnal v. State, 56 Fla. 86, 47 So. 864 (1908) (whereabouts unknown); State v. New Orleans Waterworks Co., 107 La. 1, 31 So. 395 (1901) (failure of memory); Lyons v. State, 26 Okla. Crim. 41, 133 P.2d 898 (1943) (physical disability); Smith v. Smith, 234 S.W. 419 (Tex. Civ. App. 1921) (mental incapacity).

In a Michigan case involving the privilege against self-incrimination as a ground of unavailability, a witness had testified for the state at a preliminary hearing. At the trial he invoked the privilege and refused to answer certain questions, although he had received an apparently effective grant of immunity. His previous testimony was then admitted in evidence over the defendant's objection. The Michigan Supreme Court affirmed the conviction, stating that "by invoking the privilege . . . [the witness] although having been granted immunity, made himself as 'unavailable' as if he were deceased or absent from the jurisdiction."[43] Had the privilege been properly invoked, the decision undoubtedly would be correct. Strictly speaking, however, the witness, having been granted immunity, was available. As a practical matter, in such a situation there is really no reason for excluding the previous testimony. If a witness is forced to testify under a grant of immunity, he will at best be a reluctant one; it would seem that justice would more nearly be served by providing the court with both the previous and the present testimony. If he absolutely refuses, despite the threat of contempt proceedings, his testimony is as unavailable as if he were not present.

A troublesome situation may arise under the Uniform Rules when absence from the jurisdiction is the ground relied upon for a finding of unavailability. Rule 62(7) requires the present deposition of an absent witness to be taken if it can be accomplished by the exercise of reasonable diligence, without undue hardship, and the importance of the testimony justifies the expense involved.[44] When the former testimony of the absent witness is available, it should be as reliable as a present deposition, if not more so, especially if the former trial was between the same parties and at a considerably earlier date. As it now stands, a party cannot be certain whether he must take the deposition of an absent witness whose former testimony is available or whether he can rely on the former testimony, unless, of course, the judge makes a ruling during pretrial procedure.

FORMER TESTIMONY IN FLORIDA[45]

The Florida Supreme Court had occasion to deal with the question

[43]People v. Pickett, 339 Mich. 294, 306, 63 N.W.2d 681, 687, 45 A.L.R.2d 1341, 1350 (1954); see Falknor, *Evidence*, 30 N.Y.U.L. REV. 927, 932 (1955).

[44]The elimination of this provision has been advocated in *A Symposium*, *supra* note 41, at 495.

[45]On the related topic of depositions see, for civil depositions, 1954 FLA. R. CIV.

of admissibility of former testimony in *Simmons v. Spratt*,[46] decided in 1890. The Court held that it was error to admit into evidence the bill of exceptions taken on the first trial of the cause, containing the testimony of a witness who had since died. It stated that the evidence contained in a bill of exceptions is nothing more than a certificate of the trial judge, or a subsequent statement by third parties, lacking the sanction of an oath, and is not admissible of itself to prove the truth of the prior testimony. The Court stated that the bill of exceptions was admissible to refresh memory and that living witnesses who heard the former testimony should be called upon to testify as to its nature. It was indicated that, if the bill of exceptions by itself was the only method available by which the prior testimony could be proved, it would be admissible for that purpose. No such showing had been made in the case, however. It should be noted that the case actually dealt with the mode of proof of the former testimony[47] rather than the right to prove it.

When the *Simmons* case was decided, there was no statute in Florida concerning the admissibility of prior testimony. In 1893 the following statute was enacted:[48]

> "[I]n case any judgment at law rendered by a Circuit Court shall be reversed and a new trial awarded, and it be made to appear to the satisfaction of the court that any evidence used at the former trial, whether oral or written, and incorporated in the bill of exceptions, cannot be had, then the bill of exceptions taken at the previous trial may be used as evidence upon any subsequent trial of the case, as to any matter in issue at the former trial."

In 1908 the Florida Court decided *Putnal v. State*.[49] The Court permitted the use in a second trial of testimony given in a prior trial of the defendant in the mayor's court, in which he had been convicted for selling liquor in a dry county. In the second trial, in the circuit

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P.; Mehrtens, *Deposition and Discovery in Florida Under the Federal Rules*, 1 U. FLA. L. REV. 149 (1948); for criminal depositions, FLA. STAT. §§902.12, .15-.17, 916.06 (1955).

[46]26 Fla. 449, 8 So. 123 (1890).

[47]For a discussion of mode of proof of former testimony see Annot., 11 A.L.R.2d 30 (1950).

[48]Fla. Laws 1893, c. 4135, §1.

[49]56 Fla. 86, 47 So. 864 (1908).

court for selling liquor without a license, the prosecution proved the former testimony by a witness who had heard it. The whereabouts of the original witness were unknown at the time of the later trial. Despite defendant's objections based on the hearsay rule and the right of confrontation, the Court held that this procedure was proper, laying down the following requirements: (1) The party against whom the evidence is offered, or his privy, must have been a party at the former trial; (2) the issues must be substantially the same; (3) the witness who testifies about the former testimony must be able to state it with satisfactory correctness; and (4) a sufficient reason must be shown for the unavailability of the witness. The Court felt that these conditions had been met.

The 1893 statute had no bearing on the *Putnal* case, since the later trial in that case did not take place as the result of a reversal of the judgment of a circuit court. The statute was not mentioned in the decision. This would not be remarkable except for the fact that the *Putnal* case has been cited by the Court as one involving the statute.[50]

Shortly after this decision, and apparently as a result of it,[51] the Legislature amended the statute by adding a proviso to the effect that no former testimony would be admissible except as provided in the original act.[52] The Florida Court subsequently held that the statute provided the exclusive method by which former testimony could be proved, stating that it was error to admit proof of such testimony at a later trial of the same case other than by introducing the bill of exceptions containing the testimony.[53]

The applicability of the statute arose again in *Blackwell v. State*.[54] The Court admitted the former testimony, contained in the bill of exceptions, upon a showing that the absent witness was ill and would be unable to appear in court for at least two weeks. The defendant objected on the ground of lack of confrontation, but the Court held that the constitutional provision affording this right had been satisfied by the defendant's cross-examination of the absent witness at the

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[50]Blackwell v. State, 79 Fla. 709, 752, 86 So. 224, 237 (1920) (dissenting opinion); Bennett v. State, 68 Fla. 494, 498, 67 So. 125, 126 (1914); Johnson v. State, 68 Fla. 528, 532, 67 So. 100, 101 (1914).

[51]See Johnson v. State, 68 Fla. 528, 67 So. 100 (1914).

[52]Fla. Laws 1909, c. 5897, §1.

[53]Johnson v. State, *supra* note 51; Coley v. State, 67 Fla. 178, 64 So. 751 (1914).

[54]79 Fla. 709, 86 So. 224 (1920).

former trial. In this case, as in two others,[55] all involving the crime of murder, the Court assumed that the statute applied to criminal cases. The dissenting justices in the *Blackwell* case[56] disputed this, believing that the statute should apply only to civil cases. They also felt that the defendant had been deprived of his right of confrontation on the second trial. This view was based on a strict construction of the Florida constitutional provision which states that "in all criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face."[57]

In 1919 the statute in question was amended[58] to provide that testimony at a former trial, if incorporated in a bill of exceptions or the record of the trial, could be used at any later trial or hearing of the case as to any matter in issue at the former trial, if it appeared that the original could not be had. The statute also allowed the use in a subsequent trial of former testimony not contained in a bill of exceptions or in the trial record if the evidence had been reduced to writing in the presence of the court, and if the four conditions set forth in the *Putnal* case were met. This amendment was not considered in the *Blackwell* case because the trials in that case took place prior to 1919, although the opinion was not rendered until 1920.

In 1921 the Legislature limited the application of the act to civil cases and broadened its scope by allowing testimony preserved in a bill of exceptions or trial record to be used in any later trial as to any matter in issue at the earlier trial.[59] The 1919 version had limited the admissibility of such testimony to later trials of the same case. The 1921 amendment also added the proviso that "in all criminal cases the accused shall have the right to meet the witnesses against him face to face at every trial, and testimony of a witness given upon a trial of a criminal cause shall not be admitted against an accused person in a subsequent trial, but the witness shall be produced."

The 1921 amendment was passed to nullify the effect of the decision in the *Blackwell* case and to ensure that an accused would meet the witnesses against him face to face, literally, at every trial.[60] The statute currently in effect is identical with the 1921 version except

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[55]See note 53 *supra*.

[56]79 Fla. 709, 743, 86 So.224, 234 (1920).

[57]FLA. CONST. Decl. of Rights §11.

[58]Fla. Laws 1919, c. 7838, §10 (6).

[59]Fla. Laws 1921, c. 8572, §1.

[60]See Young v. State, 85 Fla. 348, 356, 96 So. 381, 383 (1923).

that the proviso quoted above has been omitted.[61] The current statute reads:[62]

> "In the event it be made to appear to the satisfaction of the court that any evidence used at a trial of a civil case, whether oral or written, and incorporated in a bill of exceptions, or incorporated in the record proper can not be had, then the bill of exceptions taken at the trial, or the evidence incorporated in the record of the trial, may be used as evidence upon any subsequent trial or hearing of the case, or in any other civil cause or civil proceeding, as to any matter in issue at a previous trial or hearing; and, further, in the event that such evidence is not so preserved as before stated, then the same may be used at a subsequent trial or hearing, or in any other civil cause or civil proceeding involving substantially the same issue; if (1) such evidence has at such former trial been reported stenographically or reduced to writing in the presence of the court; (2) that the party against whom the evidence is offered, or his privy, was a party on the former trial; (3) that the issue is substantially the same in both cases; (4) that a substantial reason is shown why the original witness or document is not produced; and, (5) that the court is satisfied that the report of such evidence taken at such former trial is a correct report."

This statute has two distinct parts. The first portion, pertaining to evidence incorporated in a bill of exceptions[63] or in the record proper, requires a showing that the original evidence cannot be had, and only permits the former evidence to be used at the subsequent trial as to any matter in issue at the previous trial or hearing. No mention is made regarding identity of parties, however. This portion of the statute, from the date of its enactment in 1893 until the 1921 amendment, applied only to subsequent trials or hearings of the same case. In 1921 the phrase "or in any other civil cause or civil proceeding" was inserted. This has never been construed, but it is certainly open to an interpretation permitting the use of properly preserved testimony at a later trial between different parties, provided the matter was in issue at the prior trial. It is true that statutes of

[61]The proviso was superseded by FLA. STAT. §920.09 (1955), enacted as Fla. Laws 1939, c. 19554, §246; see Revision Note, 2 FLA. STAT. §92.22 (1941).

[62]FLA. STAT. §92.22 (1955).

[63]Bills of exception are no longer required in Florida appellate procedure. See FLA. STAT. §59.15 (1) (1955) and FLA. APP. RULES.

this type have been held to be declaratory of the common law,[64] and the common law requirement necessitated identity of parties. But the latter portion of this statute, pertaining to evidence not preserved in a bill of exceptions or record of trial, is substantially in line with the common law requirements. Clearly the legislature was distinguishing between evidence preserved in a bill of exceptions or record of trial and evidence not so preserved, and was relaxing the requirements for use of the former. An interpretation dispensing with the requirement of identity of parties in such a case would permit wider use of former testimony. This testimony, having been given in a former trial involving a matter in issue at the present trial, is highly reliable and should be admitted when the alternative is its complete loss.

The second portion of the statute is substantially in line with the orthodox rule regarding use of former testimony. It is a bit more liberal in that it requires only identity of opponent rather than identity of both parties. On the other hand, it does require that the evidence be stenographically recorded or reduced to writing in the presence of the court at the former trial and that the judge be satisfied that the report is correct.

The Florida Court, although stating that a sufficient reason must be given for the use of former testimony,[65] has not set forth any definite criteria. The phrase "cannot be had" in the first portion of the statute was construed in a criminal case[66] before the 1921 amendment. The Court interpreted the phrase as vesting in the trial judge discretion as to the admission of former testimony contained in a bill of exceptions. The Court held that the trial judge had not abused his discretion by admitting the former testimony of a witness who was absent because of temporary illness. Other grounds that the Court has recognized are death, absence from the jurisdiction, and insanity.[67]

Supervening disqualification has also been accepted as a ground of unavailability. In *Habig v. Bastian*[68] the defendant died after a new trial had been granted but before it took place. At the new trial the testimony of the plaintiff was objected to on the ground that it was prohibited by the dead man statute. The plaintiff then offered

[64]See Habig v. Bastian, 117 Fla. 864, 869, 158 So. 508, 510 (1935).
[65]*Ibid.*
[66]Blackwell v. State, 79 Fla. 709, 724, 86 So. 224, 229 (1920).
[67]See notes 64 and 66 *supra.*
[68]117 Fla. 864, 158 So. 508 (1935).

his former testimony taken at the first trial, at which time he had been subjected to direct, cross, redirect, recross, and recalled examination. The Florida Supreme Court reversed the lower court and held that the former testimony was admissible.

In *Alexander v. Bess*[69] the defendant had testified at a hearing to dissolve a temporary restraining order. The chancellor subsequently permitted this testimony to be used at the final hearing in support of the allegations of the answer. The defendant, a widow, was present at the final hearing but was not in condition to undergo examination. It was shown that any evidence she would have given at the final hearing would have been substantially the same as that given on the previous hearing. The Florida Supreme Court, while disapproving of this practice, stated that if it was error it was harmless and that no abuse of discretion on the part of the chancellor was shown.

In a proceeding to annul a marriage the circuit court refused to permit the introduction of a transcript of the testimony of a physician apparently taken in an earlier proceeding. The defendant's counsel had never had a chance to question the witness, and there was no showing that the witness was unavailable or that any attempt had been made to secure his attendance. The Supreme Court held that the introduction of the evidence was purely in the discretion of the trial court and that no abuse of discretion had been shown. The Court went on to state, however, that if the witness is available his testimony in another case should not be substituted for oral evidence.[70]

Apparently, then, although the Florida statute does not speak in terms of unavailability, the Court has substantially adhered to the recognized grounds upon which the use of former testimony is based. If anything, the Court has been rather liberal in its determinations of what will constitute sufficient justification.[71] This perhaps results from the fact that in most cases that have come before the Court the evidence was admitted by the trial judge. The Court has vested

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[69]123 Fla. 713, 167 So. 533 (1936).

[70]Abbe v. Abbe, 68 So.2d 565 (1953).

[71]See also Anderson v. Gaither, 120 Fla. 263, 162 So. 877 (1935). The deposition of a witness had been taken and used at the first trial of the cause in 1929. At the subsequent trial in 1933, the witness was available and testified. In addition, his deposition that had been taken four years earlier was admitted in evidence, by discretion of the court, on the ground that his memory at the time of giving the deposition was obviously clearer as to details. The Supreme Court affirmed.

discretion in the trial judge as to whether the reasons advanced for the use of such testimony are sufficient.[72] The question on appeal, therefore, is one of abuse of discretion. In this situation the Court is less likely to reverse a trial judge than if a ruling on a specific ground of unavailability was required.

One further case merits discussion at this point. In an equity suit involving a creditor's bill the final decree was reversed on appeal and the cause remanded with directions to reconsider and rehear the case after the pleadings were amended and further evidence taken. When the case was submitted to the chancellor for the second time, he considered the testimony then in the record and all additional testimony taken after the reversal of the prior final decree. The Court, in holding that this procedure was proper,[73] apparently felt that a question of former testimony was involved, since it cited the current civil statute and the case of *McDougald v. Imler*[74] in answer to appellants' contention, which presumably was based on the view that the issues under the amended pleadings differed from those under the original pleadings.

There is no discussion as to whether the witnesses were available to testify at the second hearing. If they were not, it is reasonable to assume that the Court would have mentioned this fact. Assuming that they were, this would seem to indicate that the Court was either dispensing with or overlooking the requirement of unavailability. A close reading of the mandate, however, suggests that the case did not involve a question of former testimony. The subsequent hearing in the circuit court apparently was a further proceeding in the original cause rather than a new trial. The testimony concerned, therefore, was already before the court and was not being introduced as former testimony.

In 1939 the Florida Legislature enacted a law pertaining to the use of former testimony in criminal proceedings.[75] This act, which has never been amended, reads:[76]

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[72]Abbe v. Abbe, *supra* note 70; Alexander v. Bess, *supra* note 69; Blackwell v. State, *supra* note 66. Clearly the discretion relates to the sufficiency of the reasons advanced for the use of the testimony and not to admissibility, as such. *But see* Touby, *Evidence,* 10 MIAMI L.Q. 472, 476 (1956).

[73]Hollingsworth v. Arcadia Citrus Growers Ass'n, 154 Fla. 399, 18 So.2d 159 (1944).

[74]153 Fla. 619, 15 So.2d 418 (1943). See note 40 *supra* and accompanying text.

[75]Fla. Laws 1939, c. 19554.

[76]FLA. STAT. §920.09 (1955).

> "When a new trial is granted such new trial shall proceed in all respects as if no former trial had been had, but where an offense is divided into degrees and the defendant has been convicted of a lesser degree, he cannot thereafter be prosecuted for a higher degree of the same offense.
>
> "All the testimony in such former trial must be produced anew, except of witnesses who are absent from the state or dead, in which event the evidence of such witnesses on former trial may be presented as the same was taken and transcribed by the court reporter. Before the introduction of the evidence of an absent witness, the party introducing same must show that due diligence has been used to procure the attendance of said witness at the trial, and that the witness is not absent by consent or connivance of the party moving to introduce the evidence of such witness on the former trial."

The portion of the statute concerning admissibility of former testimony has not been construed by the Court. The wording of the statute — stating that all testimony must be produced anew except that of witnesses who are dead or out of the state — indicates that the Legislature intended to preclude the use of any other generally accepted ground of unavailability. It has been held under statutes of a similar type that one of the named grounds must be made to appear.[77] An insane or disabled witness, however, is as unavailable as a dead or absent one; and, assuming that the accepted safeguards of reliability are present, there should be no reason for excluding such evidence. This could be accomplished under the Florida statute by interpreting it as declaratory of the common law and therefore not the exclusive test of admissibility. Statutes interpreted in this fashion, however, are usually permissive,[78] whereas the wording of the Florida statute, by creating an exception, is restrictive in nature.

Furthermore, the statute mentions only the use of former testimony upon the granting of a new trial and does not purport to cover its use on a subsequent occasion other than a new trial. The statute, then, being inapplicable, would not necessarily prevent the use of

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[77]People v. Bojorquez, 55 Cal. 463 (1880); People v. Rinesmith, 40 Cal. App. 2d 786, 105 P.2d 1021 (1940); Studdard v. State, 115 Tex. Crim. 402, 27 S.W.2d 820 (1930); *accord,* Collins v. Leahy, 344 Mo. 250, 125 S.W.2d 874 (1939).

[78]See State v. Moore, 40 N.M. 344, 59 P.2d 902 (1936); State v. Trujillo, 33 N.M. 370, 266 Pac. 922 (1928); State v. Ham, 224 N.C. 128, 29 S.E.2d 449 (1944); State v. Maynard, 184 N.C. 653, 113 S.E. 682 (1922).

former testimony that was given, for example, at a judicial proceeding other than a trial or at a trial of the accused in a different case involving substantially the same issues.[79] On these occasions the former testimony might be introduced under common law principles provided it met the requirements. The argument has also been made that the statute pertaining to civil cases should govern.[80]

This would seem to be the reasonable interpretation of the statute, but it presents the anomalous situation of imposing greater restrictions on the introduction of former testimony in a new trial of the same case than, for example, in a subsequent trial of a different case involving substantially the same issues. This problem would not arise if the 1921 proviso in the civil statute were still in effect. The proviso, which flatly prohibited the use of former testimony in criminal cases, would control in all situations not covered by the criminal statute. The revision note to the civil statute indicates that the proviso was eliminated in the process of statutory revision on the assumption that the 1939 criminal act had superseded it.[81] Whether this was the intention of the Legislature is subject to question. With the proviso in effect, former testimony in criminal cases not covered by the criminal statute could not be used; without the proviso there is no reason why former testimony could not be used in a case to which the criminal statute does not apply. The desirability of one approach over the other is a question apart from whether the result of the statutory revision is consistent with the intent of the Legislature.

The use of former testimony against an accused in a situation to which the criminal statute does not apply would not contravene the confrontation provision of the Florida Constitution. The *Blackwell* case[82] held that one confrontation was sufficient; although the effect of that decision was nullified by the inclusion of the criminal proviso in the civil statute in 1921,[83] the reasoning as to what would satisfy the constitutional provision was not affected. The legislative act could not amend the Constitution; it merely provided that the

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[79]It is, of course, possible that the statute might be interpreted as covering the entire field and impliedly forbidding the use of former testimony in criminal cases other than a new trial. *Cf.* People v. Frank, 132 Cal. App. 360, 22 P.2d 792 (1933).

[80]See Davis v. State, 65 So.2d 307, 308 (Fla. 1953).

[81]Revision Note, 2 FLA. STAT. §92.22 (1941).

[82]79 Fla. 709, 86 So. 224 (1920).

[83]See Young v. State, 85 Fla. 348, 356, 96 So. 381, 383 (1923).

accused should meet the witnesses against him at every trial, although less was required to satisfy his constitutional guarantee. With the proviso eliminated there should be no constitutional objection to the use of former testimony against an accused in a proper situation not covered by the 1939 criminal act.

The argument that the civil statute, section 92.22, could apply in a criminal action was made recently in *Davis v. State*.[84] The former testimony sought to be used had been given at a preliminary hearing before a county judge. The criminal statute was therefore inapplicable because there was no new trial involved. The state, in contending that the civil statute applied, based its argument on a reading of section 92.22 in conjunction with section 932.31, which states that rules relating to the competency of witnesses and evidence in civil cases shall prevail in criminal cases, except when otherwise provided by law. The Court did not answer this argument because it felt that, even if section 92.22 could apply to criminal cases, it had no applicability to the facts at hand. Since the evidence in question had been given at a preliminary hearing, it was not incorporated in a record of trial. Therefore, if the civil statute had any applicability, it would be only as to the second portion of that statute, which the Court construed to embrace testimony given at a former trial as distinguished from a preliminary hearing in a criminal case. The Court also pointed out that the statutes pertaining to preliminary examinations in criminal cases[85] indicate that the Legislature never intended that evidence given at a preliminary hearing could be used in a criminal trial. The Court, therefore, did not answer the defendant's contention that the admission of such evidence violated his constitutional right of confrontation. In the course of its opinion, however, the Court indicated that the nature of a preliminary hearing does not afford an accused an adequate opportunity to cross-examine on substantially the same issues as those at the trial.

CONCLUSION

The Florida statute regulating the use of former testimony in civil cases is not entirely satisfactory. It is the result of a series of amendments designed in some instances to incorporate, in others to frustrate, the pronouncements of the Court. It distinguishes between evidence

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[84] 65 So.2d 307 (Fla. 1953).
[85] FLA. STAT. c. 902 (1955).

incorporated in the outmoded bill of exceptions or in the record of the trial and recorded evidence not so preserved. The effect of this distinction is not at all clear, and there is no apparent reason for it in view of modern methods of reporting testimony. Both parts of this statute require a showing that the original witness cannot be produced. However, in the first portion this requirement is couched in terms of "can not be had," while the last portion requires that "a substantial reason [be] shown why the original witness . . . is not produced." These two phrases probably have the same meaning, but the difference in terminology merely adds to the confusion.

The approach suggested by the Uniform Rules should be considered for adoption in Florida, at least in regard to civil cases. Its effect would be to liberalize the prevailing law regarding admissibility of former testimony. This would be in harmony with the modern cases on the subject, which tend to permit wider use of this type of evidence.

The Uniform Rules present a more acceptable approach than the Model Code, which dispenses with the requirement of identity of parties and issues and relies solely on the test of relevancy for the admissibility of such evidence. In regard to availability of the witness it is only in a situation in which the witness is available but not present for cross-examination that the Model Code and the Uniform Rules differ. In such a case the Model Code leaves admissibility to the discretion of the trial judge, whereas the Uniform Rules make no provision for admissibility. In this respect the Model Code presents a sensible approach to the problem. If the witness is in fact unavailable, there is no reason for excluding the evidence, provided the other requirements of admissibility are met. If the witness is available and subject to cross-examination, there is no compelling reason for an absolute requirement that the live witness be used in preference to the former testimony. Either party can call the witness if necessary. When the witness is available but not present for cross-examination, however, it is reasonable to leave the admissibility of the former testimony to the discretion of the trial judge, so that undue delay in the trial can be controlled.

Therefore, the preferable solution would be a provision substantially embodying the principles of Rule 63 (3) of the Uniform Rules, amended to give the trial judge discretion to admit former testimony when the witness is available but not present for cross-examination. In any event the Uniform Rules, either amended as suggested, or in their present form, afford a reasonable and workable solution to the

problem of former testimony. It should be pointed out, however, that the Uniform Rules were meant to be adopted as a unit. Each provision was carefully fitted into the over-all scheme, and this must be borne in mind when considering proposals for the adoption of part of the Uniform Rules, or of any approach suggested by them.

Concerning criminal cases, the Uniform Rules go beyond the bounds of the Florida Court's interpretation of the constitutional right of the accused to meet the witnesses against him face to face. The present Florida statute pertaining to the use of former testimony in criminal cases, however, does not provide adequate coverage of the problem. It mentions only the use of former testimony at a new trial, leaving its use in other situations in a state of conjecture. It is of course possible that the Court will hold that the civil statute applies in a proper case not covered by the criminal statute. That this result would carry out the legislative intent is by no means clear. Moreover, the criminal statute limits unavailability to death or absence from the state, thereby eliminating the use of former testimony in other situations in which the witness is just as unavailable.

Situations involving the use of former testimony may not arise very often. When the problem does present itself, however, liberal provision should be made for the use of this generally reliable type of evidence. The attainment of a just result should not be hampered by ambiguous and unduly restrictive requirements often based on outmoded or misconceived reasons.