

EVIDENCE--WITNESS--CRIMINAL PROCEDURE: Evidence of former testimony of a witness given at a prior trial and preserved in Bill of Exceptions is admissible against a defendant at a subsequent trial where the presence of the witness cannot be obtained for statutory reasons.

September 20, 1935. 9-20

Honorable G. Logan Marr
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Versailles, Missouri



Dear Sir:

We acknowledge your request of September 7, 1935, for an opinion, which reads as follows:

"There was a former trial of a state case which resulted in a mistrial and the case is up for hearing again. One of the important state witnesses has been confined in the state sanitorium at Mt. Vernon for Tuberculosis, apparently he will be physically unable to attend court. Is it possible to use his evidence given in the former trial? If you have any recent authorities, I would appreciate very much if you would send them to me."

Section 1780 R. S. Mo. 1929, provides:

"Examinations or dispositions taken and returned in conformity to the provisions of this article may be read and used as evidence in the cause in which they shall have been taken, as if the witnesses were present and examined in open court on the trial thereof. The facts which would authorize the reading of the deposition may be established by the testimony of the deposing witness or the certificate of the officer taking the same: First, if the witness resides or is gone out of the state; second, if he be dead; third, if by reason of age, sickness or bodily infirmity he be unable to or cannot safely attend court; fourth, if he reside in a county other than that in which the trial is held, or if he be

gone to a greater distance than forty miles from the place of trial without the consent, connivance or collusion of the party requiring his testimony; fifth, if he be a judge of a court of record, a practicing attorney or physician, and engaged in the discharge of his official or professional duty at the time of the trial."

Section 1714 R. S. Mo. 1929, provides:

"Whenever any competent evidence shall have been preserved in any bill of exceptions in a cause, the same may be thereafter used in the same manner and with like effect as if such testimony had been preserved in a deposition in said cause, but the party against whom such testimony of any witness may be used shall be permitted to prove any matters contradictory thereof as though such witness were present and testifying in person."

Article II, Section 22, Missouri Constitution provides:

"In criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy, public trial by an impartial jury of the county."

In the case of *State v. Harp*, 6 S. W. (2d), 562, the Supreme Court in Banc passed favorably on the right of the State to use testimony of a witness taken at a former trial and preserved in a Bill of Exceptions, and quoted approvingly at l. c. 564 from 8, R. C. L. 88, as follows:

"The admission of evidence given on a former trial or in a prior state of the same proceeding, where the issues are the same in both instances--another

exception to the rule against hearsay--was at one time though in some jurisdictions to be an infringement of the defendant's constitutional right; but this is not the view usually taken at the present time. The confrontation of the witness at the former trial, if the defendant had the opportunity to cross-examine, is sufficient compliance with the constitutional requirement and the testimony thus given may be used at the trial, provided the witness is not legally available. * * * Among the circumstances in which the rules of evidence allow this testimony is the absence from the jurisdiction of the witness who previously testified, and this is true although the prosecution may have neglected an opportunity to subpoena him before he left the jurisdiction.' "

CONCLUSION.

We are of the opinion that testimony of a witness taken at a former trial of a criminal cause, and preserved in a Bill of Exceptions, can be used by the State upon a preliminary showing in the record that said witness is confined at the Tubercular Hospital at Mount Vernon, suffering from tuberculosis, and physically unable to attend Court by reason of said sickness.

In the Happ case the testimony at a former trial was allowed, and read in evidence, when it was shown that the witness was absent the jurisdiction of the Court in another state at the time of the subsequent trial. In that case the prosecutor resorted to the first reason set out in Section 1780, supra, for using the testimony at a former trial. In the case at bar you desire to resort to the third reason set out in the Statute, namely, that your witness cannot safely attend Court because of sickness and bodily infirmities. In both instances a statutory reason is apparent and we believe that to all intentions and purposes, a witness suffering with active tuberculosis, this witness's presence at the subsequent trial is just as unattainable as if the witness be dead. The defendant was

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confronted with the witness at the former trial where the witness was subject to cross-examination, If the evidence was admissible in the one case there is no good reason why it is not admissible in a subsequent trial against the same defendant for the same offense where a statutory reason be given for admitting said evidence.

Respectfully submitted

WM. ORR SAWYERS
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APPROVED:

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WOS:H