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Evidence--Former Testimony--Unavailability of Witness

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EVIDENCE—FORMER TESTIMONY—UNAVAILABILITY OF WITNESS.—A witness for the defendant at a former trial on a charge of homicide disappeared. Subpoenas were issued to the sheriffs of the county in which he resided and the county to which he was reputed to have gone. The first writ was returned unserved, the second not returned. The defendant then attempted to introduce the record of the former testimony of this witness. *Held*—this evidence was inadmissible because the unavailability of the witness was not sufficiently established. However, the court goes on to say in an able dictum that where a witness who testifies for the accused disappears through no fault of the parties and after diligent search cannot be found so as to testify at a later trial of the same party on the same issue, then the former testimony of the absent witness is admissible in evidence. *State* v. *Sauls,* 124 S. E. 670 (W. Va. 1924).

In the matter of the admissibility of former testimony in evidence courts have sometimes made a distinction between civil and criminal actions. The only plausible reason for such a distinction in this country and the reason generally assigned by the courts is the Constitutional guaranty of the right of confrontation, *i. e.,* the right of the accused to have the witness subjected to cross examination in his presence and before a jury. However the modern tendency and better view is that such right is satisfied by the former trial and the reproduction of the former testimony under certain conditions is permissible. See *Mattox* v. *United States,* 156 U. S. 239; *People* v. *Gilhooley,* 95 N. Y. Supp. 636, 80 N. E. 1116.

Textbooks quite generally state broadly that the evidence of a witness given at a former trial between the same parties may be introduced if the witness has died, become insane or sick and hence unable to testify, is out of the jurisdiction, or has been kept away from the trial by the opposite party. So far as civil actions are concerned this is probably a sufficiently accurate statement of the general rule. See *People* v. *Elliott,* 172 N. Y. 146, 64 N. E. 837; *Robbins* v. *State,* 82 Tex. Crim. Rep. 650, 200 S. W. 525. Inability to find the witness after a diligent search has been fovored by many courts as an additional form of unavailability warranting the admission of former testimony and may be said to represent the better view and the weight —of authority. See *Cuff* v. *Frazee, etc. Co.,* 14 Ont. L. Rep. 263.

The weight of authority favors the extension of the above rule in *toto* to criminal cases. See *People* v. *Elliott, supra; Robertson*

v. *State,* 63 Tex. Crim. Rep. 286, 142 S. W. 233. Also WIGMORE, EVIDENCE, § 1398 says, "In dealing with depositions and former testimony our courts have almost unanimously received them in criminal prosecutions as not being obnoxious to the constitutional provision. . . . Up to 1886, apparently the only contrary precedent not overruled was an early Virginia case afterwards often cited. . . This early Virginia ruling of so little weight in itself, served to keep a doubt alive; and in the last generation a few ill-considered rulings in other jurisdictions have followed it. Apart from these rulings, it is well and properly settled that such evidence—assuming always that there has been a due cross-examination—is admissible for the State in a criminal prosecution without infringing the Constitution."

The Virgina case to which Wigmore has reference is *Finn's Case,* 5 Rand. 701 (Va. 1827). This was a criminal case in which the witness at a former trial had since left the state. The court refused to admit a record of his former testimony and indulged itself in misleading dictum to the effect that former testimony was admissible only in civil cases and there properly only where the witness was dead. This dictum was followed without comment in *Brogy* v. *Commonwealth,* 10 Gratt. 722 (Va. 1853) and the *United States* v. *Angell,* 11 Fed. 34.

However by 1909 the Virginia court seems to have perceived the error in such a view for in *Parks* v. *Commonwealth,* 109 Va. 807, 63 S. E. 462 a criminal case, the court admitted the former testimony of a deceased witness. In justifying its departure from the precedent of its jurisdiction this court sets forth a strong argument to the effect that such evidence is admissible in civil cases where only property rights are at stake and since the safeguarding of life and liberty is far more important than mere property rights then such evidence should be admitted to secure the ends of justice. So it seems that the Virginia court has finally adopted the majority view in the matter of admissibility of former testimony in criminal cases and although it is dangerous to predict what a court will do it is certainly highly probable that the Virginia court is ready to go the full length in applying the rule of civil actions in this matter to criminal cases.

The principal case would also seem to indicate that the West Virginia court accedes to such a proposition and might be prepared to go a step farther in that it recognizes one of the most questionable forms of unavailability, *i. e.,* inability to find the former witness after a diligent search. WIGMORE, EVIDENCE, Volume

III, § 1405 says, "If a witness has disappeared from observation, he is in effect unavailable for the purpose of compelling his attendance" and later "Such a disappearance is shown by the party's inability to find him after a diligent search." Although in the principal case the evidence was excluded because the court did not deem the mere issuance of writs to the sheriffs of two counties a sufficiently diligent search, yet the dictum is so strong as to leave little doubt as to the attitude of the court in this matter.

The chief difficulty with this form of unavailability is the possibility of collusion, but our court specifically guards against such a thing when it says that the disappearance must have been through no fault of the parties. So that the matter of collusion and the question of the sufficiency of the search are quite properly left to the discretion of the trial court.

It is to be noted that our court in taking this stand with the better authorities expresses surprise in discovering that this proposition had never been established by judicial decision in this jurisdiction. —H. J. P.

LEASES—RENEWALS AND EXTENSIONS—NOTICE.—D leased certain property to P for five years with the right and privilege of renewing said lease for an additional period of five years; subject to the terms of the lease, except in event that if said lease being renewed and continued for the additional period the monthly rental shall be increased. *Held,* the lessee's failure to give the lessor direct notice before expiration of first term of his intention to continue the tenancy under the agreement will not deprive the former of his right to continue the tenancy. *Ammar* v. *Cohen,* 123 S. E. 582, (W. Va. 1924).

In this case D brought an action of unlawful detainer. P asks for an injunction restraining D from prosecuting the action and further decreeing P's right to continue the possession thereof as a tenant of D. The court granted the injunction and extended the lease for the additional period, stating that direct notice of renewal was unnecessary. This holding was based upon the fact that D had knowledge prior to the expiration of the lease, of P's intention to continue the tenancy. Whether or not the mere holding over by the lessee after the expiration of the term is sufficient, or whether direct notice or an affirmative act on the part of the