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The Hearsay Rule in Arizona

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I. *What Is Hearsay?*

This article deals mainly with the problem of determining what is hearsay, with special emphasis upon Arizona cases, statutes and court rules; it will not concern the many exceptions to the hearsay rule. Dean Wigmore's definition is in substance that hearsay is a statement, oral or written, made at a time when there was no opportunity to cross-examine the declarant and offered to prove the truth of the words spoken or written.[1]

Professor McCormick's recent textbook proposes a slightly different definition: "Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."[2] It appears that the only difference in these two definitions involves the question whether depositions and prior testimony are to be treated as an exception to the hearsay rule, or as satisfying the requirements of the rule and therefore not hearsay. That question is considered in Part III of this article. Under the definitions of both Wigmore and McCormick an act or conduct implying a statement or opinion can be hearsay.[3]

* See Contributors' Section, p. 117, for biographical data.

[1] 5 WIGMORE, EVIDENCE §§ 1361, 1362 (3d ed. 1940); 6 *id.*, § 1766.

[2] McCORMICK, EVIDENCE 460 (1954).

[3] Concerning conduct as hearsay, see McCORMICK, *id.*, § 229. The leading case is Wright v. Doe d. Tatham, 7 Ad. & El. 313, 112 Eng. Rep. 488 (Exch. Ch.1837). To prove sanity of testator when the will was executed there were offered business and social letters to testator of a type which would not be written to a person regarded as insane. The letters were excluded: "Those letters may be considered in this respect to be on the same footing as if they had contained a direct and positive statement

Usually either the Wigmore or McCormick definition affords easy recognition of hearsay. A few Arizona cases as examples will suffice. In an election contest involving acts of A in fraudulently changing ballots a witness testified that B told him that B had changed only one ballot but that A had changed several ballots.[4] In a forcible entry and detainer action by a corporation, defendant claimed that he purchased the property from X, an employee of plaintiff; defendant testified that X told him that the superintendent of the corporation had made X a present of all the improvements.[5] Mercantile reports concerning a party to the litigation[6] and a copy of a certificate of discharge from the army, stating the reason for discharge, have been held to be hearsay when offered to prove the truth of the contents of the writings.[7] Expert opinion is held inadmissible if based even in part on hearsay statements.[8]

A recent Arizona case, *State v. Coey,* thoroughly considered the meaning of hearsay and in substance states with approval the Wigmorean definition of hearsay.[9] In a first-degree murder trial the county attorney said in his opening statement that the evidence would show that deceased's son "was dispatched to procure a soft drink so that this incident (killing) could occur in privacy." A deputy sheriff testified concerning a conversation he had with defendant subsequent to the killing: "I told him we had talked to the little boy and the little boy was positive that he didn't ask his father (defendant) for the money but that his father gave him the quarter and told him to go to the store and get the Coca-Cola." The state contended the testimony was not hearsay because "it was admitted on the theory that it was not intended to prove the substance of what the boy had said, but merely to show a conversation between the witness and the defendant." The answer to such contention is that the only relevancy of the conversation is the truth of what the boy said. The contention is an example of a vagarious localism,

that he was competent. For this purpose they are mere hearsay evidence . . . of the matter in question, with this addition, that they have acted upon the statements on the faith of their being true, by sending the letters to the testator. That the so acting cannot give a sanction for the truth of the statement is perfectly plain; for it is clear that, if the same statements had been made . . . to a third person, that would have been insufficient. . . . If a wager to a large amount had been made as to the matter in issue by two third persons, the payment of that wager . . . would not be admissable to prove the truth of the matter in issue."

[4] Hunt v. Campbell, 19 Ariz. 254, 169 Pac. 596 (1917).

[5] Willows Cattle Co. v. Connell, 25 Ariz. 592, 220 Pac. 1082 (1923).

[6] Young's Market Co. v. Laue, 60 Ariz. 512, 141 P.2d 522 (1943).

[7] Douglass v. State, 44 Ariz. 84, 33 P.2d 985 (1934).

[8] Security Benefit Assoc. v. Small, 34 Ariz. 458, 272 Pac. 647 (1928); Middleton v. Green, 35 Ariz. 205, 276 Pac. 322 (1929).

[9] 82 Ariz. 133, 309 P.2d 260 (1957). Although the discussion is dicta in that the Court affirmed notwithstanding erroneous admission of hearsay evidence because there was no prejudice in view of the entire record, the problem of what constitutes hearsay was considered at some length. 82 Ariz. at 139-141, 309 P.2d at 264-265.

"was-defendant-present?" test of hearsay.[10] The court disposed of this argument concerning the nature of hearsay in the following statement:

> As a general proposition, where an extrajudicial statement made by a person is introduced to prove the truth of the words spoken, and where there was no opportunity to cross-examine the declarant, as here, the statement constitutes hearsay . . . and is inadmissible unless it qualifies as an exception.
>
> We fail to perceive how the mere fact that the above witness and the defendant engaged in conversation was material to any issue in this case; it was the substance and not the fact of the conversation which had materiality. Therefore, the statements made by the boy could only pass the test of materiality if they were introduced to prove the truth of what he said, namely, that he did not ask to go to the store at a time just prior to the killing but that the defendant had in fact dispatched him to the store. Since there was no opportunity to cross-examine the declarant (boy) at the time the statement was made, and since the testimony fails to qualify as an exception, the evidence comes within the rule above set forth, and its admission, therefore, was error.[11]

Even though the witness is also the declarant and there is now an opportunity to cross-examine him as a witness, his declaration out of court is hearsay.[12] Since the requirement of opportunity to cross-examine is necessary for the purpose of testing the trustworthiness of the declarant's statements, with reference to his perception, memory, bias and interest, as well as the observation of his demeanor and need for the wit-

[10] Perhaps the origin of this idea is to be found in cases in which statements could not possibly have been "binding" upon a party either because not made by an agent within his authority or because not within the doctrine of admission by silence, and the Court merely points out that the statements were not adopted by the party by stating only that he was not present. Crowell v. State, 15 Ariz. 66 at 67, 136 Pac. 279 at 283 (1913); Ives v. Lessing, 19 Ariz. 208, 168 Pac. 506 (1917). Occasionally a court goes even further and applies a vague notion about "proof-only-of-what-was said" as not being hearsay. E.g., Fred Harvey Corp. v. Mateas, 170 F.2d 612 (9th Cir. 1948), involved injuries sustained when plaintiff allegedly was thrown from a mule, Chiggers, on a trip into Grand Canyon. A dictum says it was not error to admit conversation among the group about Chiggers' antics before plaintiff fell, even though defendant's guide was not present (if present it would have the non-hearsay purpose of giving knowledge of bucking propensity). The Court said, "Upon admitting the conversations for a limited purpose, the court informed the jury that the conversations were not to be considered as proof that anything which the conversations may have alluded to was a fact, but as proof only of what was said." But what relevancy do they have, if the guide was not present to receive notice of the mule's conduct, except to prove truth of the conversations, viz., that Chiggers was bucking?

[11] State v. Coey, 82 Ariz. at 141, 309 P.2d at 265.

[12] State v. Lane, 72 Ariz. 220, 226-227, 233 P.2d 437, 441 (1951) (dictum).

ness' oath,[13] Arizona has held that the trial court cannot admit hearsay to relieve a harsh situation.[14]

II. *Hearsay Rule Inapplicable*

There are of course out-of-court statements which are admissible because they are not offered for the purpose of proving the facts asserted in them; hence their value does not depend upon the veracity of the declarant. They are not hearsay exceptions; the hearsay rule is inapplicable to them because they are not offered to prove the truth of the contents of the statements.[15] In general, they may be classified into four groups.

A. Self-contradictory (Inconsistent) Statements

Inconsistent or self-contradictory statements of a non-party witness are not admitted as substantive proof of the facts contained in the statement but only for the purpose of impeachment, that is, to neutralize his testimony.[16] Of course if the statement is made by a party-opponent it can be used substantively as an admission (hearsay exception) as well as for impeachment.[17] It may be oral or written.[18]

B. Words the Facts in Issue

When the statements are the subject of inquiry, that is, the operative facts constituting the basis of the claim, it is obvious that they are not hearsay.[19] Thus, in proving an alleged oral contract, the offer and acceptance are the facts in issue and are not offered to prove the truth of anything said. The same is true of a written contract in issue. The same principle applies to defamation, perjury and lost will cases. Indeed, in the defamation and perjury cases after plaintiff proves that the words were spoken he hopes to establish that they are false.

[13] 5 WIGMORE, EVIDENCE § 1362 (3d ed. 1940); MCCORMICK, EVIDENCE § 224 (1954).

[14] Inspiration Consol. Copper Co. v. Bryan, 31 Ariz. 302, 252 Pac. 1012 (1927).

[15] 6 WIGMORE, EVIDENCE § 1770 (3d ed. 1940); MCCORMICK, EVIDENCE § 228 (1954).

[16] Shaffer v. Territory, 14 Ariz. 329, 127 Pac. 746 (1912); Otero v. Soto, 34 Ariz. 87, 267 Pac. 947 (1928); Brooks v. Neer, 46 Ariz. 144, 47 P.2d 452 (1935); State v. Lane, 69 Ariz. 236, 211 P.2d 821 (1949). *Cf.* Rowe v. Goldberg Film Delivery Lines, Inc., 50 Ariz. 349, 354-355, 72 P.2d 432, 435 (1937), stating that trier of fact may "accept either statement which it wishes as true, or, on account of the discrepancy, may disregard the testimony of the witness entirely." But that case involved self-contradictory statements of a party, admissible substantively as an admission as well as for impeachment purposes; as an admission of a party-opponent it is a hearsay exception.

[17] Rowe v. Goldberg Film Delivery Lines, Inc., *supra* note 16, People v. Southack, 39 Cal. 2d 578, 248 P.2d 12 (1952).

[18] Tamborino v. Territory, 7 Ariz. 246, 64 Pac. 492 (1901); Shaffer v. Territory, 14 Ariz. 329, 127 Pac. 746 (1912); Buehman v. Smelker, 50 Ariz. 18, 68 P.2d 946 (1937) (prior pleading, though superseded); Posner v. N. Y. Life Ins. Co., 56 Ariz. 202, 106 P.2d 488 (1940).

[19] 6 WIGMORE, EVIDENCE § 1770 (3d ed.); MCCORMICK, EVIDENCE 463-464 (1954); Hartford v. Faw, 166 Wash. 335, 7 P.2d 4 (1932).

C. Verbal Acts Part of Conduct in Issue

Words which are part of the conduct in issue(verbal acts) are not hearsay because they are not offered to prove the truth of the facts stated.

Suppose defendant was indebted to plaintiff both on an open account and on a promissory note; plaintiff sues defendant on the note; and defendant pleads payment of the note. Defendant's witness testifies that he saw defendant hand plaintiff money and heard defendant say to plaintiff, "Apply this money on the note, not on the open account." Payment is the issue—the physical act of handing over the money coupled with the verbal act of giving directions upon which debt to make application of the money constitute the conduct in issue.

A Minnesota case furnishes a good example.[20] Plaintiff leased land to a tenant, the lardlord to receive two-fifths of the corn. When the tenant was about through husking he pointed to two cribs of corn and said to plaintiff, "Here is your corn; this belongs to you, Mr. Hanson." Previously the tenant had mortgaged his interest in the corn to a bank. After the husking and the tenant's conversation with the lessor, the bank sold the corn, including that in the two cribs. The lessor sued the bank for conversion. The words of the tenant were part of the conduct of landlord and tenant in creating separate ownership in property which formerly was owned as tenants in common. So it was held that the words were not hearsay.

This principle has been applied in Arizona. In an action by a bank on promissory notes defendant contended that the bank was negligent in disposing of cotton which was pledged as security for the notes. Plaintiff offered evidence of orders and directions to the bailee of the cotton. Defendant objected that such evidence was hearsay and self-serving. The evidence was held admissible and not hearsay. The Court said the orders and directions of plaintiff to the bailee were verbal acts bearing on the issue of negligence.[21] Incidentally, it should be noted that the Court correctly held that the fact that the evidence is "self-serving" is not a good objection if it is otherwise admissible.[22] The objection that a question calls for self-serving declarations of a party does not add anything to the objection that it calls for hearsay; they are "merely hearsay with a vituperative epithet."[23]

[20] Hanson v. Johnson, 161 Minn. 229, 201 N.W. 322 (1924).

[21] Pawley v. First Nat. Bank, 32 Ariz. 135, 256 Pac. 507 (1927).

[22] *Accord,* Richfield Oil Co. v. Estes, 55 Ariz. 81, 98 P.2d 851 (1940). *Cf.* Ives v. Lessing, 19 Ariz. 208, 210, 168 Pac. 506 (1917) (after holding testimony hearsay the Court said, "It is also self-serving, and for that reason was properly rejected.")

[23] Dean Hardman, *Hearsay: "Self-serving" Declarations,* 52 W. VA. L.R. 81 (1950); MCCORMICK, EVIDENCE 588 (3ed ed. 1954):

> The doctrine that a party's out-of-court declarations or statements cannot be

In another Arizona case applying the "verbal act" principle it was material to show that defendant received notice of a transaction between X and plaintiff. Defendant's clerk testified that he received a communication from X concerning the transaction. It was held admissible to prove notice was received by defendant but not to prove what the transaction was.[24]

D. Words as Circumstantial Evidence of a State of Mind

In a criminal case in which insanity is the defense it is quite obvious that if defendant's witness testified that shortly before the act defendant said, "I am Napoleon," this would not be hearsay because it is not offered to prove the truth of the statement but as circumstantial evidence of his mental condition. If an utterance or writing is offered to prove a state of mind or quality of conduct (knowledge, belief, good faith, reasonableness, diligence, motive, etc.) of a person, and is not offered to prove the truth of the words spoken or written, it is not hearsay but is circumstantial evidence of the state of mind or quality of conduct.[25] This principle must be distinguished from the hearsay exception for words *expressing* a state of mind.[26]

The words need not be spoken or written by the person whose state of mind is involved; they may be spoken or written to him and offered to show the effect on the mind of the hearer or reader. Under a statute prohibiting carrying concealed weapons unless one has good reason to apprehend a serious attack, a witness testified for defendant that X told the witness that Y had threatened to kill defendant and that the witness then told defendant that Y had threatened defendant. This evidence was admissible, not to prove that Y made the threats, but to prove defendant's state of mind.[27]

evidence in his favor, because "self-serving," seems to have originated as a counter-part and accompaniment of the rule, now universally discarded, forbidding parties to testify. When this latter rule of disqualification for interest was abrogated by statute, the accompanying rule against "self-serving" declarations should have been regarded as abolished by implication. Unfortunately it has lingered in the language of many opinions as a sweeping rule of exclusion.

Actually the appropriate rule for the exclusion of a party's declaration offered in his own behalf as evidence of the truth of the facts declared is the hearsay rule. Correspondingly, when such declarations fall within the exceptions to the hearsay rule, which are designed to admit hearsay statements when specially needed and unusually trustworthy, they should be admitted though made by a party and offered in his behalf.

[24] Carrillo v. Murray & Layne Co., 25 Ariz. 303, 216 Pac. 689 (1923).

[25] 6 WIGMORE, EVIDENCE §§ 1789, 1790 (3d ed. 1940); McCormick on Evidence 464-465 (1954).

[26] McCORMICK, *id.* §§ 268-270.

[27] Hurst v. State, 101 Miss. 402, 58 So. 206 (1912), approved in 6 WIGMORE, EVIDENCE § 1789 (3d ed. 1940); People v. Jones, 293 Mich. 409, 292 N.W. 350 (1940) (detectives tried for assault on R; letter admissible accusing defendants of extortion written by R and shown to defendants before assault; ". . . not objectionable as hearsay because it was not offered to establish the substantive truth of its con-

In an Arizona case the defense to a lessee's action for breach of a lease was that plaintiff consented to its termination. To rebut that contention plaintiff offered his letter written a few days after eviction stating that thirty days notice of termination was not given and hence plainiff was entitled to damages. The letter was held admissible as circumstantial evidence of his state of mind close to the time of eviction.[28]

Although the admissibility was not questioned on appeal in another Arizona case it is believed that a similar analysis applies.[29] A horseman sued the owner of the horse and his agent to recover damages for personal injuries allegedly sustained when the horse reared up and fell on the rider. Plaintiff offered evidence of the statement of the agent that the horse had thrown a rider before this event. As against the agent who was a defendant this is a hearsay exception, admission of a party-opponent; but as against the employer the Court seems to have had in mind the "circumstantial evidence of a state of mind" principle as indicated by the following language: "It is also the law that knowledge of the agent or servant of the vicious tendencies of the animal is imputable to the principal if the care or control of the animal is within the scope of the agent's employment. . . . It was admissible against appellee upon the ground that it was a statement or declaration of its agent before the accident occurred, about the conduct of a horse the control of which fell within the scope of his employment. . . ."

III. *Prior Testimony*

Evidence may be received in a pending case in the form of a written transcript or an oral report of a witness's former testimony under requirements adopted to afford an adequate opportunity of cross-examination. There is sharp disagreement concerning what those requirements are and should be. The offered evidence may have been given by deposition or at a trial either in a separate case or in a prior hearing in the pending action.

The classification of prior testimony as an exception to the hearsay rule, on the one hand, or as a satisfaction of the requirements of that rule, on the other hand, should depend upon the definition of hearsay. Since the definition generally stated by the courts includes the lack of opportunity to cross-examine the declarant when the words were spoken,

tents, but to show that defendants knew that Roberson made the accusations. From this the jury was asked to infer a motive of retaliation."); Crespin v. Albuquerque Gas & E. Co., 39 N.M. 473, 50 P.2d 259 (1935) (personal injury action; shock when plaintiff picked up live wire; plaintiff's evidence that fellow employee told him current was off, held not hearsay — shows listener's state of mind bearing on reasonableness of his conduct).

[28] Richfield Oil Co. v. Estes, 55 Ariz. 81, 98 P.2d 851 (1940).

[29] Walters v. Southern Ariz. School for Boys, 77 Ariz. 141, 267 P.2d 1076 (1954).

logically prior testimony should be considered as a satisfaction of the hearsay rule requirements and not as an exception, because an opportunity to cross-examine is insisted upon as a condition of admission of prior testimony. Especially does this classification seem correct when a deposition or prior testimony in the same action between the same parties is involved. When equity cases were tried entirely on depositions it probably was not considered that the entire trial was based on hearsay.[30] But the courts and textwriters now disagree on such classification. Wigmore takes the view that the testimony satisfies the hearsay rule.[31] McCormick takes the opposite view "by adopting a definition of hearsay which would include all testimony given by deposition or at a previous trial or hearing, in the present or another litigation, provided it is now offered as evidence of the facts testified to. Only given orally at the present trial or hearing, and subject to cross-examination, would when offered to prove the facts recited escape the name of hearsay."[32] He considers the classification as an exception of some importance because "it probably facilitates the wider admission of former testimony, which is generally of a relatively high degree of trustworthiness, under a liberalized exception."[33]

The large majority of cases have held that not only must the prior testimony be offered on the same issue, and against a party, or privy, who was also a party to the prior action with opportunity to cross-examine, but the parties on *both* sides must be the same or be in privity with a prior party, who must have been the dominant party in the sense of successive relationships to the same rights of property. A leading case supporting this strict majority view is *Metropolitan Street Railway Co. v. Gumby.*[34] A mother sued for the loss of services of an infant son in a negligence action. In a prior case the son had sued by his grandmother as guardian ad litem to recover for pain and suffering and disability caused by the same accident. The testimony of a deceased witness at the first trial was offered by the plaintiff in the second trial. Notwithstanding the testimony was offered against the same defendant and the mother would have no cause of action unless the son had a cause of action, the testimony was held inadmissible. The court said:

> Manifestly, no such mutual or successive relationship exists between the infant, claiming damages for his pain and suffering,

[30] Prior to Federal Equity Rules of 1912 "testimony by deposition in suits in equity was the standard and usual method of evidence in the federal courts." DONIE, FEDERAL PROCEDURE 716 (1928); MOORE, FEDERAL PRACTICE par. 26.03(2) (2d ed. 1950).

[31] 5 WIGMORE, EVIDENCE § 1370 (3d ed. 1940).

[32] McCORMICK, EVIDENCE 480 (1954).

[33] *Id.* at 481. The Uniform Rules of Evidence, proposed by the Commissioners on Uniform State Laws, Rule 63(3) considers prior testimony an exception to the rule against hearsay.

[34] 99 Fed. 192 (2d Cir. 1900).

and his mother, claiming damages for the loss of his services. The causes of action are distinct, and neither claimant could under any circumstances succeed to the other's cause of action. . . .

It should further be noted that testimony of a witness on a former trial cannot be admitted against one of the parties to a subsequent trial unless it could be admitted against the other.[35]

The *Gumby* case, requiring the property test of privity as well as mutuality or reciprocity to be satisfied, even though there was the same opportunity and motive for cross-examination of the witness by the same defendant in both actions, was applied in *United States v. Aluminum Company of America*.[36] The government offered testimony of a deceased witness on the same issue in a prior action by the Federal Trade Commission against the same defendant; it was inadmissible because the United States was the dominant party, so there was no privity and no "reciprocal right in the other party to introduce it."

A striking case of this strict view is an Illinois decision which held inadmissible, in an action to recover for loss under a fire insurance policy, the testimony of the state's witness in a prior trial of plaintiff for feloniously burning the property with intent to defraud the insurance company, the witness having been shot and killed by plaintiff.[37]

A minority of courts have abandoned the requirement of privity and reciprocity if the party *against* whom the testimony is offered was a party in the former action, so that there is present the opportunity of that party to cross-examine. Thus, the deposition of an employee who sued under the Federal Employers' Liability Act was held admissible after his death when his executor was substituted as plaintiff for recovery of damages for wrongful death on behalf of his widow.[38] It has been held by the Court of Appeals, Tenth Circuit, that depositions taken in a prior action for infringement of a patent were admissible against the same plaintiff in a subsequent action against other defendants for infringement of the same patent.[39]

A few cases have gone further in admitting former testimony. For example, in a Missouri case a wife sued for her personal injuries in alighting from a bus.[40] In a prior case her husband sued for loss of services of the wife from the same accident. Defendant was allowed to

[35] *Id.* at 198-199. In Rumford Chemical Works v. Hygenic Chemical Co., 215 U.S. 156 (1909), testimony of decedent in action for own injury was excluded in action by administratrix for benefit of family.

[36] 1 F.R.D. 48 (S.D.N.Y. 1938).

[37] McInturff v. Insurance Co. of N. Am., 248 Ill. 92, 93 N.E. 369, 140 Am.St.Rep. 153, 21 Ann.Cas. 176 (1910).

[38] Mid-City Bank & Trust Co. v. Reading Co., 3 F.R.D. 320 (D.N.J.1944).

[39] Insul-Wool Insulation Corp. v. Home Insulation, 176 F.2d 502 (10th Cir. 1949).

[40] Bartlett v. Kansas City Public Service Co., 349 Mo. 13, 160 S.W.2d 740, 142 A.L.R. 666 (1942).

introduce prior testimony of witnesses in the husband's case. One attorney for the husband also represented the wife. It is to be noted that there was not technical privity here because there were two separate claims, and the evidence was admitted against a party who was not a party in the first action. Even that case does not go as far as Wigmore and McCormick would go, because in the Missouri case the court stresses the family relationship of the two plaintiffs and the fact that both had the same trial attorney. Dean Wigmore wrote:

> 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; and the determination of this ought to be left entirely to the trial judge.[41]

Of Wigmore's view it has been pointed out that if, for example, the derailment of a train has caused injury to a score of passengers and a witness has testified to the circumstances of the accident in an action brought by X to recover for his injuries, and has since died, the evidence of such witness may be read by any other injured passenger upon the subsequent trial of his action for damages.[42] But it would also be admissible if offered by the railroad against any of the other passengers. There is some risk in the latter situation; suppose the first case involved lesser injuries and the plaintiff's case was not prepared well and the cross-examination not thorough; nevertheless under Wigmore's view the testimony would be admissible against all of the other injured plaintiffs.

Arizona Rules, Statutes and Cases

Arizona Rule of Civil Procedure 43(e), which is of statutory origin and not in the Federal Rules, limits use of transcript of testimony to "a subsequent trial or proceeding had in the same action." If strictly construed this could mean that it is not usable if the action is dismissed without prejudice and a new action is filed on the same claim. But it could be more liberally construed to mean the same claim or cause of action.[43] Even that result would be more strict than most modern cases

[41] 5 WIGMORE, EVIDENCE § 1388 at p. 95 (3d ed. 1940); see MCCORMICK, EVIDENCE §§ 232, 238 (1954).

[42] Circuit Judge LaCombe in Metropolitan Street Railway Co. v. Gumby, 99 Fed. 192 (2d Cir. 1900).

[43] Concerning the statutory predecessor of Rule 43(e) it is said in Inspiration Consol. Copper Co. v. Bryan, 31 Ariz. 302, 310, 252 Pac. 1012, 1015 (1927):

> It is the contention of defendant that this statute is one of the most rigid in the United States, and should therefore be strictly construed . . . The

which require only that the testimony concern the same issue although there may be a difference in the theories of the actions or in the nature of the relief sought or even in the causes of action or defenses.[44]

The statute of which Rule 43(e) is the successor has been held to prevent plaintiff's use of the transcript of testimony of witnesses in a personal injury action in a later action by the administratrix of the first plaintiff in a wrongful death action for the benefit of the widow and children arising out of the same accident because there were different parties plaintiff and different actions and causes of action.[45] However, in an action under the Employers' Liability Act substitution of the parents of deceased as plaintiffs instead of his administrator after the first trial does not preclude use of the prior testimony.[46]

In Arizona transcribed testimony in a court of record in both civil and criminal cases may be used in a subsequent trial of the same case only if "the witness dies or is beyond the jurisdiction of the court" in which the action is pending.[47] Yet depositions in civil and criminal cases and testimony at preliminary hearings in criminal cases may be used if for *any* reason the witness is unavailable.[48] Suppose the witness has become insane, or his memory has failed concerning the facts, or there is a supervening disqualification of the witness, or the exercise of a privilege not to testify.[49]

It is incongruous that prior testimony in a court of record, though of a higher order, has less extensive use from the standpoint of unavailability of the witness than depositions and testimony at preliminary hearings. Probably the only explanation is historical—the rules dealing

> premise may be true, but if so it is all the more reason that in the interest of justice the construction of the statute should be liberal. Its object is to supply a method of producing evidence before a court which is material and admissible, but which cannot otherwise be obtained. We think that in view of this obvious and salutary purpose we should construe the statute so as to effect that purpose and not to defeat it . . .

[44] McCORMICK, EVIDENCE § 233 (1954).

[45] Tom Reed Gold Mines Co. v. Moore, 40 Ariz. 174, 11 P.2d 347 (1932).

[46] Inspiration Consol. Copper Co. v. Bryan, 31 Ariz. 302, 252 Pac. 1012 (1927).

[47] Ariz. Rules of Civil Proc., Rule 43(e); Ariz. Rules of Criminal Proc., Rule 256. Although the rules specifically mention reading the transcript the court reporter may read from his notes. Estate of Sorrells, 58 Ariz. 25, 117 P.2d 96 (1941). It is proper under Crim. Rule 256 to read to the jury in the second trial of a criminal case testimony of a witness now out of the state notwithstanding Arizona has adopted the Uniform Act to Secure Attendance of Out of State Witnesses, A.R.S. § 13-1863. State v. Jordan, 83 Ariz. 248, 320 P.2d 446 (1958).

Absence from state need not be permanent. Inspiration Consol. Copper Co. v. Bryan, *supra* n. 46. Sufficient foundation is laid by testimony showing reasonable efforts to locate absent witness. B. W. L. Sam v. State, 33 Ariz. 383, 265 Pac. 609 (1928). But an affidavit is insufficient. Valuenuela v. State, 30 Ariz. 458, 248 Pac. 36 (1926); see McCreight v. State, 45 Ariz. 269, 42 P.2d 1102 (1935).

[48] Depositions in civil cases, Rule 26 (d)(3); in criminal cases, A.R.S. § 13-1905; testimony at preliminary hearings, Rules of Crim. Proc., Rule 30.

[49] Unavailability of the witness is discussed in 5 WIGMORE, EVIDENCE §§ 1401-1414 (3d ed. 1940); McCORMICK, EVIDENCE § 234 (1954).

with use of testimony in a court of record are taken from early statutes. The statutes and court rules dealing with prior testimony show the need of improvement to avoid this incongruity concerning unavailability of the witness, and to permit use of former testimony against a party if he had the opportunity and motive to cross-examine the witness concerning the same issue in the prior action even though the claims or defenses may not be identical.