Evidence

ADMISSIBILITY OF FORMER TESTIMONY WHERE WITNESS UNAVAILABLE—NECESSITY OF PRIVITY OF PARTIES—FURTHER TRIAL OF CASE

In *Lord* v. *Boschert*, 47 Ohio App. 54, 189 N.E. 863, 40 O.L.R. 97, 16 Abs. 180. (Hamilton County, January 22, 1934) plaintiff brought an action for loss of consortium of his wife, who was injured in a collision between his car and that of the defendant, the injury being caused, as he claimed, by the negligent driving of the defendant. The plaintiff offered a transcript of the testimony of one Noelcke who had testified in the action by the plaintiff's wife against the defendant for her own injury. Noelcke died before the plaintiff's action was tried. The appellate court held that the evidence was not admissible since the plaintiff's action was not *a further trial of the case* as required by section 11496 of the statute.

The above statutee provides that after the death of a witness who had previously testified and upon following the proper procedure, the evidence may be received upon *a further trial of the case.* The statute does not provide that former testimony shall not be admitted in any other situation. Obviously, the offered testimony does not come within the wording of the statute, but such statutes are not usually regarded as setting forth all the grounds of admissibility. "It is here even clearer than in the case of depositions that the statutory enumeration of conditions of admissibility is not to be taken as exclusive." Wigmore, Vol. 3, section 1413, 2nd ed. (1923).

At common law testimony of a witness in a former trial of an action between the same parties was competent. This type of testimony is regarded by most courts and textwriters as hearsay. Hearsay is usually defined as a statement made at some other time than the trial of a case when offered for the truths of the facts contained therein. Inasmuch as Noelcke did not testify at the present trial but at a previous one it comes under the category of hearsay evidence. Hearsay or not, it offered some guarantee of trustworthiness, since it had been subjected to an oath and cross-examination. The law objects to hearsay evidence because it does not trust it. Where particular types of hearsay seem unusually trustworthy the law may admit them by making an exception to the hearsay rule. Testimony at a former trial offers a greater guarantee of trustworthiness than the average hearsay. Therefore the law

will generally admit such testimony whenever the absence of the witness is satisfactorily accounted for and the cause of action is between the same parties. This is the result reached under our modern decisions following the common law.

The common law rule admitted not only testimony in previous actions between the same parties but included also testimony between parties in privity with them. The law relaxed the rule to the extent of recognizing privity between the parties to the two suits as a sufficient compliance with the requirement of identity of parties. When the previous action was not between the same parties or parties in privity with them some courts automatically excluded evidence of prior testimony. Examples of this rigid view can be found in *Anderson* v. *Hultbery*, 247 Fed. 273, 248 U.S. 581 (1918), testimony taken at prior trial before arbitrators concerning the same trial, where plaintiff was neither party nor privy excluded. Technical privity and mutauality were necessary in *Metropolitan Street R. R.* v. *Ganby*, 199 Fed. 192 (1900). There, the first suit was by the injured minor through his guardian, grandmother, and the second suit was by the mother for loss of the child's services. Testimony, taken in the first case, of a witness later deceased, was excluded in the second on the ground of lack of privity. In *Lemmons* v. *State*, 129 Ala. 41, 29 So. 929 (1929), the testimony at a trial of another person for the same offense was excluded. The Michigan court in *Waterhause* v. *Waterhause*, 130 Mich. 89, 89 N.W. (1902) stated that lack of privity will exclude former testimony where the testimony in the first trial in which the plaintiff was then party in interest, but in the second action was plaintiff only as next best friend. The issues in both cases were identical as well as the defendants in the separate actions.

Technical privity is lacking in the principal case of *Lord* v. *Boshert supra.* Here we have the same dependant, the same injury, and the same issue, namely, negligence of defendant in causing injuries to Bertha Lord. However, the two plaintiffs in the two actions do not conform to the technical rule of privity. Hence, applying the strict application of the common law doctrine the former testimony of the deceased witness, Noelcke, is inadmissible. The few Ohio cases on this issue also follow the strict common law rule. This rule was laid down in *Wagers* v. *Dickey*, 17 Ohio 439, 49 A.D. 467 (1856). The court in *Hoover* v. *Jennings*, 11 Ohio St. 624 (1860) held in a suit by an administrators that it was not competent for him to show on the trial what was testified to by his intestate on a former trial. Depositions were not admissible against parties brought in after the depositions were taken

in *Bryan* v. *O'Connor*, 41 Ohio St. 368, 60 Dec. Rep. 1095, 6 W.L.B. 819 (1884). However, in *McCloskey* v. *Barr*, 47 Fed. 154, 165 (U.S. Circuit Court, Ohio, 1891) depositions of a life tenant, taken to show ownership of fee, was admitted under the present Ohio Statute Section 12221 in a partition suit to show identity of co-tenants out of possession. Property issue was regarded as placing parties in privity. A case similar to the principal case is *Oliver* v. *Ry. Co.*, 32 S.W. 759 (Ky.). The court excluded in the action for personal injuries by the wife, the testimony taken in a former action by the husband for loss of consortium against the same defendant for the same injuries.

The requirement of identity of parties is based on the ideas that the party against whom the evidence is offered should have an opportunity to cross-examine. It might be argued that the evidence should be admitted if some one with the same incentive as the party had an opportunity to cross-examine. In many cases, as in the actions of Lord and his wife against the defendant, the principal points to be litigated are the same, that is, the negligence of the parties, the extent of the injuries and the responsible cause of the collision. However, the law usually protects the litigant by giving him an opportunity to cross-examine personally. The rule is relaxed, nevertheless, when testimony in former trials between parties in privity is admitted. The privity test seems to be based on precedent rather than reasoning. If evidence in former trials should be admitted, it should be because of its inherent trustworthiness rather than because of the presence or absence of technical privity. Privity is often important in property law but there seems no sufficient reason for making it a test of the admissibility of evidence. If Mrs. Lord's judgment against the defendant had been reversed and a new trial held, a transcript of Noelcke's testimony would have been clearly admissible on the second trial. There would have been as much and no more reason to credit the testimony in the supposed case as in the actual one, yet in the first case the testimony would have been received, and in the second, excluded.

Illustration of admissibility without strict privity can be found in the following cases: In *Paton* v. *Great Northern Railway*, 135 Minn. 154, 160 N.W. 670 (1916) the father as the guardian brought an action for his son's injuries. A testified but soon after died. Later in the father's own action for loss of the boy's services A's testimony taken in the first action was received. The fact the father was a nominal plaintiff only in the first case and the real party in interest in the second did not exclude A's testimony taken in the first suit. The former testimony was admitted also in *Kreuger* v. *Sylvester*, 100 Iowa, 647, 69 N.W.

1059 (1897). The first case was a criminal proceeding by the state against the same defendant for assault and battery and the former testimony given in the criminal action was admitted in the later civil action. The court stated that "the admissibility of such evidence seems to turn on right of cross-examination rather than the precise identity of parties." In *Atlanta W. P. R. Co.* v. *Venable,* 67 Ga. 697 (1881) the former party was the mother suing for personal injuries; the present party was her child suing for her mother's death from those injuries. The former testimony given in the mother's own action was admitted. *In re Dumont,* 80 Conn. 140, 67 Atl. 497 (1897). The testimony of a deceased witness before a bar association grievance committee on charges against respondent was admitted in a disbarment proceeding, the court stated: "the requirement of identity of parties is only a means to an end; . . . the issues were substantially the same, and nothing more is necessary in that regard."

It should be noticed that in *Lord* v. *Boschert,* the suits were against the same defendant and that he had ample opportunity to cross-examine. Most of the issues were the same but in the principal case the plaintiff was suing for loss of consortium while in the former case the wife sued for own injury. The defendant had the same incentive to cross-examine in one case as the other. A common argument for the defendant in this type of case is that testimony could not be used against the present plaintiff and so should not be admitted for him. The equitable theory of mutuality is offered as a test of admissibility of evidence. Yet mutuality seems no more satisfactory than privity as a test. Good character may be offered by the defendant; bad character cannot be offered by the state unless the dependant opens the door. A confession made before trial may be received against the defendant; a third party's admission of guilt made out of court will not be received by the courts of most states. Testimony against a defendant for arson in criminal case is by a majority of the states admissible for the insurance company in a later action against it for destruction of the same building.

It would seem that, whenever the two cases present the same issue and facts and the defendant has previously had an opportunity to cross-examine the witness who has since become unavailable for the later case, such former testimony should not be excluded. Since the objection to hearsay is based upon a want of trustworthiness, the evidence should not be barred when the trustworthiness is sufficiently established by such an opportunity to cross-examine. On principle this testimony should be admissible whether there is technical privity or not.

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