Unavailability Requirement for Exceptions to the Hearsay Rule,
The
Robert B. Lee
the responsibility for a plaintiff’s injuries between tortfeasors on the basis of relative fault. Fairness could then be achieved between the parties without the difficulties attendant on the “bare cubicles of easy nomenclature”\(^{136}\) of the active-passive negligence indemnity theory.

DAVID L. BAYLARD

THE UNAVAILABILITY REQUIREMENT FOR EXCEPTIONS TO THE HEARSAY RULE

I. INTRODUCTION

Hearsay is commonly defined as any out-of-court statement offered to prove the truth of the matters asserted therein.\(^1\) Although hearsay is generally inadmissible, there are several exceptions to the hearsay rule, some of which require the unavailability of the witness or declarant as a condition precedent to their use. There are generally considered to be four such exceptions: declarations against interest, prior reported testimony, dying declarations, and declarations as to pedigree. These exceptions are based on the necessity\(^2\) for resorting to hearsay statements—i.e., they represent the best or the only source of evidence, and any disadvantages\(^3\) which might accrue to the adversary are outweighed by the indispensability of the evidence to a proper determination of the issues.

Missouri has adopted the view, premised on necessity, that “whenever the testimony of a witness is unavailable as a practical proposition, his declaration should be received.”\(^4\) This is the general standard now applied in determining whether a witness is unavailable for purposes of the hearsay exceptions which require unavailability. The purpose of this comment is to examine the application and scope of the unavailability requirement for these exceptions to the hearsay rule.\(^5\)

Although there are differences in the conditions of unavailability required to satisfy the four exceptions, similar conditions are applicable to

\(^{136}\) This description was first used in Falk v. Crystal Hall, Inc., 200 Misc. 979, 984, 105 N.Y.S.2d 66, 71 (1951), aff’d, 279 App. Div. 1071, 115 N.Y.S.2d 277 (Sup. Ct. 1952).

1. C. McCORMICK, EVIDENCE § 246, at 584 (2d ed. 1972).

2. See Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); 5 J. Wigmore, EVIDENCE §§ 1420-21 at 251-53 (3d ed. 1940).

3. The primary objection to hearsay evidence is that it may be unreliable because the declarant is neither under oath nor subject to cross-examination at the present trial. Bartlett v. Kansas City Pub. Serv. Co., 349 Mo. 13, 160 S.W.2d 740 (1942).


5. The use of depositions, the Federal Rules of Evidence pertaining to exceptions to the hearsay rule, and the unavailability requirement in regard to criminal proceedings will also be examined in this comment.
declarations against interest and prior reported testimony. These conditions, which normally include the declarant’s death, absence, insanity, illness or disability, refusal to testify, or loss of memory, will be discussed more fully in following sections. As a general rule, declarations concerning pedigree are not admissible unless the declarant is dead. Missouri courts have relaxed this requirement by stating that the declarant must be “dead or otherwise unavailable,” although they have not as yet had to deal with a declarant whose testimony was unavailable for a reason other than his death—e.g., insanity, illness, etc. Missouri courts would probably hold that such conditions render the declarant’s testimony unavailable for purposes of this exception. Almost all jurisdictions, including Missouri, require the declarant to have died as a prerequisite to the admission of a dying declaration.

In order to establish a right to introduce the above types of hearsay evidence, the unavailability of the declarant or the unavailability of his testimony at the present trial must be shown. It should be noted that we are not dealing only with the physical unavailability of a declarant because he may be present and yet unavailable. For instance a witness may be deemed unavailable when he refuses to testify based on a fifth amendment claim. This comment, however, will not emphasize this distinction but will speak generally to the unavailability of a declarant. The determination whether there has been a sufficient showing of the unavailability of the declarant rests largely within the discretion of the trial court.

II. CONDITIONS WHICH CONSTITUTE UNAVAILIBILITY

A. Death

Unavailability based on the declarant’s death is universally accepted. Originally, death was the only condition which would satisfy the unavailability requirement for exceptions to the hearsay rule. Today, however, the only exception for which death is required in Missouri is a dying declaration.

There are several types of evidence which have been held sufficient to establish the death of the declarant. For instance, a death certificate is

7. Gordon v. Metropolitan Life Ins. Co., 238 Mo. App. 46, 50, 176 S.W.2d 506, 507 (K.C. Mo. App. 1945); State v. Bowman, 278 Mo. 492, 213 S.W. 64 (1919). The court in State v. McDonald, 55 Or. 419, 106 P. 444 (1910), held that the requirement was satisfied if the declarant was absent because he was out of the state.
8. For a contrary view, see text accompanying note 116 infra.
10. State v. Purl, 183 S.W.2d 903 (Mo. 1944).
12. State v. McO’Blenis, 24 Mo. 402 (1857) (former testimony); Wynn v. Cory, 48 Mo. 346 (1871) (declaration against interest).
prima facie evidence of death.\textsuperscript{14} In addition, although the declarant's death may not ordinarily be shown by one who can speak to that fact only from hearsay,\textsuperscript{15} it has been held that common reputation in the deceased's family is sufficient to establish his death.\textsuperscript{16} There is also a statutory presumption of death after an absence from the state for a period of seven years.\textsuperscript{17}

B. Absence

In one of the first cases to question the propriety of the early decisions making death the only condition sufficient to establish unavailability, the Missouri Supreme Court\textsuperscript{18} held that a witness' mere absence from the jurisdiction of the court did not warrant the admission of his deposition, but stated that the outcome would be different if such absence was procured by the adverse party.\textsuperscript{19} This decision was overruled by\textit{State v. Harp},\textsuperscript{20} which held that when a witness is out of the state and beyond the reach of process, his presence at trial is as unattainable as if he were dead. This situation, where the declarant is beyond the jurisdiction of the court, is now generally accepted as rendering him "unavailable," at least in civil cases.\textsuperscript{21} Under this condition of unavailability, declarations against interest,\textsuperscript{22} prior reported testimony,\textsuperscript{23} and possibly declarations as to pedigree\textsuperscript{24} are admissible.

When hearsay evidence\textsuperscript{25} is offered on the theory that the witness is beyond the court's jurisdiction or absent from the trial because he cannot be located, the proponent must show that the declarant is either out of the jurisdiction or cannot be found despite the exercise of due diligence to secure his presence at trial.\textsuperscript{26} The degree of effort which constitutes due

\begin{enumerate}
\item \textsuperscript{14} § 193.170, RSMo 1969.
\item \textsuperscript{15} State v. Gallina, 352 Mo. 557, 178 S.W.2d 433 (1944); Biggs v. Modern Woodmen of America, 71 S.W.2d 783 (K.C. Mo. App. 1934), rev'd on other grounds, 336 Mo. 879, 82 S.W.2d 898 (1935).
\item \textsuperscript{16} Denbo v. Boyd, 194 Mo. App. 121, 185 S.W. 236 (Spr. Ct. App. 1916).
\item \textsuperscript{17} § 490.020, RSMo 1969.
\item \textsuperscript{18} State v. Houser, 26 Mo. 431, 440 (1858).
\item \textsuperscript{19} Where the absence of a declarant is due to procurement by a party, the declarant will be deemed unavailable and his statements admitted. State v. Brown, 285 S.W. 995 (Mo. 1926); State v. Butler, 247 Mo. 685, 153 S.W. 1042 (1915).
\item \textsuperscript{20} 320 Mo. 1, 6 S.W.2d 562 (En Banc 1928).
\item \textsuperscript{21} In regard to criminal cases, see pt. VI of this comment.
\item \textsuperscript{22} State v. Brown, 404 S.W.2d 179 (Mo. 1966); Straughan v. Asher, 372 S.W.2d 489 (St. L. Mo. App. 1963); Neely v. Kansas City Pub. Serv. Co., 241 Mo. App. 1244, 252 S.W.2d 88 (K.C. Ct. App. 1952); Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945).
\item \textsuperscript{23} Dryden v. Aitken, 405 S.W.2d 925 (Mo. 1966); State v. Kain, 330 S.W.2d 842 (Mo. 1960); State v. Purl, 183 S.W.2d 903 (Mo. 1944); Bartlett v. Kansas City Pub. Serv. Co., 349 Mo. 13, 160 S.W.2d 740 (1942); Welp v. Bogy, 218 Mo. App. 414, 277 S.W. 600 (St. L. Ct. App. 1925).
\item \textsuperscript{24} See text accompanying note 7 supra.
\item \textsuperscript{25} This is also required for the admission of a deposition in some situations. See text accompanying note 9 infra.
\end{enumerate}
diligence will depend upon the facts of each case.\textsuperscript{27} Usually it is sufficient to show that a witness could not be located after a reasonable effort to find him, or, although located, he refused to attend and testify.\textsuperscript{28}

Courts disagree as to whether temporary absence is sufficient to satisfy the unavailability requirement. The majority view\textsuperscript{29} appears to require permanent or indefinite absence. Nevertheless, some courts\textsuperscript{30} hold that the temporary absence of the witness is sufficient to justify admitting his out-of-court statements. This would seem to be the better rule when the witness' testimony is not important enough to merit a continuance until his return or where the opponent of the evidence does not consent to a continuance.

In a criminal case,\textsuperscript{31} the Missouri Supreme Court said that in order for prior reported testimony to be admissible due to the witness' absence, such absence must be permanent or indefinite.\textsuperscript{32} If faced with this question in a civil case, Missouri courts may consider temporary absence sufficient to satisfy the unavailability requirement because the requirement is that the witness be unavailable as a practical matter. In reaching this determination, however, other factors, such as the importance of the witness' present testimony and the desirability of a continuance, should be considered.

\section*{C. Insanity}

When a witness has become incompetent to testify by reason of insanity, his present testimony at trial "is to all intents and purposes as unattainable as if he were dead."\textsuperscript{33} Thus, where a witness has become insane or mentally incapacitated, his prior reported testimony has been held admissible.\textsuperscript{34} The same is true in regard to declarations against interest.\textsuperscript{35}

Where a party offers hearsay evidence predicated on the witness' insanity, questions arise as to the degree of insanity necessary to render him incompetent to testify. In \textit{State v. Herring}\textsuperscript{36} the court held that legal confinement in an insane asylum or an adjudication as an insane person creates a presumption of incompetency as a witness. However, this presumption

\begin{footnotesize}
\begin{enumerate}
\item State v. Lloyd, 337 Mo. 990, 996, 87 S.W.2d 418, 422. (1935); see State v. Scott, 117 Kan. 803, 295 P. 380 (1924). This showing may not be sufficient in criminal cases today. See pt. VI of this comment. It should, however, be sufficient in civil cases.\textsuperscript{19}
\item State v. Purl, 183 S.W.2d 903 (Mo. 1944). See \textit{also} Williams v. Calloway, 281 Ala. 249, 201 So. 2d 506 (1967); Oklahoma Alcoholic Beverage Control Bd. v. Lobo, 391 P.2d 819 (Okla. 1964); C. McCormick, \textit{supra} note 1, \S 255, at 609.
\item See pt. VI of this comment.
\item State v. Purl, 183 S.W.2d 903 (Mo. 1944). The court cited 16 C.J. Criminal Law \S 1557 (1918) as stating the prerequisites to the admission of former testimony in a criminal case.
\item State v. Pierson, 337 Mo. 475, 485, 85 S.W.2d 48, 53 (1935).
\item \textit{Id}; Welp v. Bogy, 218 Mo. App. 414, 277 S.W. 600 (St. L. Ct. App. 1925).
\item 268 Mo. 514, 188 S.W. 169 (1916).
\end{enumerate}
\end{footnotesize}
may be rebutted by a voir dire examination of the witness, or by extrinsic evidence.\(^{37}\) In light of *Herring*, the court in *State v. Pierson*\(^{38}\) stated that the witness should be produced and examined before the court if this could be done without creating an unreasonable risk of harm to him. The reason for the examination of the witness is that an insane person is not incompetent as a witness if he has sufficient mental capacity to understand the nature of an oath, and if he possess sufficient mind and memory to observe, recollect, and narrate the things he will testify to.\(^{39}\) If the declarant lacks any of these qualities he is incompetent as a witness. Thus, his testimony is unavailable and his earlier statement should be admissible.

### D. Illness or Disability

It appears to be settled that the illness or physical disability of a witness renders him unavailable for the purpose of admitting his out-of-court statements. Both prior reported testimony\(^{40}\) and declarations against interest\(^{41}\) are admissible when the witness is unavailable due to illness or disability.

There is disagreement, however, concerning the extent and duration of the illness or disability necessary to satisfy the unavailability requirement.\(^{42}\) The illness or disability should at least be sufficiently severe to prevent a witness from attending trial.\(^{43}\) Some jurisdictions require that the witness' illness or disability be of a long-term or permanent nature. On the other hand, a few cases have held the temporary illness or disability of the witness sufficient to render him unavailable.\(^{44}\) Missouri courts have not addressed this issue, but a witness who is only temporarily ill or disabled might be considered unavailable from a practical standpoint, and therefore, temporary illness may be sufficient to constitute unavailability under the standard applied in Missouri.\(^{45}\) The best approach would be to determine in each case whether the importance of the witness' present testimony merits a continuance until the witness will be available; if not, the witness' out-of-court statement should be admitted.

---

38. 337 Mo. 475, 85 S.W.2d 48 (1935).
41. Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); Straughan v. Asher, 372 S.W.2d 489 (St. L. Mo. App. 1963).
42. "The scarcity of cases dealing with this question indicates that most of these situations are handled by continuance." C. McCormick, supra note 1, § 253, at 610.
43. Heinbach v. Heinbach, 262 Mo. 69, 170 S.W. 1143 (1914).
45. See text accompanying note 4 supra. A greater degree of permanency may be required in criminal prosecutions than in civil cases by the same court.
E. The Exercise of a Privilege or Refusal to Testify

It is generally accepted that the exercise of a privilege by a witness satisfies the requirement of unavailability.\(^{46}\) The privilege usually invoked is the fifth amendment privilege against self-incrimination. Sutter v. Easterly\(^ {47} \) was the first Missouri case to consider this ground of unavailability. The Missouri Supreme Court held that declarations against interest are admissible where the declarant is called as a witness but claims his privilege against self-incrimination.\(^ {48}\) Adopting the necessity principle,\(^ {49} \) the court stated that whenever, as a practical proposition, a witness is unavailable—as is the case when he asserts his privilege against self-incrimination—his out-of-court declaration should be received. In fact, these circumstances make it even safer to admit a declaration against interest than if the witness were dead, because his refusal to testify is added assurance that he believes the declaration to be true. If it were not, the witness would probably take the stand to repudiate it.\(^ {50} \) Likewise, it is generally held that testimony given by a witness at a previous trial or preliminary hearing is admissible where the witness later refuses to testify because his testimony may incriminate him.\(^ {51} \) It should be noted, however, that the Missouri civil procedure rule governing the admissibility of depositions\(^ {52} \) does not include the deponent's exercise of a privilege as a ground for admission.\(^ {53} \)

Several courts\(^ {54} \) have held that testimony by the spouse of a criminal defendant given at a preliminary hearing or former trial is admissible where the defendant at a subsequent criminal trial claims the privilege of refusing to allow his spouse to testify against him. The same result would probably obtain in Missouri, but the courts have not yet been confronted with this situation.\(^ {56} \)

46. Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); People v. Brown, 26 N.Y.2d 88, 308 N.Y.S.2d 825, 257 N.E.2d 16 (1970); People v. Pickett, 339 Mich. 294, 63 N.W.2d 681 (1954). This is a situation where the witness is present but his testimony is unavailable.

47. 354 Mo. 282, 189 S.W.2d 284 (1945).


49. See note 4 and accompanying text supra.

50. 354 Mo. at 295, 189 S.W.2d at 289.


53. See pt. III of this comment.


56. One cannot be required to testify against a defendant spouse if the defendant objects. § 546.260, RSMo 1969. Although declarations against interest would present little difficulty for a court, there may be a question with regard to former testimony. Former testimony may be used in the manner provided for the use of depositions and with like effect, and a witness is presumed to testify when his deposition is read in evidence. § 492.410, RSMo 1969; Howard v. Strode, 242
Missouri courts have not considered the question of unavailability in regard to other privileges which would appear to render a witness unavailable if exercised—i.e., the attorney-client privilege, the physician-patient privilege, the priest-penitent privilege, and the confidential communications privilege between spouses. Courts which have held a witness unavailable because he invoked the fifth amendment or is precluded from testifying under the husband/wife witness privilege afforded a criminal defendant should also consider a witness unavailable if he does not testify due to the invocation of any of these other privileges. This is a logical extension of the rationale involved.

Although a court may consider the witness unavailable, it may feel constrained not to allow the admission of the witness' prior testimony or declarations against interest when one of these latter privileges is invoked. The primary purpose of these privileges is different from that of the fifth amendment or witness privilege. When a witness exercises his fifth amendment privilege, he is protecting himself. On the other hand, an attorney, for instance, who refuses to testify concerning confidential information obtained from a client is protecting the client and not himself. Admission of the witness' out-of-court statements disregards the purpose of these privileges, and unless the privilege has been waived, the need for the evidence may be outweighed by the need to retain the confidentiality sought to be protected.

A flat refusal to testify has been held to render the witness as unavailable as one who is out of the jurisdiction of the court. Faced with this situation, the Missouri courts would probably consider the witness unavailable because the witness is as "practically unavailable" as one who refuses to testify on the ground that his testimony might tend to incriminate him. A New Jersey court has gone so far as to hold that the declarant of a declaration against interest was, for all practical purposes, unavailable where he would have been a hostile witness and the proponent of the evidence could not afford to be bound by his in-court testimony.

F. Supervening Disqualification: The Dead Man's Statute

Unavailability of a witness' testimony may also result from the applica-

Mo. 210, 146 S.W. 792 (1912). Thus, the argument would be that using the former testimony is equivalent to requiring the spouse to testify. However, because the Missouri Supreme Court held in State v. Phillips, 511 S.W.2d 841 (Mo. 1974), that former testimony of a witness was admissible when he invoked the fifth amendment, this argument would most likely be rejected by the court.

57. § 491.060, RSMo (1969).
61. Supervening disqualification may also result from the insanity of a witness. See §§ 21.02(9) of this volume.
tion of the Missouri Dead Man's Statute. Under the Dead Man's Statute, the death or insanity of one of the parties to a lawsuit bars the testimony of the surviving party, thus rendering his testimony unavailable. Due to the concept of waiver and the fact that only parties are disqualified from testifying, there appears to be only one situation in which the disqualification could lead to the admission of the disqualified party's out-of-court statements as exceptions to the hearsay rule. This is where testimony of the disqualified party given during an earlier trial when there was no disqualification is offered by the disqualified party at a subsequent trial of the same cause.

As with the attorney-client privilege and similar privileges, there is a question concerning the propriety of admitting the prior testimony of the disqualified party. Because the Dead Man's Statute is a bar to present in-court testimony given under oath and subject to cross-examination, prior testimony should probably also be barred. The purpose of the Dead Man's Statute is to prevent any unfairness which would result from the advantage one party would have if permitted to testify without fear of contradiction. The former testimony has the same effect as the present testimony of the disqualified party but is less reliable. It should probably be barred, at least where the prior testimony of the decedent is not available, because to admit one without the other allows the advantage the statute is intended to prevent.

G. Loss of Memory

Only a few courts have decided whether a claimed loss of memory renders a witness unavailable for the purpose of admitting his out-of-court statements as exceptions to the hearsay rule. In Orr v. State Farm Mutual Automobile Insurance Company a witness made several statements to a State Farm representative which were against the witness' interest but beneficial to the company. When his deposition was later taken by State Farm, the witness claimed he had forgotten making the statements as well as the subject matter of those statements. The witness was a resident of Kansas and therefore not present at the trial. His declarations against in-

63. Under the Missouri Dead Man's Statute the term "party" may not necessarily refer to an actual party to the law suit, but for purposes of this comment it does.
64. See Bishop, Waiver of the Missouri Dead Man's Statute, 39 Mo. L. Rev. 218 (1974).
65. This situation could arise in one of two ways. First, testimony is received at a prior trial when both parties are alive so there is no disqualification. Subsequent to this trial but prior to a later trial one of the parties dies, resulting in the disqualification at the later trial of the surviving party who at that time wishes to introduce his prior testimony. Another way in which this situation could occur is to have a non-party witness testify at the first trial. Prior to the second trial the witness becomes or is made a party to the suit. He is then disqualified from testifying at the second trial in the event the opposing party is dead.
66. Freeman v. Berberich, 332 Mo. 831, 60 S.W.2d 393 (1933).
67. 494 S.W.2d 295 (Mo, En Banc 1973).
terest were admitted over objections that the witness should be considered an available witness\(^68\) because State Farm had taken his deposition. The Missouri Supreme Court held that the witness was not available merely because he had been deposed.\(^69\) This, plus the fact that the witness was absent from the trial, would appear to have been sufficient for the court to reach its decision to admit the declarations. Nevertheless, the court continued by way of dicta to say that even if these factors had not been present, the declarant’s testimony would have been unavailable due to his claimed loss of memory at the time his deposition was taken.\(^70\)

The court reiterated the statement made in \textit{Sutter v. Easterly} that, for purposes of the unavailability requirement, it is sufficient that the declarant or his testimony be unavailable as a practical proposition.\(^71\) The court said that a witness will be deemed unavailable if he testifies to a complete loss of memory concerning his prior statements, because a witness who claims a total loss of memory is no more available than a witness who refuses to testify by exercising his privilege against self-incrimination.\(^72\) The practical effect of such a claim by a witness is to put his testimony beyond reach, thus creating the necessity for using his prior statements.

Few courts have gone so far in extending the grounds for unavailability to include a loss of memory.\(^73\) Of course, where the witness’ loss of memory is due to illness, senility,\(^74\) or lapse of time,\(^75\) his prior statements will usually be more reliable than his present testimony and therefore admissible. However, some courts have held that faulty memory due to mere lapse of time is an insufficient reason to admit prior reported testimony. In \textit{Turner v. Missouri-Kansas-Texas R.R. Co.}\(^76\) a witness had testified for the respondent at the first trial but failed to testify at the second because he was outside the jurisdiction. In a deposition taken by the appellant several years after the first trial but prior to the second, the witness claimed he could not remember many of the details about which he had previously testified. After the deposition was put in evidence, the witness’ former testimony was offered and admitted to fill in the gaps in the deposition which resulted from his faulty memory. The Missouri Supreme Court held the admission of the prior reported testimony to be error because the

\(^{68}\) The court considered abandoning the unavailability requirement for declarations against interest but found it unnecessary to do so in this case. See Shklar, \textit{The Unavailability Requirement for Declarations Against Interest—Should it be Retained?}, 39 Mo. L. Rev. 461 (1974).

\(^{69}\) See pt. V of this comment.

\(^{70}\) 494 S.W.2d at 299.

\(^{71}\) Id.

\(^{72}\) Id.


\(^{74}\) Rothrock v. Gallowher, 91 Pa. 108 (1879).


\(^{76}\) 346 Mo. 756, 142 S.W.2d 455 (1940).
mere loss of memory by a witness who was not mentally incompetent was insufficient to render the witness unavailable.77

Orr and Turner involved similar circumstances, but the hearsay evidence in Orr was held admissible due to the witness' unexplained loss of memory. These cases may be factually distinguished in two ways. In Orr, the deponent claimed a total loss of memory as to his prior statements, whereas the deponent in Turner had only partially forgotten the details to which he had previously testified. Therefore, the argument can be made that only a complete loss of memory will be sufficient to render a witness unavailable for purposes of admitting his prior statements. To find unavailability in a situation involving only partial forgetfulness would continually present the question of the degree of forgetfulness required.

A second distinction is that Turner dealt with former testimony whereas Orr dealt with declarations against interest. This distinction, however, is of little significance when considered in light of the courts' decisions dealing with these two exceptions to the hearsay rule. Whenever a witness has been considered unavailable for the purpose of one of these exceptions, the same ground of unavailability has been held to satisfy the unavailability requirement with regard to the other exception. This should hold true when the witness is unavailable due to his loss of memory. In any event, Orr is the most recent case and should therefore be controlling, thus making a loss of memory on the part of a witness a sufficient ground to render the witness unavailable, at least as to declarations against interest and prior reported testimony.

The Orr court did not discuss in detail the policy considerations involved in finding unavailability based on an alleged loss of memory. Unfortunately, the loss of memory may or may not be bona fide. Situations in which the witness in good faith testifies that he cannot remember something should be treated the same regardless of whether the loss of memory is caused by illness, old age, or mere lapse of time. Under these circumstances his prior out-of-court statements should be admissible due to the unavailability of his present testimony and the fact that his earlier testimony is probably more reliable than his present testimony would be.

It is more difficult to justify a finding of unavailability based on loss of memory when the alleged loss of memory may not be bona fide. A feigned loss of memory may satisfy the unavailability requirement under the following analysis. If a witness simply refuses to testify despite judicial pressure to do so, his testimony will probably be considered unavailable.78 In a situation where a witness claims a loss of memory when he actually does remember, the witness is, in effect, simply refusing to testify to those facts he claims to have forgotten. By analogy, the witness whose claimed

77. Id. at 463. The court stated that this rule applied whether the witness testified by deposition or was present in person.
78. See text accompanying note 59 supra.
loss of memory is not bona fide should be considered as unavailable as the witness who refuses to testify.\textsuperscript{79}

Loss of memory is rejected as a ground of unavailability by some courts because it may encourage a witness to "forget" the subject matter of his prior statements where it suits his purposes.\textsuperscript{80} There is a potential for abuse of the rule making a witness unavailable if he alleges a loss of memory. For example, a witness who desires to aid a party without having to testify may feign forgetfulness in the hope that his prior statement favorable to that party will be admitted. On the other hand, there are situations where refusing to admit the witness' prior statements may achieve the result the witness desires.\textsuperscript{81} While a closer inquiry into the validity of the witness' loss of memory and the motivation behind it might seem appropriate in such a case, the speculative nature of such an inquiry and the limited circumstances under which it is likely to be needed make it impractical. A more workable approach is the one apparently adopted in Orr making a witness unavailable any time he claims a loss of memory.

Even though the court in Orr dealt with this ground of unavailability by way of dicta, Missouri courts should follow its conclusion that a witness' alleged loss of memory renders him unavailable and, therefore, his prior statements admissible as an exception to the hearsay rule. The court's analysis and conclusion seem correct because his testimony is, as a practical matter, unavailable.

\section*{III. Requirements for the Admission of Depositions}

Even if a deposition is not considered to be hearsay,\textsuperscript{82} its similarity to prior reported testimony is obvious. Most jurisdictions, including Missouri, condition the use of the deposition as substantive evidence\textsuperscript{83} upon unavailability requirements specified by statutes or rules of court.\textsuperscript{84}

The use of depositions in Missouri civil cases is governed by Missouri Supreme Court Rule 57,\textsuperscript{85} which lists several situations which satisfy the requirement that the witness be unavailable. First, where the witness dies

\begin{footnotes}
\item 81. Orr is an example of this type of situation. Had the court found the witness available and refused to admit his prior statements, State Farm may have been found liable which is what the witness apparently desired.
\item 82. See State v. Granberry, 491 S.W.2d 528 (Mo. En Banc 1973); Pulitzer v. Chapman, 337 Mo. 298, 85 S.W.2d 400 (En Banc 1935); Woelfle v. Connecticut Mut. Life Ins. Co., 234 Mo. App. 135, 112 S.W.2d 865 (St. L. Ct. App. 1938).
\item 83. A deposition may be used for impeachment or as the admission of a party opponent even though the witness is available. Pettus v. Casey, 358 S.W.2d 41 (Mo. 1962); Wilt v. Moody, 254 S.W.2d 15 (Mo. 1953).
\item 84. Depositions were unknown at common law so the grounds or conditions of their admissibility are usually prescribed by statutes or rules of court. 5 J. Wigmore, Evidence § 1401 (3d ed. 1940).
\item 85. Mo. Sup. Cr. R. 57.07 (1975). This rule replaced rule 57.29 but almost identical language was used in both and there were no major substantive changes made.
\end{footnotes}
after being deposed, his deposition may be used in evidence. Second, a deposition is admissible if the witness cannot safely attend court due to age, sickness, bodily infirmity, or imprisonment. The imprisonment of a witness was not previously a ground in Missouri upon which to base the admission of depositions. However, the Missouri Supreme Court Rules are modeled after the Federal Rules of Civil Procedure which include imprisonment as a ground for the admission of depositions. This condition is also sufficient for the admission of depositions in other jurisdictions. Third, where the witness is a judge, attorney, or physician, his deposition is admissible provided there is a showing that he is engaged in his official or professional duties at the time of trial. Fourth, the deposition of a witness who is a nonresident of either Missouri or the county in which the trial is held is admissible. Fifth, a deposition given by a witness is admissible if he has gone out of the state or is over 40 miles from the place of trial without the consent, connivance, or collusion of the proponent. Finally, where the witness is absent without the consent, connivance, or collusion of the proponent, his deposition is admissible provided the proponent has exercised due diligence in an unsuccessful attempt to obtain his attendance by subpoena.

These same grounds will generally be found in the statutes of other jurisdictions. One ground that is expressly recognized in many jurisdictions, but not in Missouri, is the supervening insanity of the witness. One theory to explain why insanity is not an express ground in Missouri is that if a witness is incompetent to testify at the time of trial, as he would be if he were insane, his deposition is not admissible even if taken when the deponent was competent. This is evidently because the deponent is presumed to testify when his deposition is admitted in evidence; and, therefore, "the competency of a deposition is to be determined by the status

---

87. Mo. Sup. Ct. R. 57.07 (a) (3) (B) (1975); Boyle v. Crimm, 363 Mo. 731, 253 S.W.2d 149 (1952); Kirton v. Bull, 168 Mo. 622, 68 S.W. 927 (1902); Scoville v. Hannibal and St. Joseph R.R. Co., 94 Mo. 84, 6 S.W. 654 (1888).
88. See, e.g., Fed R. Civ. P. 32 (a) (3) (C); Ky. R. Civ. P. 32.01 (3) (10).
91. Mo. Sup. Ct. R. 57.07 (a) (3) (E) (1975); Meyers v. Karchmer, 313 S.W.2d 697 (Mo. 1958).
92. Mo. Sup. Ct. R. 57.07 (a) (3) (F) (1975); State v. Brown, 285 S.W. 995 (Mo. 1926) (procurement by adverse party); Carpenter v. Lippitt, 77 Mo. 242 (1888).
94. See pt. II (c) of this comment.
95. Howard v. Štrode, 242 Mo. 210, 146 S.W. 792 (1912).
96. 242 Mo. at 227, 146 S.W. at 798-99.
of the witness at the time the deposition is offered in evidence." If the witness were incompetent at that time, his deposition would be as inadmissible as his present testimony. This theory, however, is antiquated and should not be accepted, especially in view of the modern concept of the hearsay rule and its exceptions. If the testimony was competent when given, it should be no less competent simply because the witness has become insane.

Two arguments may be made in favor of admitting the deposition of an insane witness as long as the witness was sane when deposed. First, insanity is considered by many to be an illness. Its classification as an illness may, at least technically, bring it within the second ground listed above. Second, a deposition is a form of prior reported testimony, and the insanity of a witness has been held to satisfy the unavailability requirement for that exception to the hearsay rule. To illustrate, suppose that a witness testified at the first trial but became insane prior to the second trial. His prior testimony would be admissible in the later trial. On the other hand, if a sane witness is deposed prior to a trial, but is insane at the time of trial, his deposition would not be admissible under a literal reading of rule 57. This result cannot be reasonably justified. Deposition should probably be considered prior reported testimony, and should be admissible under any condition which satisfies the unavailability requirement for that exception to the hearsay rule.

As noted earlier, Missouri cases dealing with unavailability due to absence or illness have not considered whether temporary unavailability is sufficient to satisfy the requirement. The same is true in regard to depositions. Neither Missouri case law nor the Supreme Court Rules distinguish between temporary and permanent absence or illness. The previous discussions relating to this question seem to be applicable to the conditions under which depositions may be admitted.

The admissibility of testimony given at a prior trial is affected by statute as well as by case law. Section 492.410, RSMo 1969, provides that such testimony may be used at a subsequent trial "in the same manner and with like effect as if such testimony had been preserved in a deposition." This has been interpreted to mean that a witness' former testimony may be admitted into evidence in a later trial if the proponent of the testimony shows one or more of the statutory conditions upon which depositions may be read into evidence. For instance, if a witness is simply absent from the trial, rule 57.07 requires the exercise of due diligence before his deposition may be admitted. This same requirement has been applied to the ad-

98. See pt. II (B) and II (D) of this comment.
mission of prior testimony. Any of the grounds listed in rule 57.07 should, by analogy, satisfy the unavailability requirement in regard to prior testimony.

On the other hand, it has been noted that testimony given at a prior trial is admissible when the witness is unavailable for reasons other than those listed in rule 57.07. For example, in State v. Phillips the Missouri Supreme Court admitted the former testimony of a witness who refused to testify because his testimony might have incriminated him. Although his former testimony was admitted, his deposition would not have been admitted under rule 57.07, because the exercise of a privilege is not one of the grounds listed in the rule. Therefore, when seeking the admission of prior testimony, it is necessary to examine both the rule and the case law to determine if the witness is unavailable.

IV. Federal Rules of Evidence

Rule 804 of the Federal Rules of Evidence deals with the recognized hearsay exceptions which require the declarant to be unavailable as a witness. Unavailability, as defined by rule 804 (a), includes situations in which the declarant: (1) is exempted from testifying on the ground of privilege; (2) refused to testify; (3) testifies to a lack of memory; (4) is unable to testify as a result of death or physical or mental illness; or (5) is not present at the hearing and the proponent of his statement has not been able to procure his attendance and in some cases his testimony, by process or other means. However, a witness is not unavailable...
if any of the above situations are due to the procurement or wrongdoing of the proponent of the out-of-court statements.

Two aspects of rule 804 deserve comment. Rule 804(a)(5) states that absence is a ground for unavailability, but something more than mere absence is required. Further, this requirement is not the same for all the exceptions. For purposes of the prior reported testimony exception, it need only be shown that the proponent of the evidence is unable to procure the attendance of the absent witness. However, for purposes of declarations against interest, dying declarations, and declarations as to pedigree, it must be shown that the proponent was also unable to secure the witness' testimony, such as by deposition or interrogatory.\textsuperscript{111} For these exceptions, the rule requires an attempt, not only to secure the witness' presence, but also to depose him.\textsuperscript{112} In other words, the rule purports to render a witness "available," even though he is absent, if he has been or could reasonably have been deposed.

Several jurisdictions require an effort to take the witness' deposition before he will be considered unavailable.\textsuperscript{113} There is even authority for this in two early Missouri cases, one of which held that if a deposition could have been taken through the exercise of proper diligence, the prior testimony of a witness would not be admissible.\textsuperscript{114} In \textit{Orr},\textsuperscript{116} however, the court held that the mere taking of a deposition did not render a witness available. The court stated that it made no difference whether a deposition was taken or could have been taken. This language, added to the fact that the court would not overrule prior cases holding that a witness outside the jurisdiction of the court was unavailable, gives the impression that the court would not require an effort to depose a witness as a condition precedent to a witness being deemed unavailable.

There are several disadvantages to a requirement that an attempt be made to depose an absent witness. The procedure is both time-consuming and expensive. There is also the possibility that a deposition, once taken, would be useless for the purpose for which it was taken. For example, where the deponent claims a loss of memory, or refuses to testify at the taking of the deposition, the deposition is of no value. In any event, deposition procedures are available to any party who desires to use them. Giving due consideration to the benefit that may be derived from taking a witness' deposition, such a requirement would appear to be an unnecessary, impractical, and highly restrictive complication in situations involving exceptions to the hearsay rule.

The second important aspect of the Federal Rules is that rule 804 departs significantly from the common law by recognizing other grounds

\textsuperscript{114} Franklin v. Gumersell, 11 Mo. App. 306 (St. L. Ct. App. 1881); Augusta Wine Co. v. Weipert, 14 Mo. App. 488 (St. L. Ct. App. 1889).
\textsuperscript{115} 494 S.W.2d at 299.
in addition to death as a prerequisite to the admission of dying declarations. There is justification for this expansion of the common law. Assuming that the circumstances of impending death provide reliability, the fact that a witness does not die but subsequently becomes otherwise unavailable should not affect the trustworthiness of his declaration. The death of the witness does not add to the truthfulness of the statement except to the extent that it may help to insure that the declarant was in fact in apprehension of near and certain death when the statement was made. The necessity for admitting the declaration is just as great where the witness is unavailable for reasons other than death.

V. Effect of the Use of a Prior Deposition

In _Orr_ the plaintiffs contended that the witness' out-of-court statements, offered as declarations against interest, were inadmissible because the taking of his deposition had made him "available." Thus the issue was whether a witness is available "because his deposition had been taken prior to trial." The court held that the taking of a witness' deposition does not make him available for purposes of the declaration against interest exception to the hearsay rule. The court's analysis is difficult to follow, but it seems that the decision was based mainly on practical considerations. According to the court, a contrary holding would have had the effect of overruling prior cases which held that a witness outside the jurisdiction of the court was unavailable, because a witness' deposition could always be taken if his whereabouts were known. The court said there was "no logical difference in the situation where a deposition has been taken and the one where it could have been taken."

The court made a distinction between the taking of a deposition and its actual use at trial when it stated that although State Farm "was under

116. Under the common law, dying declarations were admissible only in prosecutions for criminal homicide, the declaration being that of the victim. See 5 J. Wigmore, _supra_ note 2, §§ 1432-33, at 221-25. The federal rules, on the other hand, permit the admission of dying declarations in civil cases and prosecutions for crime other than homicide. Missouri still follows the common law, but does allow the use of dying declarations in prosecutions for abortion where the woman's death resulted. § 546.310, RSMo 1969. It would appear, therefore, that Missouri still requires that the declarant be dead at the time his declaration is offered even though the declarant need not die for a considerable time after the declaration is made. State v. Hendricks, 172 Mo. 654, 73 S.W. 194 (1903). The better view is that taken by the federal rules.

117. State v. Custer, 336 Mo. 514, 80 S.W.2d 176 (1935). The deceased must have believed that he was going to die soon at the time the declaration was made. State v. Woodard, 499 S.W.2d 553 (Mo. App., D.K.C. 1975).

118. 494 S.W.2d at 298.

119. _Id._

120. Under similar circumstances, a federal court stated that it would not preclude the introduction of a declaration against interest on the ground that the witness was available simply because he had been deposed. Gichner v. Antonio Troiano Tile and Marble Co., 410 F.2d 238 (D.C. Cir. 1969). This court would reach a contrary result under Fed. R. Evid. 804 (A) (5) which is now in effect. See _id._ pt. IV of this comment.

121. 494 S.W.2d at 299.
no obligation to use Charles' deposition . . . if it had offered same it would have made Charles its witness." Dissenting in Orr, Judge Bardgett made a similar distinction when he concluded that the "introduction in evidence" of the deposition rendered the witness available. The distinction between taking and using a deposition is important because once a deposition is read in evidence it stands for and takes the place of a witness as to matters on which the witness attempted to testify in the deposition, and the deponent is considered the witness of the party introducing the deposition. In Orr the out-of-court statements were offered by State Farm prior to the plaintiff's offer of the deposition, so the court was not faced with the situation where the deposition was already in evidence. If State Farm had introduced the deposition and then sought to have the declarations against interest admitted, a different result might have been reached because depositions are used "as though the witness is present and testifying." The court might have considered the witness to be available under these circumstances, at least as to State Farm. But suppose that the plaintiff had introduced the deposition first, thereby making the deponent his witness. Would this have precluded State Farm from introducing the declarations against interest? Although it seems unreasonable to allow one party or the other to introduce evidence first and thereby control whether a witness is unavailable for purposes of admitting his out-of-court statements into evidence, this may be the result under these circumstances. It is obvious that this aspect of the use of depositions raises many questions; the answers to which are beyond the scope of this comment.

In any event, the issue before the court was whether the mere taking of a deposition made the witness available. The court held it did not. In view of the fact that most witnesses with relevant testimony will be deposed, a holding that a deposed witness is available would probably minimize the use of the hearsay exceptions requiring unavailability, especially declarations against interest and prior reported testimony. Under this approach, if a deposition was taken covering a particular subject matter, the litigants would be required to look solely to the deposition for admissible evidence on that matter. It was noted earlier that these exceptions to the hearsay rule are recognized because of the necessity for this type of evidence. A holding on this issue contrary to that of Orr would preclude the admission of this evidence in many cases where there is no other way to obtain it.

122. Id. See also Pettus v. Casey, 358 S.W.2d 41 (Mo. 1962).
123. 494 S.W.2d at 301.
125. Turner v. Missouri-Kansas-Texas R.R. Co., 346 Mo. 28, 142 S.W.2d 455 (1940). The court in this case permitted the use of a transcript of former testimony on matters not covered by a deposition which had been admitted.
126. Pettus v. Casey, 358 S.W.2d 41 (Mo. 1962).
128. Even if the court had held the witness to be available because his deposition had been offered, it ultimately would have held the witness to be unavailable due to the witness' loss of memory during the taking of the deposition.
VI. CONSTITUTIONAL CONSIDERATIONS IN CRIMINAL PROCEEDINGS

In a criminal proceeding the confrontation clause\textsuperscript{129} places a greater burden on the state to show that a witness is actually and not just technically unavailable before his out-of-court statements may be used against the defendant. Prior to Barber v. Page,\textsuperscript{130} it was generally accepted that the mere absence of a witness from the jurisdiction of the court was a sufficient ground to allow the admission of his former testimony because of the inability of the prosecution to compel the attendance of the witness.\textsuperscript{131} In Barber, the defendant and one Woods were jointly charged with armed robbery. During the preliminary hearing Woods waived his privilege against self-incrimination and gave testimony that incriminated Barber. Woods was not cross-examined by Barber's counsel. At the time of Barber's trial in Oklahoma, Woods was in a federal prison in Texas. The government made no effort to obtain Woods' presence at the trial but was allowed to introduce the transcript of Woods' testimony at the preliminary hearing on the ground that Woods was out of the state and thus unavailable to testify. The Supreme Court invoked the confrontation clause of the sixth amendment (made applicable to the states by the fourteenth amendment\textsuperscript{132}) and held that for the purpose of allowing prior reported testimony into evidence, a witness is not unavailable "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."\textsuperscript{133} Thus, in a criminal proceeding, unavailability can no longer be established merely by showing that the witness is out of the jurisdiction.

The good-faith effort requirement appears to be based upon the fact that numerous methods to secure a witness' presence are available today.\textsuperscript{134} The Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings\textsuperscript{135} is one such method. Also, the attendance of a witness in the custody of federal officials may be obtained by a writ of habeas corpus ad testificandum.\textsuperscript{136} In addition, voluntary cooperation by the declarant or law enforcement authorities in other jurisdictions will often make the witness available even though he may not be subject to process.

In State v. Brookins\textsuperscript{137} the Missouri Supreme Court held that the admission of an absent witness' deposition was error because the state had made no effort to secure the attendance of the witness by having her returned to Missouri under the Uniform Law. The court, stating that the

\textsuperscript{129} U.S. Const. amend. VI.
\textsuperscript{130} 390 U.S. 719 (1968).
\textsuperscript{131} J. Wigmore, supra note 2, § 1404, at 149.
\textsuperscript{132} Pointer v. Texas, 380 U.S. 400 (1965).
\textsuperscript{133} 390 U.S. at 724-25.
\textsuperscript{134} Id. at 723-24.
\textsuperscript{135} §§ 491.400-450, RSMo 1969. This act provides a means by which prosecuting authorities in one state can obtain an order from a court in the state where the witness is found directing the witness to appear in court in the requesting state.
\textsuperscript{136} 28 U.S.C. § 2241 (c) (5) (1964).
\textsuperscript{137} 478 S.W.2d 372 (Mo. 1972).
accused was deprived of his sixth and fourteenth amendment right of confrontation, held that a deposition, if otherwise admissible, may be used only when the defendant's constitutional rights will not be violated. The State must show either that the witness is dead or that the party offering the deposition made a good-faith effort to obtain the presence of the witness at trial. The Supreme Court of Missouri has adopted similar language in Missouri Supreme Court Rule 25.44 which specifies when depositions offered by the state are admissible.

Although a greater burden may be placed on the state to show unavailability, the circumstances which satisfy the unavailability requirement in civil cases are generally applicable to criminal proceedings. The exercise of the fifth amendment privilege by a witness satisfies the unavailability requirement in criminal as well as civil cases. The Missouri Supreme Court held that testimony given by a witness during a preliminary hearing is admissible when the witness later asserts his privilege against self-incrimination and refuses to testify, provided the defendant was present and had the opportunity to cross-examine the witness at the prior hearing. Illness or absence may also render a witness unavailable, but it is generally accepted that in criminal proceedings the temporary illness or disability of a witness will not be sufficient to justify the admission of his prior reported testimony. In Peterson v. United States a witness was unavailable due to a temporary illness. The court held that the witness was not unavailable for the purpose of admitting her testimony from a previous trial. The same is true with regard to a witness' absence from the trial. In Missouri, such absence must be either permanent or indefinite in criminal cases. No matter which ground of unavailability is relied on, a higher standard is required to establish the unavailability of a witness whose out-of-court statements are offered against a defendant in a criminal proceeding. In substance the state must show actual unavailability.

VII. Conclusion

Unavailability is an important concept because it may be a prerequisite to the admission of evidence crucial to a lawsuit. What constitutes unavailability not only varies among jurisdictions, but also varies within a single jurisdiction depending on the evidence sought to be admitted. Case law determines when a witness is unavailable for the purpose of admitting his prior out-of-court statements as exceptions to the hearsay rule, whereas

138. Id. at 375.
139. State v. Phillips, 511 S.W.2d 841 (Mo. 1974). In this case there was no transcript of the preliminary hearing but the court allowed testimony as to the statements made by the witness.
140. 344 F.2d 419 (5th Cir. 1965). See also Smith v. United States, 106 F.2d 726 (4th Cir. 1939); 29 Am. Jur., Evidence § 754 (1967). The court in United States v. Bell stated that it disagreed with Peterson if Peterson meant to imply that in every case where a witness is ill but will sometime recover, the prosecution must suffer a continuance or forego entirely the use of the evidence. 500 F.2d 1287 (2d Cir. 1974).
the conditions which satisfy the unavailability requirement for depositions are set forth in the Missouri Supreme Court Rules. Many of these conditions satisfy both requirements, but there are differences. A stronger showing of unavailability is often required in criminal cases.

Missouri has taken a more realistic approach than many jurisdictions regarding unavailability under the exceptions to the hearsay rule. A theory of unavailability premised on necessity has been adopted. The unavailability requirement is satisfied when a declarant is unavailable as a practical matter. With this standard to guide them, Missouri courts are afforded sufficient flexibility to find unavailability in any situation where there is a legitimate need for the evidence.

ROBERT B. LEE