USE OF FORMER TESTIMONY

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Under Rule 501 (2), a statement made by a witness in the process of testifying at the present trial, or contained in a deposition or other record of testimony taken and recorded pursuant to law for use at the present trial, is not hearsay. But a statement made at a former trial, and of which evidence is offered as tending to prove the truth of the matter intended to be asserted, is hearsay.

This hearsay testimony is admissible under Rule 503 if the judge finds that the declarant (a) is *not* available as a witness, *or* (b) *is* present and subject to cross-examination.

Rule 511 treats of the use of this particular type of hearsay where the declarant *is* available to testify, *and* is *not* present and subject to cross-examination. It reads:

> "Evidence of a hearsay statement which consists of testimony given by the declarant as a witness in an action or in a deposition taken according to law for use in an action is admissible for any purpose for which the testimony was admissible in the action in which the testimony was given or for use in which the deposition was taken, unless the judge finds that the declarant is available as a witness and in his discretion rejects the evidence."

In Wisconsin, the use of former testimony is governed by Section 325.31 of the Wisconsin Statutes which provides:

> "325.31 *Testimony of deceased or absent witness.* The testimony of a deceased witness, or a witness absent from the state, taken in any action or proceeding (except in a default action or proceeding where service of process was obtained by publication), shall be admissible in evidence in any retrial, or in any other action or proceeding where the party against whom it is offered shall have had an opportunity to cross-examine said witness, and where the issue upon which it is offered is substantially the same as the one upon which it was taken."

The affect of the adoption of Rule 511 upon the Wisconsin practice in respect to the use of former testimony will be pointed out in a discussion of the following questions:

1. What prior testimony is admissible?

2. Where and for what purpose is the prior testimony admissible?
3. What is the effect of the availability or unavailability of the declarant?

What Prior Testimony Is Admissible?

A. *Under the Model Code*

Rule 511 requires that the prior testimony (1) must have been given by the declarant as a witness in (a) in action, or (b) in a deposition taken according to law for use in an action, and that (2) the testimony "was admissible" in the action in which the testimony was given, or for use in which the deposition was taken.

An "action" is defined by Rule 1 (1) as, " 'Action' includes action, suit, special proceeding, criminal prosecution and every proceeding conducted by a court for the purpose of determining legal interests."

If the prior testimony constitutes a part of a deposition, it is not necessary that the testimony was ever actually offered or received in an action, but merely that it was taken according to law for use in an action.

The second requirement under the Code is that the prior testimony must have been admissible in the action or deposition. Thus, the Rule does not authorize the admission of evidence of a declaration made in a prior action, which, if then objected to, would have been inadmissible as hearsay under the Code. The Comment to Rule 511 uses the following example:—

> ". . . . if *W*, in testifying at a former trial said: 'I saw *A* strike *B*,' evidence of that statement would be admissible in a later trial or action. If, however, he said: '*X* told me that he heard that *A* struck *B*,' evidence of that statement, offered to prove that *A* struck *B*, would not be admissible under this Rule in a later trial or action."

B. *Under the Wisconsin Rule*

The Wisconsin Statute refers to testimony taken ". . . in any action or proceeding except in a default action or proceeding where service of process was obtained by publication."

The testimony ordinarily admitted in evidence under the Wisconsin Statute is testimony which was given on the former trial of

an action. Usually, this trial was between the same parties as the trial in which the former testimony is offered.[1] And the testimony is most frequently used in the subsequent trial on behalf of the same party as on whose behalf it was taken on the prior trial.[2]

Whether testimony in an adverse examination—the examination being in the action in which the testimony is offered—is testimony ". . . taken in any action or proceeding . . ." within this statute is doubtful.[3] This question would not arise under the proposed Rule 511 because Rule 501 (2) specifically provides that testimony taken for use in the trial is not hearsay.

Obiter dicta in *Roberts v. Gerber*,[3a] is to the effect that testimony taken by deposition in *another* action is within the meaning of the Wisconsin statute.

In *F. J. Bresler Co. v. Bauer*,[3b] the court had occasion to point out that prior testimony is not admissible under Section 325.31 unless the declarant thereof would be a competent witness at the time the testimony is offered. Thus, the prior testimony of one incompetent as a witness by reason of the so-called "transactions with a deceased person is not admissible by reason of Section 325.31. We assume the result would be the same under the proposed Rule 511.

It appears therefore that the only substantial difference between the Code rule and the Wisconsin rule, in respect to the nature or the identity of the prior testimony, is that the Code permits the use of testimony taken in a default action or proceeding, while the Wisconsin statute specifically excludes such testimony. This variance is a natural one because, as hereafter noted, Wisconsin stresses the right of the person against whom the testimony is offered to have had

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[1] Wilson v. Noonan, 35 Wis. 321 (1874); McGeoch and another v. Carlson, 96 Wis. 138, 71 N.W. 116 (1897); Howard v. Beldenville Lumber Co., 134 Wis. 644, 114 N.W. 1114 (1908); Szeliwicki v. Connor Lumber & Land Co., 163 Wis. 20, 156 N.W. 622 (1916); Lambrecht v. Holsaple, 164 Wis. 465, 160 N.W. 168 (1916); Philbrook v. State, 216 Wis. 206, 256 N.W. 779 (1934); See also: Will of Bilty, 171 Wis. 20, 176 N.W. 220 (1920).

[2] Wilson v. Noonan, 35 Wis. 321 (1874); McGeoch and another v. Carlson, 96 Wis. 138, 71 N.W. 116 (1897); Howard v. Beldenville Lumber Co., 134 Wis. 644, 114 N.W. 1114 (1908); Szeliwicki v. Connor Lumber & Land Co., 163 Wis. 20, 156 N.W. 622 (1916); Lambrecht v. Holsaple, 164 Wis. 465, 160 N.W. 168 (1916); Philbrook v. State, 216 Wis. 206, 256 N.W. 779 (1934); See also: Will of Bilty, 171 Wis. 20, 176 N.W. 220 (1920).

In the McGeoch Case, *supra*, the testimony was offered by the executor of the deceased former plaintiff.

[3] Nelson v. Ziegler, 196 Wis. 426, 220 N.W. 194 (1928); Drexler v. Zohlen, 216 Wis. 483, 257 N.W. 695 (1934).

[3a] 187 Wis. 282, 202 N.W. 701 (1925).

[3b] 212 Wis. 386, 250 N.W. 8 (1933).

an opportunity to cross-examine the declarant. Rule 511 abolishes this prerequisite.

WHERE IS THE PRIOR TESTIMONY ADMISSIBLE?

A. *Under the Model Code*

As a general rule, prior testimony has been admitted only in retrials or in actions where the parties and issues have been the same as in the action in which the testimony was given. The Comment to Rule 511 states: "The Rule abolishes all these limitations and makes the former testimony admissible, wherever relevant,[4] regardless of identity of parties or issues."

B. *Under the Wisconsin Rule*

The statute provides that the prior testimony "shall be admissible in evidence in any retrial or in any other action or proceeding where the party against whom it is offered shall have had an opportunity to cross-examine said witness, and where the issue upon which it is offered is substantially the same as the one upon which it was taken."

As stated, most of the Wisconsin cases involving the use of prior testimony are retrials of the same action and are between the same parties,[5] but it is neither necessary that it be such a retrial[6] nor that parties be the same.[7]

The Wisconsin requirement that the testimony may be used only in an action where the party against whom it is offered shall have had an opportunity to cross-examine the witness, is strictly construed. In *Illinois Steel Co. v. Muza*,[7a] the court stated: ". . . The

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[4] Relevancy is defined by Rule I (12) as follows: "Relevant evidence" means evidence having any tendency in reason to prove any material matter and includes opinion evidence and hearsay evidence.

[5] Wilson v. Noonan, 35 Wis. 321 (1874); McGeoch and another v. Carlson, 96 Wis. 138, 71 N.W. 116 (1897); Howard v. Beldenville Lumber Co., 134 Wis. 644, 114 N.W. 1114 (1908); Szeliwicki v. Connor Lumber & Land Co., 163 Wis. 20, 156 N.W. 622 (1916); Lambrecht v. Holsaple, 164 Wis. 465, 160 N.W. 168 (1916); Philbrook v. State, 216 Wis. 206, 256 N.W. 779 (1934); See also: Will of Bilty, 171 Wis. 20, 176 N.W. 220 (1920).

[6] State v. Anderson, 219 Wis. 623, 263 N.W. 587, (1935); Inda v. State, 198 Wis. 557, 224 N.W. 733 (1929); Roberts v. Gerber, 187 Wis. 282, 202 N.W. 701 (1925); Charlesworth v. Tinker and another, 18 Wis. 663 (1864), which was decided prior to the enactment of the statute.

[7] Illinois Steel Co. v. Muza, 164 Wis. 247, 159 N.W. 908 (1916); Zimdars v. Zimdars, 236 Wis. 484, 295 N.W. 675 (1941).

[7a] 164 Wis. 247, 159 N.W. 908 (1916).

essential thing is that the issue upon which such testimony is offered is substantially the same and that the objecting parties shall have had an opportunity of a full and adequate cross-examination and had the interest and motive to exercise this right that he has on the pending trial. . . ."

For What Purpose Is The Prior Testimony Admissible?

Rule 511 provides that the prior testimony is admissible only for such purposes as it was admissible when given.

There appears to be little, if any, difference in this requirement and the Wisconsin rule that it is admissible "where the issue upon which it is offered is substantially the same as the one upon which it was taken." It seems safe to say that under the Wisconsin Statute the issue upon which the testimony is offered need not be the major issue in either the case in which the testimony is taken or in the case in which it is offered.[8]

What Is The Effect Of The Availability Or Unavailability Of The Declarant?

The essential difference between Rule 511 and the Wisconsin rule with respect to the availability of the declarant is this: In Wisconsin, prior testimony cannot be used if the witness is available; under Rule 511, the use of prior testimony lies in the discretion of the judge if the witness is available. As pointed out in the beginning of this note, Rule 511 need be resorted to only when the witness *is* available but is not present to testify. Under these circumstances the judge in his discretion may reject the prior testimony.

And the Wisconsin rule is less liberal in another respect. Under Rule 511, as well as under Rule 503, prior testimony may be used if the witness is unavailable. That term is broadly defined in Rule I (15).[9] In Wisconsin, the testimony may be used only if the witness is deceased or is "absent from the state."

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[8] Zimdars v. Zimdars, 236 Wis. 484, 295 N.W. 675 (1941).

[9] Rule I (15) reads: "Unavailable as a witness" concerning a matter means exempted from testifying as to the matter on the ground of privilege, or disqualified from testifying as to the matter, or unable to testify because of deatb, or of physical or mental illness, permanent or temporary, or absent from the place of trial permanently or temporarily, if

(a) the exemption, disqualification, inability or absence is not due to procure-

The Wisconsin cases generally indicate that mere absence from the state is sufficient.[10] However, *State v. Anderson*,[10a] demonstrates that the statute cannot be taken literally. In this case, the defendants had been convicted of larceny. A deputy district attorney had testified at the preliminary hearing that the defendants had admitted their guilt to him. This testimony was read in evidence upon the trial. This procedure was predicated upon an affidavit showing that the deputy district attorney was "in southern United States on his vacation," and that he left on November 10th, and would not return until approximately November 24th.

The court recognized that the absence of a witness from the state is usually accepted as sufficient foundation for the admission of former testimony. It decided, however, that justice demanded the granting of a new trial. The court apparently was influenced by the temporary nature of the absence from the state, the fact that the deputy district attorney had not been cross-examined at the time of the preliminary hearing, and the fact that it felt that the deputy district attorney was not justified in leaving on a vacation, knowing that the case would be tried during his absence and that his testimony of such a vital nature would be read in evidence.

Although the Wisconsin rule refers only to a deceased witness or a witness absent from the state, the testimony of a witness who is unavailable by reason of mental or physical incapacitation—even though apparently located within the state—may be used under case law.[11]

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ment or wrongdoing, for the purpose of preventing the witness from attending or testifying, by the party in whose favor a finding of unavailability is sought or to the culpable neglect of that party, and

(b) the importance of the issue or the added reliability of the witness's testimony in court or his deposition over his declaration does not justify the expense and inconvenience of procuring his presence or taking his deposition.

[10] Lambrecht v. Holsaple, 164 Wis. 465, 160 N.W. 168 (1916); Will of Bilty, 171 Wis. 20, 176 N.W. 220 (1920); Philbrook v. State, 216 Wis. 206, 256 N.W. 779 (1934); See Inda v. State, 198 Wis. 557, 224 N.W. 733 (1929) for the degree of proof necessary to prove absence from the state.

[10a] 219 Wis. 623, 263 N.W. 587 (1935).

[11] Markowitz v. Milwaukee E.R. & L. Co., 230 Wis. 312, 284 N.W. 31 (1939); Spencer v. State, 132 Wis. 509, 112 N.W. 462 (1907).