Former Testimony: A Comparison Of The California And Federal Rules Of Evidence

I. INTRODUCTION

The California[1] and federal[2] codifications of the former testimony exception to the hearsay rule represent an effort to balance

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[1] CAL. EVID. CODE § § 1 *et seq.* The relevant sections are:

§ 1290. As used in this article, "former testimony" means testimony given under oath in:
(a) Another action or in a former hearing or trial of the same action;
(b) A proceeding to determine a controversy conducted by or under the supervision of an agency that has the power to determine such a controversy and is an agency of the United States or a public entity in the United States;
(c) A deposition taken in compliance with law in another action; or
(d) An arbitration proceeding if the evidence of such former testimony is a verbatim transcript thereof.

§ 1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:
(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or
(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.
(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:
(1) Objections to the form of the question which were not made at the time the former testimony was given.
(2) Objections based on competency or privilege which did not exist at the time the former testimony was given.

§ 1292. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if:
(1) The declarant is unavailable as a witness;
(2) The former testimony is offered in a civil action; and
(3) The issue is such that the party to the action or proceeding in

the constitutionally protected right to confront witnesses[3] against the need for reliable evidence in the litigative fact-finding process. Although in general the federal rules relating to former testimony resemble their counterparts in the California Code, the federal rules achieve this balance more effectively in a few important areas. After an initial discussion of the substance and rationale for the former testimony exception, this article will focus on the areas of difference between the respective statutes, which are few but crucial.

"Former testimony" is testimony taken under oath at a hearing or action prior to the one in which it is being offered in evidence.[4] For example, in the retrial of a case that had ended in a mistrial, the court was justified in admitting into evidence former testimony given under oath by two witnesses who had died since the original trial.[5]

To be admitted, evidence of former testimony must comply with several criteria, which include: 1) a requirement that the original declarant be unavailable to testify at the hearing at which the former testimony is offered; 2) a limitation of the types of hearings from which former testimony may be introduced; and 3) a substantial identity of parties and of issues.

Former testimony has long been regulated by statutes, which are usually construed as reflections of the common law.[6] Where the

> which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.
> (b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to objections based on competency or privilege which did not exist at the time the former testimony was given.

CAL. EVID. CODE § § 1290-92 (West 1968).

[2] 28 U.S.C. FED. R. EVID. 101 *et seq.* (1975). The relevant rule is 804(b)(1), which reads:

> Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

FED. R. EVID. 804(b)(1).

[3] U.S. CONST. AMEND. VI, which reads in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to confront the witnesses against him . . ."

This guarantee was made applicable to state trials through the due process clause of Amendment XIV in Pointer v. Texas, 380 U.S. 400 (1965).

[4] E. CLEARY ET AL., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 254 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)].

[5] Mattox v. United States, 156 U.S. 237 (1895).

[6] 6 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES

common law imposes a restriction or allows the admission of evidence not specifically covered by the statute, the common law doctrine will prevail, unless the circumstances show a legislative intention to abrogate it.[7]

Former testimony when used to prove the truth of the matter asserted is hearsay evidence[8] and is admissible only through an exception to the hearsay rule.[9] A statement offered to prove the truth of the matter asserted must meet three indicia of reliability: an oath;[10] cross-examination by the opposing party;[11] and the declarant's demeanor evidence.[12] Former testimony lacks only the reliability provided by demeanor evidence. In the dry reading of an unavailable declarant's transcribed testimony, the judge or jury has no opportunity to observe the witness' gestures, tone of voice, or carriage, and thereby to gauge his[13] veracity.

II. RATIONALE FOR ADMISSION

The rationale for the hearsay exception admitting former testimony is a dual one: 1) former testimony is admitted only to satisfy a special need for evidence, and 2) former testimony as defined by the governing statutes is a highly reliable form of hearsay, having been given under oath and subject to the opportunity for cross examination.

APP. 308 (1964). [hereinafter cited as 6 CAL. LAW REV. COMM'N].

[7] MCCORMICK (2d ed.), *supra* note 4, § 254 at 615.

[8] *See* Comment, *Hearsay: The Threshold Question*, this volume.

[9] However, a minority view, to which Wigmore subscribed (5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1370 (Chadbourn rev. 1974) [hereinafter cited as 5 WIGMORE]), is that former testimony is admissible because it "satisfies the [hearsay] rule." B. WITKIN, CALIFORNIA EVIDENCE § 596 (2d ed. 1966). According to this formulation, the hearsay rule excludes only testimonial statements "which have not been in some way subjected to the test of cross-examination." 5 WIGMORE, *supra* this note, § 1362. Since former testimony is admissible only when it has been subjected to cross-examination at the earlier hearing, it is not considered hearsay under Wigmore's definition.

[10] Although the oath has lost much of its potency as a religious and ceremonial tool, it does serve to remind the declarant of the criminal penalties for perjury and thus tends to compel veracity. Because a declarant who makes a statement not under oath has no perjury liability, such a statement is excluded as hearsay. To be admissible, former testimony must have been taken under oath. MCCORMICK (2d ed.), *supra* note 4, § 245 at 582, § 255 at 616.

[11] Cross-examination is considered the most important of the three indicia of reliability. 5 WIGMORE, *supra* note 9, § 1367. To be admissible, former testimony must have been subjected to cross-examination at the former hearing. *See* discussion in text accompanying notes 21-28 *infra*.

[12] Demeanor allows the trier of fact to evaluate the declarant's credibility according to his conduct and attitude while testifying in court. MCCORMICK (2d ed.), *supra* note 4, § 245 at 582.

[13] In accord with standard usage, the male pronoun will be used generically. The author makes this concession to avoid distracting the reader, but does not wish to indicate approval of the use of the male pronoun when referring to a party

A. SPECIAL NEED

Originally, English law required that testimony be given only in the presence of the accused.[14] At common law, classification of former testimony as hearsay precluded its admission in court. However, in *Morley's Case*,[15] the House of Lords decided, prior to the trial of a murder case, that if any of the witnesses who had been examined before the coroner were dead or unable to travel, the record of their examinations might be read after the coroner's taking an oath that he would not add or delete any part of the testimony he reported.

This was an early recognition that the state's need for reliable evidence may prevail over the defendant's interest in actually confronting the witnesses at trial. Former testimony was admissible only when the declarant was unavailable to testify in court himself, and originally only when the declarant had died.[16] Eventually, the number of occasions upon which the witness could be deemed unavailable for purposes of introduction of former testimony was increased.[17] The several criteria presently used to determine witness unavailability are discussed below.[18]

B. SPECIAL RELIABILITY

Former testimony is recognized as a particularly reliable form of evidence. Without such reliability, even the court's special need for the evidence would not justify admission.[19] This special reliability derives from the circumstances under which the testimony is taken: the declarant swears an oath which binds him to speak truthfully under penalty of perjury; he testifies in the solemn atmosphere of a judicial proceeding; he must submit to cross-examination;[20] and he

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who may be either male or female.

[14] COKE, 2 INST. p.49 (*cited in* Annot., 15 A.L.R. 495, 496 (1921)).

[15] 6 Howell's State Trials 770 (1666).

[16] MCCORMICK (2d ed.), *supra* note 4, § 253 at 609.

[17] Annot., 15 A.L.R. 495, 499 (1921).

[18] *See* text accompanying notes 35-100 *infra*.

[19] . . . The traditional policy is adhered to, namely that the probative value of hearsay is not a mere matter of weight for the trier of fact, but that its having any value at all depends primarily upon the circumstances under which the statement was made. The element of unavailability of the declarant or the fact that the statement is the best evidence available is . . . for the most part a minor factor or no factor at all.

Commissioners on Uniform State Laws, *Comment on Uniform Rule of Evidence 63, quoted in* 6 CAL. LAW REV. COMM'N, *supra* note 6, at APP. 307-08.

[20] If the party opponent at the former hearing had an adequate opportunity to cross-examine the declarant, this requirement is satisfied. *See* text accompanying notes 104 *et seq. infra*.

knows that his testimony is being recorded verbatim by a court reporter. Live testimony taken at trial has an additional index of reliability: the demeanor evidence furnished to the jury while the witness testifies. Former testimony must necessarily forego the advantage of such demeanor evidence, but the other elements are considered sufficient to insure a high degree of reliability.

1. CROSS-EXAMINATION

The most important of the factors tending to produce reliability is the cross-examination of the witness by the party opponent.[21] Wigmore described cross examination as:

> . . . beyond any doubt the greatest legal engine ever invented for the discovery of truth. . . .The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.[22]

Wigmore's position has been reiterated in many decisions.[23] In *Mattox v. United States*,[24] the United States Supreme Court held that admitting former testimony of deceased witnesses did not violate a defendant's sixth amendment right to confrontation where those witnesses had been "fully examined and cross-examined on the former trial."[25]

Mattox was convicted in 1891 in a Kansas Federal District Court of first degree murder. His conviction was reversed by the United States Supreme Court and the first of his subsequent trials on remand ended in a deadlocked jury. In a final trial, in 1893, Mattox was again convicted, largely on the strength of a transcript of testimony given by two witnesses at the first trial who had since died. Finding that the defendant's confrontation rights had not been violated by introduction of the transcript, the Court said:

> [T]he primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity . . . of testing the recollection and sifting the conscience of the witness. . .[26]

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[21] 5 WIGMORE, *supra* note 9, § 1367.

[22] *Id.*

[23] *See, e.g.*, Pointer v. Texas, 380 U.S. 400 (1965); Mattox v. United States, 156 U.S. 237 (1894); People v. Gibbs, 255 Cal. App. 2d 739, 63 Cal. Rptr. 471 (3d Dist. 1967).

[24] 156 U.S. 237 (1895).

[25] *Id.* at 240.

[26] *Id.* at 242.

In 1965, the Court employed similar reasoning in *Pointer v. Texas*,[27] when it applied the sixth amendment's guarantee of the right to confrontation to a criminal trial in a state court. Pointer was charged with robbery. The complaining witness, Phillips, testified at the preliminary hearing. Pointer was not represented by counsel at the preliminary hearing and did not attempt to cross-examine Phillips. Before the trial of the case, Phillips moved from Texas to a permanent residence in California. A transcript of his former testimony was admitted into evidence on the grounds of unavailability. In holding that Pointer's constitutional right to confrontation had been violated since he had not been given an adequate opportunity to cross-examine the witnesses against him, the Court stated:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.[28]

Former testimony that has been subjected to cross-examination is thus considered highly reliable, warranting its introduction at trial to prove the truth of matters asserted.

2. *DEMEANOR*

Demeanor evidence is considered important enough to the judicial process to be one of the three indicia of reliability that must be satisfied for evidence to qualify as non-hearsay. The advantages of witness demeanor evidence have been well-catalogued.[29] It has been acknowledged a useful tool for determining credibility of witnesses, and for swaying juries with a sympathetic presentation.[30] Most authorities, however, would concede that the court's interest in obtaining former testimony outweighs the disadvantages to the fact-finder or to the parties in forgoing the demeanor evidence.[31] In all cases where former testimony is used, the court has already determined that the declarant is unavailable to testify. Thus, the trier of fact is faced with the choice of excluding the declarant's testimony entirely, for lack of demeanor evidence, or admitting it despite that flaw. The consensus has been that demeanor evidence is not so overridingly important as to justify exclusion and loss of valuable sub-

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[27] 380 U.S. 400 (1965).

[28] *Id.* at 405.

[29] *See, e.g.*, Leonard, *Preparation and Use of Witnesses*, 16 PRAC. LAW. 43, 46 (January 1970); S. GAZAN, TRIAL TACTICS AND EXPERIENCE 276 (1954).

[30] Interview with Ken Peterson, Sacramento County Deputy District Attorney, in Sacramento, California, Oct. 22, 1975 [hereinafter cited as Peterson interview].

[31] 5 WIGMORE, *supra* note 9, § 1396.

stantive evidence.[32]

III. ANALYSIS OF THE STATUTES

The former testimony exception in California is described in sections 1290-1292 of the California Evidence Code. The germane federal rule is 804(b)(1). Both federal and California provisions place a high priority on preserving the tool of cross-examination for the party opponent.

The California and federal statutes lend themselves to analysis based on four questions: 1) When will a witness be considered unavailable for the purpose of introducing his former testimony? 2) At what type of hearing must the testimony have been taken? 3) Must the same persons have been parties to both the prior and subsequent hearings? 4) Must there be identity of issues as between the earlier and subsequent hearings?

Federal and California statutes respond almost identically to the second (sources of former testimony) and fourth (identity of issues) of these questions.[33] However, there are significant differences in their treatment of the first (witness unavailability) and third (identity of parties) question.[34]

A. WITNESS UNAVAILABILITY

A witness' former testimony is admissible at a subsequent hearing only when that witness is not available to testify in person.[35] If the witness is unavailable, his absence creates a special need for the testimony taken at an earlier hearing.

Both the California Evidence Code and the Federal Rules of Evidence offer specific definitions of "unavailability," which were

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[32] The Court in Mattox v. United States, 156 U.S. 237 (1895), emphasized this point, noting in reference to both cross-examination and demeanor evidence:

> There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. . . . The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

156 U.S. at 243.

[33] See discussion of sources of former testimony in text accompanying notes 101-40 *infra*, and of identity of issues in text accompanying notes 159-61 *infra*.

[34] *See* discussion of witness unavailability in text accompanying notes 35-100 *infra*, and of identity of parties in text accompanying notes 141-58 *infra*.

[35] McCORMICK (2d ed.), *supra* note 4, § 253 at 608.

intended to express existing common law.[36] In civil as well as criminal actions, the law places great importance upon a witness' testifying in person if at all possible; former testimony of an available witness cannot be introduced to prove the matter asserted.[37] In criminal trials, this exclusion is founded upon the United States Constitution's sixth amendment guarantee of confrontation,[38] whereas civil litigants must rely on the hearsay rule, an evidentiary principle lacking constitutional dimensions.[39]

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[36] 7 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES 48 (1965) [hereinafter cited as 7 CAL. LAW REV. COMM'N]; FED. R. EVID. 804(a), Advisory Comm. Notes.

CAL. EVID. CODE § 240 (West 1968) reads:

> (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is:
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> (1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his statement is relevant;
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> (2) Disqualified from testifying to the matter;
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> (3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity;
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> (4) Absent from the hearing and the court is unable to compel his attendance by its process; or
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> (5) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process.
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> (b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying.

FED. R. EVID. 804(a) reads:

> "Unavailability as a witness" includes situations in which the declarant —
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> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
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> (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
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> (3) testifies to a lack of memory of the subject matter of his statement; or
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> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
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> (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.
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> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

[37] MCCORMICK (2d ed.), *supra* note 4, § 255 at 617.

[38] Pointer v. Texas, 380 U.S. 400 (1965).

[39] A civil litigant's right to exclude an available witness' former testimony depends on the hearsay rule, under which a finding that the declarant's demeanor evidence was not adduced will exclude the former testimony. MCCORMICK (2d ed.), *supra* note 4, § 245 at 582.

However, some authorities have argued that civil and criminal litigants, equally, should be able to exclude former testimony of an available witness on

Because violation of a criminal defendant's constitutional right to confrontation is more serious than denial of a civil litigant's right to exclusion based on the hearsay rule, courts have tended to scrutinize claims of witness unavailability more carefully in criminal than in civil cases.[40] This fact is reflected in the great disparity between the numbers of civil and criminal cases heard on appeal on the issue of witness unavailability. For these reasons, the following discussion will focus on interpretation of statutory unavailability requirements in the context of criminal trials, and will deal only tangentially with unavailability in civil actions.

Since the California and federal definitions of unavailability are in most respects identical, this section, unless otherwise noted, will deal with California case law, and include federal decisions only when they express propositions not found in the California cases.

1. ASSERTION OF A PRIVILEGE

Generally under both federal and California statutes, when a witness is entitled to invoke a privilege against testifying and does so, his former testimony will be admissible.[41] Under California Penal Code section 686, which governed use of former testimony in criminal trials until the adoption of the present Evidence Code sections in 1965, the invocation of a privilege did not render a witness unavailable for the purpose of introducing the former testimony into evidence. Applying that statute, one California court refused to admit the transcript of an informant's testimony given in a *voir dire* examination when the informant claimed his privilege against self-incrimination at the subsequent trial. The court based its ruling on the fact that Penal Code section 686 listed only four grounds[42] of unavailability, and claim of privilege was not one of them.[43]

Before the adoption of the present California Evidence Code,

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constitutional grounds, as a violation of the due process clause rather than of the confrontation clause. Dutton v. Evans, 400 U.S. 74, 97 n.4 (1970) (Harlan, J., concurring in result).

See also MCCORMICK (2d ed.), *supra* note 4, § 253 at 608; 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 4 at 16-17 (3d ed. 1940).

It is beyond the scope of this article to address the question of whether litigants can claim due process protection to prevent the introduction of former testimony in civil actions. This article is written with the assumption that they cannot.

[40] Mattox v. United States, 156 U.S. 237, 242 (1895).

[41] CAL. EVID. CODE § 240(a)(1), FED. R. EVID. 804(a)(1), reproduced note 36 *supra*.

[42] ". . . deceased, insane, out of jurisdiction, or who cannot, with due diligence, be found within the state." CAL. PEN. CODE § 686(3) (1872), *amended by* Stats, 1965, Ch.299, § § 240, 1290-92.

[43] People v. Lawrence, 168 Cal. App. 2d 510, 518; 336 P.2d 189, 194 (1st Dist. 1959).

each hearsay exception had its own definition of witness unavailability.[44] California Evidence Code section 240, enacted in 1965, created one standard for witness unavailability to apply to every hearsay exception. That statute lists five criteria for unavailability, including invocation of privilege.[45] In *People v. Williams*,[46] the court upheld the use of former testimony where the declarant invoked the privilege against self-incrimination at a later hearing, finding that such testimony did not violate the defendant's constitutional right of confrontation.[47]

2. *DEATH OR PHYSICAL OR MENTAL INCAPACITY OF WITNESS*

That a witness' death will justify introduction of his former testimony has long been accepted.[48] Both the California and federal evidence statutes extend the concept of disability to include physical and mental illness sufficiently serious to preclude the witness' testifying.[49] Thus, former testimony of a witness who is physically unable to appear or to testify in court will be admitted. For example, in a 1968 California case,[50] the defendant was charged with selling marijuana to minors. One of his customers testified at the preliminary hearing of the case, but was involved in a serious automobile crash before the trial. At the time of the trial the witness was uncon-

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[44]The Law Revision Commission found "no apparent reason" for this variation among definitions of unavailability, and so proposed the adoption of Uniform Rule of Evidence 62(7), which would set up one standard of witness unavailability to be applied to every hearsay exception requiring it. 6 CAL. LAW REV. COMM'N, *supra* note 6, at APP. 411. Rule 62(7) also recognized privilege of the declarant as making him unavailable, which California law then did not. The various standards for unavailability under old California law all required that a witness be absent or physically unable to testify. 6 CAL. LAW REV. COMM'N, *supra* note 6, at APP. 410. Apparently since a witness claiming a privilege is present in court and physically able to give testimony, privilege was not accepted as a ground of unavailability.

Finding that "extending the concept of unavailability to include unavailability by reason of . . . privilege will not thwart any purpose of the laws relating to . . . privilege." (6 CAL. LAW REV. COMM'N, *supra* note 6, at APP. 411.) the Commission advocated that this aspect of Rule 62(7) also be adopted.

[45]6 CAL. LAW REV. COMM'N, *supra* note 6, at APP. 411.

[46]265 Cal. App. 2d 888, 71 Cal. Rptr. 773 (1st Dist. 1968).

[47]In that case, the defendant was convicted of murder and his conviction reversed on appeal. At retrial, a key witness invoked her privilege against self-incrimination and did not testify. The trial court admitted the transcript of her testimony at the first trial into evidence. The appellate court ruled that a defendant's right to confrontation is not violated if the prior testimony was taken at a formal hearing where the defendant was represented by counsel who had a sufficient opportunity to cross-examine the witness. *Id.*

[48]*See, e.g.*, Morley's Case, 6 Howell's State Trials 770 (1666).

[49]CAL. EVID. CODE § 240(a)(3), FED. R. EVID. 804(a)(4), reproduced note 3 *supra*.

[50]People v. Hernandez, 263 Cal. App. 2d 242, 69 Cal. Rptr. 448 (5th Dist. 1968).

scious, with an uncertain prognosis for recovery and a likelihood of permanent brain damage. The appeals court affirmed the trial court's use of the witness' former testimony.[51]

In another California case,[52] the court held that where the complaining witness was in the hospital recovering from a cerebral thrombosis which rendered him confused and unable to speak, and was not likely to recover for at least eight weeks, his former testimony could be admitted into evidence without abrogation of the defendant's rights to confrontation.[53]

Under both California and federal statutes, mental illness or infirity which prevents the witness from being present or testifying at the hearing is also grounds for admission of his former testimony. In *People v. Gomez*,[54] the defendant was charged with statutory rape. The complaining witness testified at the preliminary hearing of the case, but by the time of trial she was confined in a psychiatric hospital and in such a condition that giving testimony threatened to precipitate a serious regression. The court held her former testimony admissible and not violative of the defendant's confrontation rights.

In *People v. Rojas*,[55] the California Supreme Court greatly extended the meaning of "mental infirmity" as a ground of unavailability. In that case, a key prosecution witness refused to testify at the retrial of an assault charge because he and his family had been threatened. The court held his testimony from the first trial admissible after finding that the threats had rendered the witness mentally infirm and therefore unavailable to testify. This decision seems to extend the umbrella of "mental infirmity" over some types of recalcitrant witnesses, and will be discussed at length below.[56]

Thus, both California and federal laws permit introduction of a witness' former testimony when he is so physically ill or mentally unstable as to make testimony in court impossible. The party seeking to introduce the former testimony must prove the witness' incapacity by competent evidence.[57]

3. *WITNESS' ABSENCE FROM THE HEARING*

The California statute provides that a witness will be considered

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[51] *Id.* at 252, 69 Cal. Rptr. at 453.

[52] People v. King, 269 Cal. App. 2d 40, 74 Cal. Rptr. 679 (2d Dist. 1969).

[53] The Fourth Circuit Court of Appeals has held, however, that where the physical illness is temporary and a short continuance would enable the witness to appear in person, there is not a sufficient showing of unavailability for former testimony purposes. Smith v. United States, 106 F.2d 726 (4th Cir. 1939).

[54] 26 Cal. App. 3d 225, 229-30, 103 Cal. Rptr. 80, 83 (2d Dist. 1972).

[55] 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975).

[56] *See* text accompanying note 88 *et seq. infra.*

[57] *See, e.g.*, People v. Plyler, 126 Cal. 379, 58 P. 904 (1899); People v. King, 269 Cal. App. 2d 40, 74 Cal. Rptr. 679 (2d Dist. 1969).

unavailable when absent from the hearing and when neither the court nor the proponent has been able to procure his attendance by the court's process.[58] Early cases[59] concluded that to satisfy this requirement for witness unavailability, the proponent needed only to show that the witness was outside the jurisdiction, on the theory that "it is impossible to compel his attendance, because the process of the trial court is of no force without the jurisdiction and the party desiring his testimony is therefore helpless."[60]

In *Barber v. Page*,[61] however, the United States Supreme Court decided that a criminal defendant's confrontation rights required that a prosecutor show more than a witness' mere absence from the jurisdiction. The defendant Barber and his codefendant Woods were charged with armed robbery in Oklahoma. At the preliminary hearing, Woods waived his privilege against self-incrimination and gave testimony which also implicated Barber. By the time of Barber's trial, Woods was absent from the jurisdiction, in a Texas prison. The prosecution moved to introduce the transcript of his testimony on the grounds of his unavailability, and the trial court admitted the former testimony. The United States Supreme Court held such admission error.

Reviewing earlier decisions on the limits of former testimony, the Court found that cross-examination and confrontation were so important that only necessity justified admission of former testimony.[62] The Court found no such necessity in *Barber*, since the prosecution had means through which it could have obtained Woods' presence at trial. It held that a court's mechanical assumption that a witness is unavailable simply because he is beyond the borders of the state is an infringement on the defendant's right to confrontation.[63] The Court concluded that:

> In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial

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[58] CAL. EVID. CODE § § 240(a)(4) and (5), reproduced note 36 *supra*.

[59] *See, e.g.*, People v. Padilla, 81 Cal. App. 528, 254 P. 585 (2d Dist. 1927); People v. Myers, 77 Cal. App. 10, 245 P. 1106 (2d Dist. 1926); People v. Lederer, 17 Cal. App. 369, 119 P. 949 (2d Dist. 1911).

[60] 5 WIGMORE, *supra* note 9, § 1404 at 205, *quoted in* Barber v. Page, 390 U.S. 719, 723 (1968).

[61] 390 U.S. 719 (1968).

[62] *Id.* at 722-23.

[63] To obtain attendance of witnesses not in prison, prosecutors may use the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (11 UNIFORM LAWS ANNOTATED 1 (1974)), which enables authorities in one state to obtain a court order from another state directing a witness in the latter jurisdiction to attend a criminal proceeding in the former. Barber v. Page, 390 U.S. at 723-24 n.4. To obtain attendance of witnesses in prison, such as Woods, the prosecutor can obtain a writ of habeas corpus *ad testificandum* which, upon a showing of adequate safeguards to keep the witness in custody, will be honored by prison authorities. *Id.* at 724.

> authorities have made a good-faith effort to obtain his presence at trial.[64]

The effect of the Court's decision in *Barber* is to alter the California Evidence Code's definition of unavailability with regard to criminal trials. Evidence Code sections 240(a)(4) and (5)[65] require only that a witness be absent from the hearing and beyond the trial court's process. Since the Court's opinion in *Barber* now requires that the prosecution make a good faith effort to obtain the presence of witnesses who are to testify against the defendant, that requirement should be read as a gloss on the definition of unavailability in the use of former testimony in a criminal trial.

It is unlikely that this decisional expansion of Evidence Code section 240 will be applied to civil trials. The requirement that the prosecution make a "good faith effort" to bring a witness into court arises out of the criminal defendant's constitutional right to confrontation.[66] Since civil litigants have no such right, they probably would not succeed in an attempt to exclude former testimony solely because no extraordinary measures were taken to procure the declarant's attendance from outside the jurisdiction.

The Federal Rules of Evidence reflect the *Barber* expansion of prosecutorial responsibility for procuring witness' attendance at trial, requiring use of "process or other reasonable means."[67] This language does not limit a prosecutor's efforts to the use of court process, but contemplates the use of alternative means such as those listed in *Barber*.[68] In a civil case, however, it is unlikely that "reasonable means" will require anything more than attempt to serve the witness within the jurisdiction.[69]

When the witness is absent from the hearing and cannot be produced even with exercise of due diligence, he will be considered "unavailable" for purposes of introduction of former testimony. The question of what constitutes "due diligence"[70] or "reasonable diligence"[71] or "reasonable means"[72] is one that the courts have had to

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[64] *Id.* at 724-25.
[65] Reproduced note 36 *supra*.
[66] Barber v. Page, 390 U.S. 719, 724-25 (1968).
[67] FED. R. EVID. 804(a)(5), reproduced note 36 *supra*.
[68] 4 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(a)[01] at 804-43 (1975).
[69] *See, e.g.*, United States v. Squella-Avendano, 478 F.2d 433, 439 (5th Cir. 1973); McIntyre v. Reynolds Metal Company, 468 F.2d 1092, 1093 n.2 (5th Cir. 1972); Trade Development Bank v. Continental Insurance Co., 469 F.2d 35, 42 (2d Cir. 1972).
[70] CAL. PEN. CODE § 686(3) (1872), amended by Stats. 1965, Ch.299, § § 240, 1290-92.
[71] CAL. EVID. CODE § 240(a)(5), reproduced note 36 *supra*.
[72] FED. R. EVID. 804(a)(5), reproduced note 36 *supra*.

resolve on a case-by-case basis.[73] In general, due diligence requires at least that the proponent of the former testimony has made a good faith effort to locate the witnesses.[74] Another factor in determining due diligence is the prosecution's timely beginning of its search, consistent with any anticipated difficulty of finding the witness.[75] However, a United States Supreme Court case did set an outside limit on exercise of due diligence, holding that where a witness had become a permanent resident of Sweden, the prosecution was not required to try to obtain his presence at trial.[76]

Both federal and California statutes agree that if the witness' absence has been procured by the proponent of the former testimony, the witness will not be considered unavailable for the purpose of introducing his former testimony.[77]

4. "UNAVAILABILITY" EXPANDED— ADDITIONS IN THE FEDERAL RULES

The federal rules include two additional circumstances under which a witness will be considered "unavailable." Federal rule 804 (a)(3)[78] defines as unavailable a witness suffering from a lapse of memory with regard to the substance of his former testimony, and federal rule 804(a)(2)[79] allows introduction of a recalcitrant witness' former testimony on the grounds of unavailability.

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[73] *See, e.g.*, People v. Horn, 225 Cal. App. 2d 1, 36 Cal. Rptr. 898 (5th Dist. 1964); People v. Johnson, 51 Cal. App. 464, 197 P. 135 (2d Dist. 1921).

For this reason, the question of whether "due diligence" has been exercised by the party offering the former testimony is a preliminary question for the trial judge. Only where abuse of discretion is shown will the trial court determination be overturned. People v. Poo On, 49 Cal. App. 219, 223-24, 192 P. 1090, 1091-92 (3d Dist. 1920); People v. Lederer, 17 Cal. App. 369, 374, 119 P. 949, 952 (2d Dist. 1911).

[74] For example, in People v. Beyea, 38 Cal. App. 3d 176, 113 Cal. Rptr. 254 (1st Dist. 1974), the Court of Appeal admitted proffered former testimony after finding that the prosecution had made "timely and extensive efforts to locate missing witnesses." *Id.* at 190-92, 113 Cal. Rptr. at 262-63. In this case, a police inspector made attempts to locate the witnesses even before the trial date was set, and spent three weeks looking for them while one tried to hide from him and after both had promised at the preliminary hearing that they would testify at trial.

[75] People v. Horn, 225 Cal. App. 2d 1, 36 Cal. Rptr. 898 (5th Dist. 1964). That court found due diligence on the basis of evidence showing that the officer attempting to serve the subpoena was informed at the address on the subpoena that the witness had left the state, but nevertheless checked local directories and interviewed the witness' probation officer and bondsman, both of whom were ignorant of the witness' whereabouts.

[76] Mancusi v. Stubbs, 408 U.S. 204 (1972).

[77] CAL. EVID. CODE. § 240(b), FED. R. EVID. 804(a), reproduced note 36 *supra*.

[78] Reproduced note 36 *supra*.

[79] *Id.*

a. Memory Lapse

Judges have long been hostile to classifying as unavailable a forgetful witness.[80] Courts have considered that to admit former testimony of a witness who now claims a memory lapse would "create a dangerous precedent,"[81] possibly leading to fraudulent denial of litigants' confrontation rights. Since excluding a forgetful witness' former testimony will mean forgoing whatever substantive evidence it may have contained, courts' attitudes have recently begun to change. Several federal court decisions prior to adoption of the rules admitted former testimony of a forgetful witness, reasoning that a witness who has forgotten crucial facts is no less unavailable for purposes of testimony and cross-examination than is a witness who is dead.[82]

Incorporation of this definition of unavailability into the federal rules will not, however, leave a court defenseless before a claim of memory lapse. The House Committee Report on the federal rules noted that the Judiciary Committee intended "no change in existing federal law, under which the court may choose to disbelieve the declarant's testimony as to his lack of memory."[83] Such assurances were first expressed in the Advisory Committee's note that "the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination."[84] Thus, the objections of the early cases to use of a forgetful witness' former testimony are met by the assurance that a simple unchallenged assertion of memory lapse will not be sufficient to classify such a witness as unavailable.

This provision of the federal rules balances both purposes of the evidence statutes,[85] broadening the range of former testimony available to the trier of fact,[86] while preserving intact all confrontation rights of criminal defendants.

b. Witness Recalcitrance

The Federal Rules of Evidence also define as unavailable a witness who "persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so."[87] In Califor-

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[80] Annot., 129 A.L.R. 843 (1940).
[81] Rio Grande S. R.R. Co. v. Campbell, 55 Colo. 493, 136 P. 68 (1913).
[82] *See, e.g.*, United States v. Hughes, 411 F.2d 461, 466 (2d Cir. 1969), *cert. denied*, 396 U.S. 867 (1969).
[83] FED. R. EVID. 804(a)(3), Notes of Comm. on the Judiciary, H. Rpt. No. 93-650.
[84] FED. R. EVID. 804(a)(3), Advisory Comm. Notes.
[85] *See* text accompanying notes 1-3 *supra*.
[86] MCCORMICK (2d ed.), *supra* note 4, § 253 at 612.
[87] FED. R. EVID. 804(a)(2), reproduced note 36 *supra*.

nia such unprivileged refusal to testify has never been statutorily recognized as a source of unavailability, though in fact the testimony is just as inaccessible as if the declarant were dead.

In *People v. Rojas*,[88] the California Supreme Court recently declined to expand the definition of unavailability to include recalcitrance. Instead, the court found the witness unavailable under the "mental infirmity" definition in the existing statute.[89]

In *Rojas*, Navarrette, a witness who had given crucial testimony for the People at an earlier mistrial of the same case, refused to testify at the retrial because of fear for the safety of himself and his family. Navarrette was sent to juvenile hall for contempt, but he continued to refuse to testify. The trial court declared his live testimony unavailable and admitted his former testimony. The Court of Appeal upheld the decision, noting that "a fear of personal or family harm" may be a mental infirmity within the meaning of California Evidence Code section 240(a)(3) that "renders the person harboring the fear unavailable as a witness."[90] The appeals court also noted, however, that the legislative enumeration of situations in which a witness is "unavailable" was not meant to be exhaustive, but was merely declaratory of common law rules already in existence.[91] Hence, the court said, the testimony could also have been admitted because Navarrette was unavailable due to recalcitrance.

In a per curiam opinion that was largely a verbatim restatement of the opinion delivered by the Court of Appeal, the California Supreme Court held Navarrette unavailable under section 240(a)(3), as unable to testify because of mental infirmity. The court did include as dicta, however, some of the Court of Appeal's language about the non-exclusivity of section 240. The Supreme Court in an added footnote[92] acknowledged the new federal rule defining a recalcitrant witness as unavailable,[93] and cited two federal court decisions supporting this view.[94] In so doing, the court seemed to be anticipating an eventual legislative expansion of California's statu-

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[88] 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975).

[89] CAL. EVID. CODE. § 240(a)(3), reproduced note 36 *supra*. *See* discussion in text accompanying note 54 *supra*.

[90] People v. Rojas, 119 Cal. Rptr. 144, 150 (1st Dist. 1975), *aff'd*, 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975).

[91] "We are of the opinion, moreover, that the causes mentioned in section 240 are not exhaustive but are a restatement of existing law and declaratory of rules previously recognized by the decisions. [citations omitted] We observe that at common law the general principle of necessity or unavailability was 'broad enough to sanction any case in which the present testimony is in fact unavailable by any means whatever.' (5 WIGMORE (3d ed.) § 1402, p.148)" *Id.*

[92] 15 Cal. 3d 540, 551 n.7, 542 P.2d at 236 n.7; 125 Cal. Rptr. at 364 n.7 (1975).

[93] FED. R. EVID. 804(a)(2), reproduced note 36 *supra*.

[94] United States v. Mobley, 421 F.2d 345 (5th Cir. 1970); Mason v. United States, 408 F.2d 903 (10th Cir. 1969).

tory definitions of unavailability to include recalcitrance.

It is unfortunate that the *Rojas* court declined to judicially expand the definition of unavailability to include recalcitrance. The application in future cases of the mental infirmity standard used by the California Supreme Court in this decision will present logical and practical difficulties which would have been avoided by adoption of the recalcitrance standard embraced in the federal rules.

In the *Rojas* case, the court invoked the mental infirmity ground of unavailability only after making some logically doubtful leaps of faith. Case law prior to *Rojas* has interpreted section 240's mental infirmity provision, without specifically defining the term, to require that the witness' illness or infirmity must be "of comparative severity; it must exist to such a degree as to render the witness' attendance, or his testifying, relatively impossible and not merely inconvenient."[95] In enacting section 240, the legislature also apparently intended that the witness unavailable as mentally infirm be incapacitated by some internally-generated disease or disability.[96]

In *Rojas*, however, the witness responded to external stimuli (threats) by *deciding* not to testify. In its interpretation of section 240, the *Rojas* court seemed to disregard both precedent and legislative intent when it found Navarrette's volitional refusal to testify sufficient to qualify him as mentally infirm and therefore unavailable for purposes of introducing his former testimony.[97]

As precedent, the *Rojas* decision will have a restrictive effect on admission of former testimony. In instances where the declarant simply refuses to testify, but does not do so out of threat-induced fear, his former testimony will be excluded. Also excluded will be former testimony of a witness who has been threatened to the point where he will not disclose the reasons for his refusal to testify. Such former testimony satisfies all reliability criteria. The declarants are in fact unavailable to give in-court testimony. And under a recalcitrance standard of unavailability such testimony would be admissible, whereas under the *Rojas* precedent it would not.

Furthermore, the logical grounding of the opinion is so tenuous that courts aware of the legislative origins and case law interpretations of section 240's mental infirmity provision are likely to distinguish *Rojas*, and to exclude former testimony even of witnesses who

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[95] People v. Gomez, 26 Cal. App. 3d 225, 230, 103 Cal. Rptr. 80, 83-84 (2d Dist. 1972).

[96] "'Unavailable as a witness' includes . . . cases where the declarant is *physically* unavailable (*i.e.*, dead, *insane*, or beyond the reach of the court's process) . . ." 7 CAL. LAW REV. COMM'N, *supra* note 36, at 49 (emphasis added). *See also* 6 CAL. LAW REV. COMM'N, *supra* note 6 at APP. 410 and 411 n.7.

[97] The court's selected definition of "infirmity"—"defect or personality or weakness of the will: failing, foible" (WEBSTER'S THIRD NEW INTERNAT. DICTIONARY, 1159 (1969))—is the third of three definition entries under "infirmity," a further indication of the shaky underpinnings of this decision.

refuse to testify in response to threats. The effect of the *Rojas* decision, then, is to restrict courts' access to former testimony in situations where by every common sense standard the witness is indeed unavailable.

Apart from the disadvantages manifest in the *Rojas* interpretation of section 240, strong arguments exist for the adoption of the federal rules approach to witness recalcitrance. Excluding a recalcitrant witness' former testimony deprives the trier of fact of highly reliable testimony and the substantive evidence it contains, when in fact the witness' live testimony at the hearing is no more accessible than if the declarant were absent or dead. After imposition of judicial sanctions for contempt, a court is powerless to compel a declarant to speak. Counsel for Rojas' co-defendant maintained in his Petition for Hearing that the trial court "could have postponed the trial for several weeks and held Navarrette in contempt during this time period, unless he indicated a willingness to testify."[98] However, even such extraordinary and impracticable measures in no way guarantee that a witness will relent and decide to testify. Nor is it likely that a court will lightly hold a witness unavailable under this definition without doing its utmost to obtain the witness' present testimony.

Adoption of this additional form of unavailability would also render ineffective threats and attempted intimidation of witnesses at subsequent hearings.[99] In *Rojas*, the witness Navarrette received letters and phone calls from an anonymous group threatening both him and his family. These threats resulted in his decision not to testify again and thereby expose himself and his family to danger. If the trial court had not admitted Navarrette's former testimony, its substance would have been lost to the jury. Since he was the only witness directly tying Rojas and his co-defendant to the shooting, exclusion of Navarrette's testimony would have resulted in dismissal of the charges and in success for those who sought to distort the judicial process by coercive methods. Therefore, adopting recalcitrance as a source of witness unavailability would well serve a policy of preserving the integrity of the judicial system.

Even with encouragement from the United States Supreme Court,[100] the California Supreme Court declined to take advantage

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[98] Appellant Ramirez' Petition for Hearing at 7, People v. Rojas, 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975).

[99] *Id*, at 552, 542 P.2d at 236, 125 Cal. Rptr. at 364.

[100] In dictum in its opinion in California v. Green, 399 U.S. 149 (1969), the United States Supreme Court seems to approve inclusion of both forgetfulness and recalcitrance as circumstances of unavailability:

> Whether Porter then testified in a manner consistent or inconsistent with his preliminary hearing testimony, claimed a loss of memory, claimed his privilege against compulsory self-incrimination, or simply refused to answer, nothing in the Confrontation Clause prohibited

of the opportunity presented by *Rojas* to expand the statutory definition of unavailability. The advantages of the federal rules' approach, as noted above, are manifest with regard to both recalitrant and forgetful witnesses. The legislature should incorporate these criteria into the California statute, thereby expanding the circumstances under which the trier of fact has access to former testimony.

B. SOURCES OF FORMER TESTIMONY

The Federal Rules of Evidence do not specifically restrict the sources of former testimony. However, the statutory requirement that the party opponent, or someone with a motive and interest similar to his,[101] must have had an opportunity to cross-examine the witness would exclude some kinds of hearings. For example, grand jury proceedings and coroner's inquests, where there is no opportunity to cross-examine witnesses, are not proper sources of former testimony. The California Code, in section 1290, lists several sources from which admissible former testimony may be taken. These include another action or a deposition[102] taken therein; a former hear-

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the State from also relying on his prior testimony to prove its case against Green.

Id. at 267-68.

[101] The determination of similarity of interest and motive in cross-examination should be based on practical considerations and not merely on the similarity of the party's position in the two cases. For example, testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action should be excluded if the judge determines that the deposition was taken for discovery purposes and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case. In such a situation, the party's interest and motive for cross-examination on the previous occasion would have been substantially different from his present interest and motive.

7 CAL. LAW REV. COMM'N, *supra* note 36, at 1248.

[102] The California statutes deal in separate sections with the use of depositions taken in the same and in different actions. Former testimony use of a deposition taken in a different action is governed by Evidence Code sections 1290-92, whereas such use of a deposition taken in connection with the action in which it is offered is governed by sections in the Code of Civil Procedure (CAL. CODE CIV. P. § § 2016-36 (West 1967)) and Penal Code (CAL. PEN. CODE § § 1345, 1362 (Deering 1976)), for civil and criminal actions respectively.

One significant difference exists between the Evidence Code sections relating to depositions and those in the Code of Civil Procedure. The Evidence Code and Penal Code sections predicate use of depositions on witness unavailability as defined by Evidence Code section 240. In contrast, the Civil Procedure Code sections governing use of depositions advance another criterion for introduction of the deposition:

> [A] deposition may be used by any party for any purpose if the court finds: . . . (ii) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of

ing or trial of the same action, an administrative hearing by a public agency with the power to determine the controversy heard, and an arbitration hearing of which there is a verbatim transcript.[103]

The Green Decisions

To be admissible in evidence, former testimony must have been given at a hearing in which the party opponent had an adequate opportunity to cross-examine the declarant.[104] If the party opponent fails to make full use of this opportunity, he waives his constitutional right to confrontation, and the testimony will be admissible in a subsequent hearing as former testimony.[105]

The type of hearing at which the former testimony was originally given is an important factor in determining the adequacy of a party opponent's opportunity to cross-examine.[106] California Supreme Court decisions in *People v. Green*[107] and *People v. Johnson*[108] indicated that a party opponent's right to confrontation was not satisfied unless the party had had an opportunity to cross-examine the declarant at the former hearing. Subsequent opportunities to cross-examine on the substance of the former testimony were held to be inadequate.

In *People v. Green*[109] (hereinafter *Green I*), defendant Green was charged with supplying marijuana to a minor, Porter. Porter told a police officer, Wade, that Green had delivered 29 ounces of marijuana to be sold by Porter. A week later at the preliminary hearing, Porter changed his story and stated that he had picked up the drug in Green's backyard. Porter was extensively cross-examined at the preliminary hearing. Two months later, at Green's trial, Porter asserted that he could not remember the transaction because he was under the influence of LSD when the sale took place.

> justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

CAL. CODE CIV. P. § 2016(d)(3)(ii) (West 1967).

This standard gives the trial court a great deal of flexibility, obviating the need for the preceding clause (CAL. CODE CIV. P. § 2016(d)(3)(i)) incorporating the Evidence Code section 240 definition of unavailability. Under this subsection (ii), a trial court in a civil action would certainly have sufficient discretion to admit the deposition of a recalcitrant or forgetful witness.

[103] CAL. EVID. CODE § § 1290(a)-(d), reproduced note 1 *supra.*

[104] Pointer v. Texas, 380 U.S. 400, 405 (1965).

[105] Baldwin v. United States, 5 F.2d 133 (6th Cir. 1925).

[106] People v. Hillery, 62 Cal. 2d 692, 401 P.2d 382, 44 Cal. Rptr. 30 (1965) (grand jury hearing); People v. Lint, 182 Cal. App. 2d 402, 6 Cal. Rptr. 95 (2d Dist. 1960) (coroner's inquest).

[107] 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969).

[108] 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968).

[109] 70 Cal. 2d 654, 451, P.2d 422, 75 Cal. Rptr. 782 (1969).

The prosecutor read from preliminary hearing testimony to refresh the witness' memory. On cross-examination, Porter admitted that he still did not remember the transaction itself, but did remember his own testimony on the subject at the preliminary hearing. Later. Officer Wade testified about Porter's statement to him naming Green as the supplier.[110]

The California Supreme Court determined that the trial court's admission of these statements violated the defendant's rights of confrontation and cross-examination, and reversed the conviction.[111] In making this determination, the court relied heavily on its earlier decision in *People v. Johnson.*[112] In *Johnson*, the defendant was charged with committing incest with his daughter. His wife and daughter testified against him at a grand jury hearing, at which he had no opportunity to cross-examine them. At trial, both wife and daughter recanted their testimony, and the trial court allowed the prosecutor to introduce their grand jury testimony as a prior inconsistent statement under Evidence Code section 1235. The California Supreme Court reversed the resulting conviction on the ground that a defendant's right to confrontation is satisfied only by contemporaneous cross-examination of witnesses. Thus, to satisfy sixth amendment confrontation requirements, Johnson must have been given an opportunity to cross-examine the witnesses against him at the grand jury hearing; cross-examination at the subsequent trial on the earlier testimony was constitutionally inadequate.[113]

The California Supreme Court applied *Johnson* in *Green I*, finding that the *Green* former testimony had been admitted in violation of the defendant's confrontation rights. In *Green*, as in *Johnson*, the declarant could not testify at trial as to the substance of his statements at the earlier hearing.[114] The California court found that in

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[110] Both Officer Wade's testimony and Porter's preliminary hearing testimony were admitted as evidence of prior inconsistent statements under California Evidence Code section 1235, which permits introduction of such statements to prove the truth of the matters asserted (CAL. EVID. CODE § 1235 (West 1968)), rather than as former testimony. However, the issue of confrontation is important to both hearsay exceptions.

[111] The court based its decision on its determination that a defendant's sixth and fourteenth amendment confrontation rights are satisfied only by cross-examination contemporaneous with the witness' testimony, which gives the trier of fact maximum access to demeanor evidence. Since Porter was present at the trial, the element of necessity which would have justified forgoing his demeanor evidence in favor of his former testimony, was absent. Moreover, since defendant Green had no opportunity to cross-examine Porter in the presence of the ultimate trier of fact, the court found a violation of Green's confrontation rights. 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969).

[112] 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968).

[113] *Id.* at 660, 441 P.2d at 120-21, 68 Cal. Rptr. at 608-09.

[114] In *Johnson*, the declarants who had testified against the defendant at the grand jury hearing recanted their testimony when the case came to trial. In *Green*, the declarant who testified against the defendant at the preliminary

Green, as in *Johnson*, the testimony given at the earlier hearing was constitutionally inadequate to satisfy the defendant's sixth amendment rights. *Green* and *Johnson* differed in that at the Johnson grand jury hearing, the defendant had no opportunity at all to cross-examine the witnesses against him, whereas Green's attorney conducted a thorough cross-examination of Porter at the preliminary hearing. However, the California Supreme Court used some strongly worded dicta from the United States Supreme Court's decision in *Barber v. Page*[115] as authority for the premise that a preliminary hearing by its very nature fails to provide a constitutionally adequate opportunity to confront and cross-examine opposing witnesses, and is therefore an unacceptable source of former testimony.[116]

In *California v. Green*[117] (hereinafter *Green II*), the United States Supreme Court disputed the California court's analysis of *Barber*. It reversed the California decision in *Green I*, and held that a preliminary hearing does afford a constitutionally adequate opportunity to cross-examine opposing witnesses.[118]

Prior to the United States Supreme Court decision in *Green II*, many courts[119] and commentators[120] had vigorously questioned whether a defendant's right to confrontation could be fully satisfied at a preliminary hearing. The chief objections to the preliminary hearing as a source of former testimony were expressed by the California Third District Court of Appeal, in *People v. Gibbs:*[121]

> In most California criminal prosecutions the preliminary examination is conducted as a rather perfunctory uncontested proceeding with only one likely denouement—an order holding the defendant for trial. . . . The prosecution need show only "probable cause," a burden vastly lighter than proof beyond a reasonable doubt. Committing magistrates usually accept the prosecution evidence at face value, leaving credibility judgments for the trial of guilt. The tactical influences pervading the process tend to induce shallow cross-

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hearing claimed a lapse of memory at trial with regard to the substance of his former testimony.

[115] 390 U.S. 719, 725 (1968).

[116] *See* text accompanying notes 119-24 *infra*.

[117] 399 U.S. 149 (1970).

[118] On remand, the California Supreme Court affirmed Green's conviction, finding that both the preliminary hearing testimony and Officer Wade's statement had been constitutionally admitted into evidence. People v. Green, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971).

[119] *See, e.g.*, People v. King, 269 Cal. App. 2d 40, 47, 74 Cal. Rptr. 679, 683 (2d Dist. 1969); People v. Gibbs, 255 Cal. App. 2d 739, 743-44, 63 Cal. Rptr. 471, 475 (3d Dist. 1967).

[120] *See, e.g.*, Williamson, *Prior Recorded Testimony Exception to the Hearsay Rule in Criminal Cases in State and Federal Courts*, 6 CRIM. L. BULL. 179, 282-83 (1970); Note, *The Use of Prior Recorded Testimony and the Right of Confrontation*, 54 IOWA L. REV. 360, 374-75 (1968) [hereinafter cited as Note, *Use of Prior Recorded Testimony*].

[121] 255 Cal. App. 2d 739, 63 Cal. Rptr. 471 (3d Dist. 1967).

> examination. . . . Cross-examination may lack width and depth, not because counsel lacks opportunity, but because he chooses to defer his real effort until the trial itself.[122]

In a dissenting opinion in *Green II*,[123] Justice Brennan carefully reviewed the arguments for the constitutional inadequacy of the preliminary hearing. He concluded that the majority's decision was contrary not only to reality, but also to sound public policy. He agreed with the California court in *Green I* that one possible result would be that due to cautious attorneys' elaborate preparations, preliminary hearings would lose their value as a quick means to determine the relatively limited question of probable cause.[124] Another undesirable result of such a decision would be the defendant's loss of the tactical advantages to be gained in reserving material that may be used to impeach the witness at trial.

Although *Green II* has not had the severe effect anticipated,[125] arguably the decision should be confined substantially to its facts. In *Green II*, the Court specifically noted that the cross-examination at the preliminary hearing was extensive, and conducted by the

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[122] *Id.* at 743-44, 63 Cal. Rptr. at 475.

The United States Supreme Court in Barber v. Page, 390 U.S. 719 (1968), expressed similar reservations. In that case, there was a question as to whether the defendant had waived his right to confrontation, since his attorney did not cross-examine a subsequently unavailable witness at the preliminary hearing. The *Barber* court found that he had not waived the right, and noted:

> [W]e would reach the same result . . . had petitioner's counsel actually cross-examined Woods at the preliminary hearing. . . .The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

Id. at 725.

[123] 399 U.S. 149, 189 (1969) (Brennan, J., dissenting).

[124] People v. Green, 70 Cal. 2d at 664, 451 P.2d at 428, 75 Cal. Rptr. at 788, *cited in* California v. Green, 399 U.S. at 199-200 (Brennan, J., dissenting).

[125] Some commentators have theorized that in his concern to conduct a thorough cross-examination, defendant's counsel may have to expose more of the case than is tactically advisable. Note, *Use of Prior Recorded Testimony*, *supra* note 120, at 375. In fact, these worries seem to have been unfounded. In the six years since *Green II*, the conduct of preliminary hearings has changed very little. Peterson interview, *supra* note 30. Moreover, only rarely must counsel introduce preliminary hearing testimony at trial because of the unavailability of the witness. Peterson interview, *supra* note 30; interview with Burt Loehr, Sacramento County Assistant Public Defender, in Sacramento, California, Oct. 25, 1975. For that reason, defense attorneys tend to use the preliminary hearing as a discovery tool and as a means to pin witnesses to an identifiable story which may be introduced for impeachment purposes at trial, rather than as an arena for a searching cross-examination. Since it is unlikely that the preliminary hearing testimony will be used at trial, counsel would rather not alert a witness to inconsistencies in his testimony which he may then rectify before appearance at trial.

same counsel who represented the defendant at trial. The witness was under oath, and the hearing was conducted "before a judicial tribunal, equipped to provide a judicial record of the hearing."[126] The Court did not indicate whether absence of one or more of these factors would have required an opposite conclusion.

Certainly the most important of these factors is the extent of the cross-examination at the preliminary hearing. The common-law right to confrontation was intended to protect the defendant from unsubstantiated accusations by absent accusers.[127] By requiring the accusing witness to appear in court and face the scrutiny of judge, jury, and accused, the law contemplated obtaining a higher degree of reliability for such witness' testimony.[128] Ultimately, the cross-examination requirement also acts to insure reliability of testimony,[129] and the United States Supreme Court has consistently held that a criminal defendant's right of confrontation requires an opportunity not only to face adverse witnesses, but to examine them as well.[130] And, as the *Gibbs* court suggested,[131] simple physical confrontation at the preliminary hearing does not guarantee adequate cross-examination. Most commentators agree that the purpose of the confrontation requirement is to facilitate probing and challenging the witness' testimony by use of cross-examination.[132]

Justice Harlan, in his concurring opinion in *Green II*, [133] argued vigorously against this approach to defining the sixth amendment confrontation right. Harlan considered it the purpose of the confrontation clause to assure a criminal defendant that all available witnesses against him will be produced at trial.[134] He maintained that to equate confrontation with the right to cross-examine, which is basically a hearsay standard of reliability, was to unnecessarily constitutionalize the hearsay rule.[135] He feared that such an application of the sixth amendment would hamstring the courts and prevent them from reacting flexibly to evolving legal thought in the hearsay area.[136]

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[126] California v. Green, 399 U.S. 149, 165 (1969).
[127] Mattox v. United States, 156 U.S. 237, 242 (1895).
[128] *See* text accompanying notes 29-32 *supra*.
[129] *See* text accompanying notes 21-28 *supra*.
[130] *See, e.g.*, cases cited in California v. Green, 399 U.S. 149, 172-73 (1969) (Harlan, J., concurring).
[131] People v. Gibbs, 255 Cal. App. 2d 739, 743-44, 63 Cal. Rptr. 471, 475 (3d Dist. 1967). *See* text accompanying notes 121-22 *supra*.
[132] 5 WIGMORE, *supra* note 9, § 1395 at 150.
[133] 399 U.S. 149, 173 (1969) (Harlan, J., concurring).
[134] *Id.* at 174.
[135] *Id.* at 173.
[136] *Id.* at 184-85.

Harlan's narrow conception of confrontation separates it from inquiry as to the reliability of the evidence offered. Insofar as the confrontation doctrine was developed to prevent testimony by affidavit[137] (which, lacking cross-examination and demeanor, is considered inherently unreliable), its purpose was to guarantee that testimony introduced against a criminal defendant met a basic standard of trustworthiness. The most important guarantor of such trustworthiness is generally conceded to be cross-examination.[138] Thus, adequate cross-examination is central to the confrontation clause purpose of insuring reliability of testimony introduced against a criminal defendant.

In the case of the preliminary hearing, the pressures for a cursory, or at least circumscribed, cross-examination are strong. Therefore, before testimony from such a source is admitted, the court should determine whether those pressures have in fact affected the defendant's cross-examination so as to prevent an adequate test of the testimony's reliability. In order to make such a determination, the court would have to look to the record of the preliminary hearing to be sure that the *Gibbs* pressures[139] for cursory cross-examination have been overcome.

In instances where there was an opportunity to cross-examine, but the defendant did not in fact conduct a thorough cross-examination due to *Gibbs* pressures, the court should exclude the former testimony. Insofar as the majority *Green* opinion specifically noted that Green's attorney conducted an extensive cross-examination at the preliminary hearing,[140] it tends to support this view. Harlan's view, on the other hand, addresses no inquiry to the reliability of the testimony adduced, but would admit any preliminary hearing testimony if the declarant is unavailable to testify at trial. Such a standard would seriously weaken a criminal defendant's right to reliable testimony introduced against him at trial, and is not consistent with the implications of the *Green* majority's opinion. Any former testimony use of a declarant's preliminary hearing statements given without cross-examination, or with only cursory cross-examination, should be excluded as violative of the defendant's confrontation rights.

C. IDENTITY OF PARTIES

1. CIVIL CASES

Throughout the early history of the former testimony exception

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[137] Mattox v. United States, 156 U.S. 237, 242 (1895).
[138] *See* text accompanying notes 21-28 *supra*.
[139] *See* text accompanying notes 121-22 *supra*.
[140] 399 U.S. 149, 151 (1969).

to the hearsay rule, former testimony was inadmissible at a subsequent hearing unless the parties to the original and subsequent hearings were identical.[141] The rationale for this identity requirement was that a successor in interest or stranger to the earlier litigation should not have to accept as adequate his predecessor's conduct of that hearing, because such acceptance would violate the successor's right to cross-examination.

This theory had another element: the requirement of "mutuality" between opponent and proponent of former testimony, namely, that a party may successfully offer former testimony at a later hearing only if it might also be introduced against him. This, of course, was possible only when the proponent was also a party to the earlier hearing at which the former testimony was taken.[142]

This requirement of "mutuality" has been much criticized[143] as irrelevant to the purpose of the identity rule, which was to protect the party against whom the testimony was offered by insuring that he had had an adequate opportunity to test the evidence by cross-examining the witness. But the effect of mutuality was to restrict use by different proponents of former testimony which had been already used against the same opponent.

Mutuality has been generally discarded.[144] The standard for

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[141] For example, in a suit for personal injuries stemming from an auto accident, a California court held that former testimony was not admissible when the parties to the two actions were not the same, and no privity was shown, although the plaintiff in the first action was the husband of the proponent-plaintiff in the second action against the same defendant. Redwing v. Moncravie, 138 Cal. App. 432, 32 P.2d 408 (3d Dist. 1934). A federal case held, on the same theory, that in a second action between the same parties involving the same issue, former testimony of a deceased witness was admissible when given under oath, with an opportunity for cross-examination by the parties against whom it was offered in the second action. Smythe v. New Providence Township, 263 F. 481 (3d Cir. 1920).

[142] For example, in a personal injury suit arising from a multiple-victim air crash, a federal court ruled that depositions taken pursuant to a cross-complaint between defendants were not admissible on behalf of one of the plaintiff-victims because the proponent was not a party to the cross-suit. Wolf v. United Air Lines, 12 F.R.D. 1 (D.C. Pa. 1951). Similarly, in Smith v. Schwartz, 35 Cal. App. 2d 659, 96 P.2d 816 (1st Dist. 1939), former testimony originally offered in a suit for personal injury of a daughter was ruled inadmissible in a suit for the wrongful death of her father arising out of the same auto accident, because the plaintiff-proponent was not the same in both actions.

[143] See 5 WIGMORE, *supra* note 9, § 1370.

[144] In Werner v. State Bar, 24 Cal. 2d 611, 150 P.2d 892 (1944), the California Supreme Court held that former testimony taken at a criminal trial was admissible at a subsequent disbarment hearing against the same defendant. There, the court found that substantial identity of parties was preserved because the State of California was represented at the first trial by the prosecutor and at the subsequent hearing by the State Bar. And in a federal case, Insul-Wool Corp. v. Home Insulation, Inc., 176 F.2d 502 (10th Cir. 1949), depositions taken in one action for patent infringement were held admissible against the same plaintiff in a subsequent action on the same issue, though offered by different defendants.

civil trials now reflected in both the California Code[145] and the federal rules[146] is that former testimony may be introduced against a party 1) who offered the testimony on his own behalf at the former hearing; or 2) who has a "similar interest and motive" in cross-examining the declarant as had the party against whom the testimony was originally introduced. Where this similar motive and interest exist, the former testimony is deemed to have been subject to adequate cross-examination, even if there is no privity[147] between the original and subsequent parties opponents.[148]

Since in a civil action, the parties cannot claim a constitutional right to confrontation,[149] this rule represents a policy decision that the testimony is more important to the court than is preserving every adversary advantage to the parties.[150] It also abolishes the vestiges of an identity of parties requirement, no longer requiring even privity between the first and later parties opponent. The California Code sections instead reemphasize the rule's original rationale—adequacy of cross-examination.

2. *CRIMINAL CASES*

The "similar interest and motive" rule does not apply, however, to situations in which the party against whom the former testimony is offered is a criminal defendant. To preserve the constitutional right to confrontation, the law requires that the defendant have been personally present at the earlier hearing.[151] with an adequate opportunity to cross-examine the declarant.[152] Even when the crime at issue is the same, former testimony taken at a hearing at which the defendant was not a party is not admissible against him at a later hearing.[153]

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[145] CAL. EVID. CODE §1291(a)(1), reproduced note 1 *supra*.

[146] FED. R. EVID. 804(b)(1), reproduced note 2 *supra*.

[147] Privity: "Derivative interest founded on, or growing out of contract, connection, or bond of union between parties; mutuality of interest." BLACK'S LAW DICTIONARY 1361 (rev. 4th ed. 1968).

[148] Falknor, *Former Testimony and the Uniform Rules*, 38 N.Y.U. L. REV. 651, 653 (1963) [hereinafter cited as Falknor].

[149] *See* notes 38-40, *supra*, and text accompanying them.

[150] Falknor, *supra* note 148, at 655.

[151] In dictum, the United States Supreme Court indicates that not only is the defendant's presence at the hearing necessary, but that presence of counsel is also required to satisfy the confrontation clause. Pointer v. Texas, 380 U.S. 400, 407 (1965).

[152] CAL. EVID. CODE § 1292, reproduced note 1 *supra*; FED. R. EVID. 804(b)(1), reproduced note 2 *supra*.

The California Law Revision Commission expressed its policy concern thus:

> When a person's life or liberty is at stake—as it is in a criminal trial—the Commission does not believe that the accused should be compelled to rely on the fact that another person has had an opportunity to cross-examine the witness.

6 CAL. LAW REV. COMM'N, *supra* note 6, at 317.

[153] In People v. Verdier, 96 Cal. App. 2d 29, 214 P.2d 433 (1st Dist. 1950),

In criminal trials, the California Evidence Code and the Federal Rules of Evidence allow introduction of former testimony against its original proponent. The California Code is framed so as to allow introduction "against a person who offered it in evidence in his own behalf on the former occasion."[154] The federal rules, however, express a more limited standard than the California statute and admit former testimony only if the party against whom it is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[155]

Thus, under the California Code, a criminal defendant who introduced testimony at the preliminary hearing to prove one point may have it introduced by the prosecution at trial to prove something very different. Under the federal rules, however, the prosecution's offer of evidence will not be admitted unless at the preliminary hearing the defendant had the opportunity and similar motive to develop on direct or redirect examination the testimony now offered adversely.

The California rule[156] is based on an assumption that a proponent has as good an opportunity to probe testimony using direct and redirect examination as does an opponent using cross-examination. As a result of this assumption a proponent at an earlier hearing is essentially estopped to claim violation of confrontation rights when the testimony is offered against him at a subsequent hearing.

Such a rule may be venerated for its ancient common law roots,[157] but it has no place in a modern evidence code. It is inconsistent with a central aim of the former testimony statutes—protection of a criminal defendant's confrontation rights. By allowing the prosecution at a later hearing to advance former testimony originally offered by the defendant, this section essentially denies its own "similar interest and motive" test. Proponents' and opponents' motives and interests are widely dissimilar in fact. A proponent is concerned with enhancing, and an opponent with impeaching, a witness' credibility. This rule assumes erroneously that both parties are anxious to

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the defendant was charged with robbery and pleaded guilty. At a hearing to determine the degree of the offense for sentencing purposes, the prosecutor introduced testimony from the earlier trial of Verdier's accomplice, to which Verdier was not a party and at which he had no chance to confront or cross-examine the witnesses. The appellate court reversed the trial court's degree determination because it had been based on the erroneously admitted former testimony.

[154] CAL. EVID. CODE § 1291(a)(1), reproduced note 1 *supra.*

[155] FED. R. EVID. 804(b)(1), reproduced note 2 *supra.*

[156] The common law rule that former testimony is admissible against any party to the original hearing, Gates v. Pendleton, 71 Cal. App. 752, 236 P. 365 (2d Dist. 1925), was incorporated into the California Code of Civil Procedure in 1872 (CAL. CODE CIV. P. § 1870(8) (1872), *repealed by* Stats. 1965, Ch.299, § § 1290-92), and thence into Evidence Code section 1291(a)(1). The section applies equally to civil and criminal actions.

[157] *See* note 156 *supra.*

develop all aspects of the testimony fully, whereas each party will aim at eliciting only the information that supports his case. And by the time former testimony is introduced against him at the later hearing, the proponent will have forgone his opportunity to impeach it. The federal rules take the preferable approach in this area, avoiding some of the problems with California's overbroad standard by imposing the "similar interest and motive" test on original and subsequent parties opponent.[158]

D. IDENTITY OF ISSUES

As a result of the "similar interest and motive" rule, the identity of issues requirement emerges as a more important criterion for testing the adequacy of former hearing cross-examination than is the old identity of parties rule. If the issues are such that the original party was likely to conduct a cross-examination at the prior hearing that would be sufficient to satisfy the needs of the party opponent in the subsequent hearing, confrontation clause requirements have been satisfied.[159] This approach guarantees that both original and subsequent opponents are concerned with exploring the same aspects of a witness' testimony. Otherwise, the earlier cross-examination will be of little value in terms of the factual issues at the subsequent hearing.

As with the identity of parties requirement, the identity of issues requirement has been somewhat relaxed since its first applications. The strict identity of issues required in the earlier cases[160] has given way to a requirement of substantial identity of issues.[161]

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[158] The identity of parties test does not extend to parties who have been added in a suit, or to the parties remaining of a group from which some have been subtracted. Where the issues are substantially the same and an adequate opportunity to cross-examine witnesses was afforded, mere addition or subtraction of parties will not affect the admissibility of former testimony.

For example, in People v. Bianchi, 140 Cal. App. 698, 35 P.2d 1032 (3d Dist. 1934), several co-defendants were tried on a charge of assault to rape. One was acquitted and the others retried. The court held that evidence offered by or on behalf of the acquitted defendant was admissible in the second trial of the others, since it was originally introduced by all defendants collectively. Here, as in its other aspects, the identity of parties requirement attempts to insure that no former testimony is admitted against a litigant that has not either been offered, or tested through cross-examination, by someone with similar interests and motives.

[159] 5 WIGMORE, *supra* note 9, § 1388.

[160] Smythe v. New Providence Township, 263 F. 481 (3d Cir. 1920); Redwing v. Moncravie, 138 Cal. App. 432, 32 P.2d 408 (3d Dist. 1934).

[161] Thus, in Werner v. State Bar, 24 Cal. 2d 611, 150 P.2d 892 (1944), former testimony taken at a trial for grand theft was admissible against the defendant in a subsequent disbarment proceeding, the question in both actions being whether the defendant committed the same alleged acts. And in People v. Hart, 28 Cal. App. 335, 152 P. 947 (1st Dist. 1915), where the defendant was ar-

The identity of issues requirement has virtually replaced identity of parties as a guarantee of litigants' rights to confront and cross-examine. This change in the law gives parties more opportunity to introduce former testimony, while adhering to the original rationale which requires exclusion when cross-examination has been inadequate.

IV. PROOF OF FORMER TESTIMONY

Early cases followed the common law[162] in permitting oral proof of former testimony by persons who had heard it at the previous hearing, but insisted that it must be recounted verbatim.[163] This requirement was eventually relaxed, and today a witness can testify to the substance of the former testimony rather than to the exact words used by the original declarant.[164] Such a witness may use his or her own notes taken at the earlier hearing to refresh memory about the substance of the testimony there given.[165]

Notes of former testimony taken by a stenographer or by the magistrate at the previous hearing may be introduced as proof of the former testimony when properly authenticated,[166] through a reporter's transcript is now the most frequently offered method of proof. Neither the stenographer's transcript nor the magistrate's notes, however, is considered "best evidence" that will exclude parol proof of the former testimony.[167]

V. OBJECTIONS TO FORMER TESTIMONY

The California statutes provide that former testimony will be subject to objections as to relevancy or materiality.[168] However, when introduced against an opponent who was a party to the previous hearing, it is not subject to objections which go to the form of the questions.[169] Since at the previous hearing the opponent either asked the questions himself or had the opportunity to object to them when asked of the other party's witnesses, his failure to object at

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raigned on a charge of grand larceny but held for trial on an embezzlement charge, preliminary hearing testimony on the former charge was admitted in the trial on the latter, because the issues were substantially identical. *See also* Mid-City Bank and Trust Co. v. Reading Co., 3 F.R.D. 320 (D.C. N.J. 1944); and Riviera v. American Export Lines, Inc., 13 F.R.D. 27 (S.D. N.Y. 1952).

[162] Annot., 15 A.L.R. 495, 542 (1921).

[163] United States v. Wood, 28 F. Cas. 754 (No. 16, 756) (C.C. E.D. Pa. 1818).

[164] United States v. Macomb, 26 F. Cas. 1132 (No. 15, 702) (C.C.D. Ill. 1851); United States v. White, 28 F. Cas. 572 (No. 16, 679) (C.C.D. D.C. 1838); People v. Murphy, 45 Cal. 137 (1872).

[165] 5 AM. JUR. PROOF OF FACTS 229 (1960).

[166] People v. Murphy, 45 Cal. 137 (1872).

[167] People v. Shortridge, 179 Cal. 507, 177 P. 458 (1918).

[168] CAL. EVID. CODE § § 1291(b), 1292(b), reproduced note 1 *supra*.

[169] CAL. EVID. CODE § 1291(b)(1), reproduced note 1 *supra*.

that time is considered a waiver. If the party opponent at the subsequent hearing was not a former party, the statute will allow objection to the form of questions as well.[170] This seems equitable, preserving to a subsequent opponent the right to rectify oversight or ineptitude on the part of a predecessor in interest.

The statute also prohibits objections based on competency or privilege which did not exist at the time the former testimony was given.[171] If a witness was competent to testify and asserted no privilege at the former hearing, that witness' former testimony could not be later excluded on the basis of a subsequently-acquired privilege or incompetency. A privilege or incompetency existing at the time of the earlier hearing, however, may be the basis of a valid objection at the later hearing.[172]

VI. CONCLUSION

The differences between the former testimony rules of the California Evidence Code and the Federal Rules of Evidence are few. Where they do diverge however, the federal rules tend to take the more enlightened view, incorporating recent advances in former testimony law, liberalizing the court's access to such testimony, and still preserving litigants' cross-examination and confrontation rights.

In particular, the federal rules allow access to testimony of both forgetful and recalcitrant witnesses, defining them as unavailable for purposes of introducing their former testimony. However, the California Code excludes former testimony of such witnesses. In *People v. Rojas*,[173] the California Supreme Court recently declined to judicially expand the circumstances of unavailability in the California Code. The legislature should do so, since such former testimony is inherently trustworthy and is not accessible to the trier of fact without a finding that the declarant is unavailable to testify at the subsequent hearing.

The other major area in which the federal rules and the California Code differ is in the identity of parties requirement for criminal trials. The best rule here would be to forbid in criminal actions any introduction of former testimony against the original proponent. The federal rules do impose a "similar interest and motive" test, which to a degree protects criminal defendants' confrontation rights. California's rule, on the other hand, provides no such protection and is therefore unsatisfactory when applied in criminal actions. The California Legislature should amend section 1291 so as to bring

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[170] CAL. EVID. CODE § 1292(b), reproduced note 1 *supra*.
[171] CAL. EVID. CODE § § 1291(b)(2), 1292(b), reproduced note 1 *supra*.
[172] Letwin, *Waiver of Objections to Former Testimony*, 15 U.C.L.A. L. REV. 118, 142 (1967).
[173] 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975).

it into conformity with constitutional standards, or the judiciary should apply it only in civil actions.

Finally, neither the California Code nor the federal rules limit the introduction of former testimony taken in preliminary hearings in criminal cases. The United States Supreme Court indicated in *California v. Green*[174] that introduction of former testimony taken at a preliminary hearing did not violate the defendant's confrontation rights, at least when the cross-examination at the preliminary hearing had been "extensive."[175] Because preliminary hearings are frequently used as a discovery device rather than as a method to fully probe and challenge witnesses' testimony, the *Green* criterion seems a necessary safeguard in criminal actions to preserve defendants' sixth amendment rights.

Patience Milrod

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[174] 399 U.S. 149 (1969).
[175] *Id.* at 151.