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THE NORTH CAROLINA HEARSAY RULE AND THE UNIFORM RULES OF EVIDENCE*

Leonard S. Powers**

IX

HEARSAY OF AN UNAVAILABLE DECLARANT

The hearsay exceptions to be dealt with in this installment are those in which unavailability of the declarant is a requirement. Those covered in the previous installment were those in which unavailability has no bearing. It can be argued that unavailability of the hearsay declarant ought to have nothing to do with the problem of whether hearsay should be admitted in evidence. This argument is that the principal reason for the hearsay rule is the absence of an opportunity for cross-examination, and unavailability of the declarant does not to any extent supplant this test. Unavailability of the hearsay declarant does not contribute to the trustworthiness of his statements uttered out of court. It is true, of course, that his unavailability may supply a compelling motive for admitting the statements, but the original taint coming from lack of cross-examination is not removed nor mitigated by such a consideration. Yet, if there is some circumstantial probability of trustworthiness to join to the unavailability of the declarant, it would seem that the minimum requirements for an exception to the rule against hearsay are met.¹

Several of the traditional exceptions require a showing of unavailability.² Such exceptions and their treatment in the Uniform Rules will now be discussed, but they are overshadowed by a broad exception based in part on unavailability which is undoubtedly the most far-reaching change proposed by the Commissioners. It is a modification of Rule 503 (a) of the Model Code which provided that “Evidence of a hearsay declaration is admissible if the judge finds that the declarant is unavailable as a witness...”.³ This was said to be “the most objectionable fea-

*This is the second and concluding portion of this article.
**Administrative Assistant to the Chief Justice of North Carolina; former Professor of Law, Wake Forest College School of Law.
² Prior testimony, dying declarations, and statements of family history. Declarations against interest must meet the unavailability requirement in most jurisdictions, but not under the Uniform Rules. See the discussion of this wholesome proposal in 34 N. C. L. Rev. 171, 196 (1956).
³ Model Code of Evidence, rule 503 (a) (1942).
ture of the Model Code from the standpoint of practicing lawyers."4 The modified rule would make admissible, if the declarant is unavailable as a witness, "a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action."5

The Model Code provision would have admitted practically all first-hand hearsay if the judge found the declarant to be unavailable. The Uniform Rules provision requires that other findings be made by the judge, the effect of which is to set some standards limiting the exception. The new clause was "drafted so as to indicate an attitude of reluctance and require most careful scrutiny in admitting hearsay statements under its provisions."6

There has long been agitation for some relaxation of the hearsay rule, and most of it has centered on a demand for a new exception such as that now under consideration. Massachusetts has had a statute providing for the admissibility of declarations of deceased persons since 1898.7 A survey was made in 1922 by the Commonwealth Fund Committee to ascertain how the lawyers and judges of Massachusetts thought the statute had worked. The results indicated that, in the opinion of the profession in Massachusetts, the statute had operated satisfactorily.8 Rhode Island has a similar statute.9 In 1938, the American Bar Association recommended a statute of this type.10 The English Evidence Act of 1938 contains an exception along these lines, but it is limited to written hearsay statements.11

The proposal in the Uniform Rules, the Massachusetts statute before

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5 UNIFORM RULES OF EVIDENCE, rule 63 (4) (c).
6 Id., comment.
7 In its present amended form, it reads as follows: "In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible as hearsay ... if the court finds that it was made in good faith and upon the personal knowledge of the declarant." MASS. ANN. LAWS c. 233, § 65 (1954). Before the amendment of 1943, this statute required the declaration to have been made prior to the commencement of the action. Note that the Uniform Rules proposal contains such a requirement.
9 "A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant." R. I. GEN. LAWS, C. 538, § 6 (1938).
10 "That declarations of a deceased or insane person should be received in evidence if the trial judge shall find (1) that the person is dead or insane, (2) that the declaration was made and (3) that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant." VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 321,338 (1949).
11 1 & 2 GEO. 6, c. 28, sec. 1.
its amendment, and the Rhode Island statute all require the declaration to have been made prior to the commencement of the action. The Massachusetts statute and the English Act apply only to civil proceedings, but the Rhode Island statute and the proposal in the Uniform Rules apply in both criminal and civil actions. The Massachusetts statute only applies where the declarant is unavailable because of death. The Rhode Island statute applies to the declarations of deceased and insane persons. The English Act is broader than either of these, admitting the statement where the declarant is unavailable for any reason, where he is called as a witness, and when the judge dispenses with any requirement of his attendance or any showing of unavailability. The proposal in the Model Code was based on a very broad definition of unavailability, which, in effect, provided that any inability to secure the declarant's testimony established unavailability if not due to the fault or procurement of the proponent of the evidence. It was, perhaps, this wide-open definition of unavailability which led to suspicions that the real effect of the proposal was to abolish the hearsay rule.

Thus, it is clear that the definition of "unavailability" is a consideration in evaluating a proposed exception based on it. The definition in the Uniform Rules is much like that in the Model Code. The Commissioners state that the definition is carefully framed "so as to give assurance against the planned or fraudulent absence of the declarant." It is not on a narrow definition of "unavailability" which the proposal principally depends for its merit, but, properly, on findings by the judge

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14 "[I]t opened the door to everything but secondary hearsay, to everything but gossip, and almost opened the door to gossip." Gard, supra note 4, at 47.
15 "'Unavailable as a witness' includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant, or (b) disqualified from testifying to the matter, or (c) unable to be present or to testify at the hearing because of death or then existing physical or mental illness, or (d) absent beyond the jurisdiction of the court to compel appearance by its process, or (e) absent from the place of hearing because the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts. But a witness is not unavailable (a) if the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying, or to the culpable neglect of such party, or (b) if unavailability is claimed under clause (d) of the preceding paragraph and the judge finds that the deposition of the declarant could have been taken by the exercise of reasonable diligence and without undue hardship, and that the probable importance of the testimony is such as to justify the expense of taking such deposition." Uniform Rules of Evidence, rule 62 (7).
16 Uniform Rules of Evidence, rule 63 (4), comment. "In view of the fact that unavailability of the declarant is an important condition under a number of exceptions, a safe definition of 'unavailable as a witness' becomes absolutely essential. The objective is to assure that unavailability is honest and not planned in order to gain an advantage. This definition gives the judge considerable discretion to reject the offer if he is not satisfied that the absence of the declarant is legitimately explained." Id. at rule 62, comment.
which assure a substantial basis for trustworthiness. In other words, the findings required by the exception are such as to provide a substantial substitute for the missing test of cross-examination which is the real basis for the rule against hearsay. The judge must find that the statement was made by the declarant at a time when the matter had been recently perceived by him, while his recollection was clear, in good faith, and prior to the commencement of the action. It is clear that if the judge cannot make the necessary findings for admission he should exclude such a statement. Rule 1 (8) provides that "a ruling implies a supporting finding of fact; no separate or formal finding is required unless required by a statute of this state." This seems to mean that the mere ruling of the judge admitting the evidence is sufficient to imply a finding of the necessary facts. Thus no formal findings are necessary as to the foundation facts. This would have significance largely on appeals, no express findings needing to appear in the record. It is assumed, of course, that such an implied finding unsupported by evidence would be subject to attack on appeal. Without the benefit of such a statute as Rule 1 (8), the North Carolina Court in a similar situation has held that an express finding should appear in the record. 

It is undoubtedly true that some reliable hearsay cannot be fitted into the present rigid hearsay exceptions. For example, consider a statement made concerning a transaction by a person since deceased, litigation having arisen concerning the transaction. The hearsay statement of the deceased may be the only evidence favorable to the estate. Similarly, the exception for dying declarations does not cover many situations where statements are made prior to death by a solitary workman who alone knew how the accident happened in which he was injured. As expressed by the Commissioners, "the fact remains that there is a vital need for a provision such as this to prevent miscarriage of justice resulting from the arbitrary exclusion of evidence which is worthy of consideration, when it is the best evidence available." 

In *Towe v. Penland*, respondent claimed sole ownership in a proceeding for partition on the contention that he had conveyed to the other party a one-half interest in a lot inherited from their father under an agreement that he was to have the entire use of the land owned by the parties as heirs at law of their mother. The respondent offered testimony of declarations made by the mother prior to her death intestate.

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16 Metropolitan Life Ins. Co. v. Boddie, 194 N. C. 199, 139 S. E. 228 (1927). It has been argued that express findings of fact should be required in connection with the proposed exception under consideration. This argument is based on the feeling that Rule 1 (8) makes the "substantial basis for trustworthiness" found in the requirement of preliminary findings "to some degree illusory." Falknor, *The Hearsay Rule and Its Exceptions*, 2 U. C. L. A. L. Rev. 43, 64-5 (1954).

17 *Uniform Rules of Evidence*, rule 63 (4), comment.

18 231 N. C. 504, 57 S. E. 2d 652 (1950).
tending to confirm the agreement as contended for by the respondent. One witness would have testified that "Mrs. Hall told me that she had it fixed so there would not be any fussing at her death; that she just had two children and just had two homes; that she wanted one to have one and the other to have the other home. . . . She said that her son Oliver had signed his part to his sister, so that at her death Oliver would get her house." The admission of this hearsay was held error. Under the proposed change, it would probably be admitted, assuming that the necessary findings could be made by the judge.

The Uniform Rules do not contain a "dead man's statute." Rule 7 serves to abolish such a statute, and it is not reintroduced by any other rule. This is in line with the vigorous attack which has been made against this remnant of the earlier rule that interest renders a witness incompetent. North Carolina, of course, has such a statute, and it is enforced with vigor by our courts. No prolonged discussion of the problem will be undertaken here, for it is not primarily a hearsay matter. Such declarations come within the exception for admissions insofar as

19 Morgan, op. cit. supra note 8, at 25; Stansbury, The North Carolina Law of Evidence § 66 n. 33 (1946) (hereinafter cited as Stansbury, N. C. Evidence); Vanderbilt, op. cit. supra note 10, at 334 et seq. "The argument . . . that a contrary rule 'would place in great peril the estates of the dead' sufficiently typifies the superficial reasoning on which the rule rests. Are not the estates of the living endangered daily by the present rule, which bars from proof so many honest claims? Can it be more important to save dead men's estates from false claims than to save living men's estates from loss by lack of proof? . . . As a matter of policy, this survival of a part of the now discarded interest-qualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and its encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words." 2 Wigmore, Evidence § 578. Nine states have abolished or never had such a disqualification. Abolition of it has been proposed in North Carolina, Proposals for Legislation in North Carolina, 11 N. C. L. Rev. 51, 61-3 (1932); Note, 13 N. C. L. Rev. 230 (1935). For a case illustrating the illogical distinctions arising under the Dead Man's Statute, see Hardison v. Gregory, 242 N. C. 324, 88 S. E. 2d 96 (1955) and the criticism of it in 34 N. C. L. Rev. 53-4 (1955).

20 "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication." N. C. Gen. Stat. § 8-51 (1955).

the hearsay rule is concerned, and thus would be admissible were it not for the statute. The abolition of the "dead man's statute" does have a connection with the proposal under discussion, however, for the proposed rule would render the statements of the deceased favorable to his estate admissible. This is important because the favorable statements which the estate might wish to offer are not admissions of a party and otherwise would not usually come within an exception to the rule against hearsay. Under the proposal being considered, the statements of the deceased as to the transactions "would be an impressive counterweight to the testimony of the survivor." In fairness, this ought to be available to the estate of the deceased, along with the testimony of other witnesses to the transaction and cross-examination of the interested survivor. To avoid any question, "it is arguable that the Rules should be supplemented by a broad provision for the admission of all declarations of the deceased, in cases where the surviving party testifies against the estate."23

This proposed exception is so broad as to include within its bounds many hearsay statements which might also fall within some other hearsay exception requiring unavailability such as a dying declaration. The overlapping will cause no particular difficulty, and a little reflection will reveal that situations arise where the statement would qualify under the proposed exception and not under one of the traditional exceptions requiring unavailability and vice versa.

The Uniform Rules do not contain an exception for declarations concerning boundaries made by disinterested persons who are now dead, an exception recognized in this and many other states. This is undoubtedly because such statements can be admitted under the proposed exception, and, indeed, will probably be more freely admitted since death is the only type of unavailability which has been recognized for this exception in North Carolina.

The arguments in favor of this broad exception are very convincing. It would not be forthright, however, to contend that it does not represent a major relaxation of the rule against hearsay. The most reasonable position seems to be that even though it is a significant change, it is justified on grounds of policy, expediency, and the historical considerations dealt with in the first part of this paper. There can be no major reform of the hearsay rule without a major change such as this.

23 McCormick, supra note 22, at 565.
24 White v. Price, 237 N. C. 347, 75 S. E. 2d 244 (1953); Stansbury, N. C. Evidence § 151.
25 Stansbury, N. C. Evidence § 151, n. 86.
Testimony Taken at a Former Trial

One of the principal exceptions to the hearsay rule is that for the testimony of a witness in a prior trial. This exception has been limited by various requirements designed to assure an adequate opportunity for cross-examination. Generally, most jurisdictions have insisted that the witness be unavailable at the present trial and that the former trial at which the testimony of the witness was taken have involved the same issues and the same parties. There has been a great deal of division on how strictly these requirements should be applied. Basically, the exception covers highly reliable hearsay, for the testimony at the former trial was under oath and an opportunity for cross-examination was available, and thus it has reliability similar to a deposition which is also taken under oath with an opportunity to cross-examine being afforded.

Indeed, there is a division of opinion on whether prior testimony should even be regarded as hearsay. Wigmore contended that the requirements of the hearsay rule were met by such evidence, since an opportunity for cross-examination was presented and not some substitute for it. With the basic reason for the hearsay rule not involved, it was felt that it would be improper to classify such statements as hearsay. This was bolstered by the fact that such testimony was given under oath. The more general view has been that such evidence is hearsay, but that an effective substitute for present cross-examination exists and that, therefore, it falls within an exception to the rule. Under this view, only testimony taken at the present trial and subject to cross-examination at that trial is outside the definition of hearsay if offered to prove the truth of the matter asserted.

Occasionally, testimony taken at a former trial may be used for the purpose of refreshing a witness or for impeachment. If so, the hearsay rule and the limitations of the exception under consideration do not apply. Also, it is possible that former testimony may come within some other exception to the rule against hearsay such as the admission of a party opponent or declaration against interest, in which case the requirements of the exception for prior testimony are not applicable.

The exception under consideration is expressed as follows in the Uniform Rules: "Subject to the same limitations and objections as though the declarant were testifying in person . . . if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in com-

25 Wigmore, Evidence § 1370.
pliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered."

The requirement that the witness at the former trial be unavailable is preserved in the proposed rule, but "unavailable as a witness" is given a broad definition in the Rules which will serve in many jurisdictions to abolish unreasonable limitations and distinctions based on whether the litigation is civil or criminal. Constitutional provisions concerning confrontation have led some courts toward stricter requirements regarding unavailability in criminal than in civil cases. Fortunately, this has not been the case in North Carolina, and unavailability in the form of death, insanity, illness, and removal from the jurisdiction are recognized. The modern trend has been in this direction.

The substantial change which the proposed exception would effect is in the traditional requirement of identity of parties and issues. Certainly, if both parties in the two trials are the same, the requirement as to identity of parties is met. Similarly, it is sufficient that the present party, though not the same, is a privy in interest with the corresponding party in the earlier trial. Wigmore went further and contended that the identity of parties requirement was sufficiently observed if the party against whom the former testimony is now offered was the party against whom it was offered in the first trial. Thus, identity of party in the sense that the proponent needed to be the same in both trials has not been insisted upon by a growing number of recent decisions, and such is the rule in North Carolina. The proposed rule goes a step further and drops any requirement of identity of party on either side, provided "the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered." There is considerable support for this posi-

28 UNIFORM RULES OF EVIDENCE, rule 63 (3).
29 McCormick, EVIDENCE § 234.
30 Id. § 231.
32 Wigmore, EVIDENCE § 1388.
Yet, it can be argued convincingly that a party against whom the prior testimony is offered should have had an opportunity to cross-examine the witness himself. That someone else had an opportunity to cross-examine the absent witness in the earlier trial may not satisfy all critics. While North Carolina has relaxed the mutuality of parties requirement to the extent that only identity of opponent is necessary, the cases do not indicate that the Court is disposed to go beyond this point.

The argument that the opponent against whom the prior testimony is offered ought not to be forced to accept the cross-examination of another unrelated party who may not have conducted an effective cross-examination at the former trial would be convincing if the matter were one involving the doctrine of res judicata. In such a case, the issue could not be relitigated. In the matter under consideration, however, the prior testimony is only evidence and may be disbelieved by the jury. The prior testimony can be met with contradictory testimony and the unavailable witness impeached.

A related requirement is that of identity of issues in the two trials. While it is sometimes said that the issue in the two trials must be the same, this is taken to mean that the issue on which the testimony was offered in the first trial must be substantially the same as the issue upon which it is offered in the second. In North Carolina, it has been held that the prior testimony must have been given in the trial of a cause involving the same issue and subject matter as the one in which the evidence is offered. There is no difficulty where the prior testimony was given at a former trial of the same cause of action or at a

35 "My own opinion is that the 'mutuality' idea—the requirement of identity of parties on both sides—cannot rationally be supported. But I question the wisdom of dispensing with the requirement of identity of opponent." Falknor, The Hearsay Ride and Its Exceptions, 2 U. C. L. A. L. Rev. 43, 58 (1954).
36 "The admissibility in evidence of testimony taken in another action depends not only upon the identity of the question being investigated, but upon the opportunity of the party against whom the evidence is offered, to cross-examine." Citizens Bank & Trust Co. v. Reid Motor Co., 216 N. C. 432, 435, 5 S. E. 2d 318, (1939); McLean v. Scheber, 212 N. C. 544, 193 S. E. 708 (1937).
37 The court reporter statute was amended in 1955 to include the following: "The testimony taken and transcribed by said court reporter or said court reporter pro tem., as the case may be, and duly certified, either by said reporter or the presiding judge at the trial of the cause, may be offered in evidence in any of the courts of this State as the deposition of the witness whose testimony is taken and transcribed, in the same manner, and under the same rules governing the introduction of depositions in civil actions." N. C. Gen. Stat. § 7-89 (1955). This is subject to the construction that mutuality requirements are abolished. Court reporter statutes for specific judicial districts had long had such a provision. They were repealed in 1955.
38 Stansbury, N. C. Evidence § 145 n. 70.
preliminary stage of the same trial. Parrish v. Bryant illustrates a more difficult situation. The first action was a criminal proceeding arising out of an automobile accident against a defendant who was a defendant in a later civil action brought by the injured party. Plaintiff in the civil action sought to enter a transcript of testimony taken in the criminal proceeding from a witness unavailable at the trial of the civil action. It was held that the plaintiff failed to show the identity of the issues in the civil action with those of the former criminal prosecution. The Court stated that the question of the identity of the issues is a preliminary question to be decided by the court before any evidence at a former trial is competent.

One factor which may affect the manner in which a jurisdiction observes the requirement of identity of issues is the breadth of the scope of cross-examination rule recognized in the jurisdiction. If a jurisdiction follows the wide scope of cross-examination rule, then unless all the issues of the second trial were present in the first trial the party against whom the testimony is offered will be deprived of his right to cross-examine the absent witness on all the issues of the second trial. North Carolina, of course, observes the wide scope of cross-examination rule. In the Parrish case, it was pointed out that contributory negligence was an issue in the second trial but not in the first.

The Uniform Rules deal with the identity of issues requirement in a general but logical way. The issue in the second trial must be such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the second trial. Thus the policy of securing an adequate opportunity for cross-examination by the party against whom the evidence is now offered or by someone with a like interest is observed without getting into detailed specifications about the similarity of issues. This leaves something to the judgment of the trial judge, but judges deal with other preliminary questions on which the admissibility of evidence depends with similar or greater freedom.

The Rule under consideration would admit prior testimony against a party which the same party or his successor in interest offered in his own behalf at the first trial. This raises the question of whether the opportunity for direct and redirect examination at the first trial is the equivalent of an opportunity for cross-examination at the second trial. Should a party be bound by testimony he elicited himself at a former trial? There is some authority for regarding such testimony as an

41 STANSBURY, N. C. EVIDENCE § 35 n. 57.
adoptive admission.\textsuperscript{42} There is also authority supporting the admissibility of such prior testimony as coming within the exception for prior testimony.\textsuperscript{43} Some argument may be made against this principle, however, in a state such as North Carolina which restricts severely the impeachment by a party of a witness called by that party.\textsuperscript{44} The consequences of the proposal in this respect would, in North Carolina, make the testimony of a witness who is unavailable at the second trial admissible against the party who offered the testimony at the first trial where the testimony may have been disappointing but the offering party could not conduct an effective cross-examination due to the restrictive rule mentioned. Yet, the point may be made that such testimony is not conclusive in the second trial against the party who offered it in the first trial and should be admitted rather than lost altogether due to the unavailability of the witness. While unrestricted cross-examination was not available to the party against whom it is offered at the second trial, there is some assurance of reliability in that direct and redirect examination was available to him at the first trial, which is a far cry from no testing at all.

The rule under consideration is subject to the construction that it would admit a deposition taken for use as testimony in the trial of an earlier action even though it was not offered into evidence at that trial. This can be supported because cross-examination was available at the taking of the deposition. In a North Carolina case where the deponent was unavailable at the second trial, a deposition taken in connection with the former trial was excluded, in part, because the deposition was not introduced at the first trial.\textsuperscript{45} So this proposal might effect a change in the local law of evidence.

The exception for prior testimony was not so important in the \textit{Model Code}\textsuperscript{46} because of the broad exception under Rule 503 (a) for declarations of an unavailable declarant. The general exception for statements of an unavailable declarant in the \textit{Uniform Rules} will not include prior testimony in most cases because of the requirement that the judge must find that the statement "was made . . . prior to the commencement of the action."\textsuperscript{47} Some doubt might arise, however, where the witness had testified, not in an earlier trial of the same action, but in an entirely different case.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{43} \textsc{McCormick, Evidence} § 231; 5 \textsc{Wigmore, Evidence} § 1389.
  \item \textsuperscript{44} STANSBURY, N. C. \textsc{Evidence} § 40.
  \item \textsuperscript{45} Mechanics Bank and Trust Co. v. Whilden, 175 N. C. 52, 94 S. E. 723 (1917).
  \item \textsuperscript{46} \textsc{Model Code of Evidence}, rule 511 (1942).
  \item \textsuperscript{47} \textsc{Uniform Rules of Evidence}, rule 63 (4) (c).
\end{itemize}
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Under both the *Model Code* and the *Uniform Rules*, the prior testimony of a witness who is available and subject to cross-examination may be admitted under the exception for previous statements.\(^4\)

The more liberal treatment of the exception for prior testimony found in the *Uniform Rules* as compared with the orthodox common law principle, hedged about as it is with restrictions dealing largely with requirements concerning identity of parties and issues, is doubtless justified. Transcribed former testimony taken under oath is far more reliable than the oral hearsay which is admissible under exceptions for admissions, declarations against interest, declarations of present bodily or mental state, and excited or contemporaneous utterances.\(^4\) These exceptions admit hearsay without furnishing guaranties of trustworthiness comparable to the test of cross-examination which is present with prior testimony. As Morgan has written, "were the same strictness applied to all hearsay, evidence of reported testimony would constitute the only exception to the hearsay rule."\(^5\)

**XI**

**DYING DECLARATIONS**

One of the oldest of the exceptions to the rule against hearsay is that for dying declarations. That this should be true is not surprising in view of the general belief that deathbed statements are likely to be true. A dying declarant who knows he is about to die is not likely to be influenced by the usual motives for falsification. Also, there may be some feeling that the solemnity of such an occasion provides a religious motive for veracity equivalent to an oath. The common law exception required the declarant to have made the statement while in full apprehension that he was in actual danger of death and his death to have ensued.\(^5\) The exception in the *Uniform Rules* retains these requirements. Rule 63 (5) admits as an exception "a statement by a person unavailable as a witness because of his death if the judge finds that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery."

\(^4\) *Model Code of Evidence*, rule 503 (b) (1942); *Uniform Rules of Evidence*, rule 63 (1).

\(^5\) *McCormick, Evidence* § 238.


\(^7\) *McCormick, Evidence* § 259; 5 *Wigmore, Evidence* § 1430-52. Three requirements for a dying declaration have been listed by the North Carolina Court: (1) the declarant at the time he made the statement should have been in actual danger of death; (2) he must have had full apprehension of his danger; and (3) death must have ensued. *State v. Gordon*, 241 N. C. 356, 85 S. E. 2d 322 (1955); *State v. Rich*, 231 N. C. 696, 58 S. E. 2d 717 (1950); *State v. Ensley*, 228 N. C. 271, 45 S. E. 2d 357 (1947); *Stansbury, N. C. Evidence* § 146; Note, 14 N. C. L. Rev. 380 (1936).
The broad exception based on unavailability in the Model Code made it unnecessary to provide an exception for dying declarations as such. Rule 503 (a) of the Model Code provided an exception for hearsay declarations of unavailable declarants, and thus admitted all dying declarations. The general exception based on unavailability has limitations in the Uniform Rules. Of course, many dying declarations would also qualify under Rule 63 (4) (c), but that exception is not coextensive with Rule 63 (5) which covers dying declarations. Rule 63 (4) (c) requires findings of recency of observation, clear recollection, and that the statement was made prior to the commencement of the action. Some of these might not be present with a dying declaration. Similarly, Rule 63 (5) requires a finding that the declarant was conscious of his impending death and believed that there was no hope of his recovery. Thus, a separate exception for dying declarations was logically necessary in the Uniform Rules in order that statements coming within the bounds of the common law exception but not qualifying under the general unavailability exception might be admissible.

The principal change in this exception proposed by the Uniform Rules is the elimination of the requirement that the exception be limited to criminal prosecutions for homicide of the declarant. This odd restriction on the common law exception seems to have been the result of a mistake. An early nineteenth century treatise gave as a reason for the exception for dying declarations that otherwise murderers might escape unpunished due to the lack of the testimony of their victims. Though this is certainly a situation where a dying declaration should be heard, it was never intended that this be the only situation in which such declarations should be admitted. Thus, though prior to this nineteenth century development, such declarations had been admitted in civil cases, the idea that dying declarations should only be admitted in homicide cases rapidly became the law nearly everywhere. At an early date, a dying declaration was admitted in the trial of a civil action in North Carolina. The decision so holding was overruled in 1854 by Barfield v. Britt.

52 Uniform Rules of Evidence, rule 63 (4) (c).
53 5 Wigmore, Evidence §§ 1432-3.
54 McCormick, Evidence § 260; Note, 1 N. C. L. Rev. 113 (1922).
55 McFarland v. Shaw, 4 N. C. 200 (1815). This was a civil action for seduction in which the dying declaration of the plaintiff's daughter was admitted against the defendant. Taylor, C. J. wrote:

"In cases where life is at stake, such evidence is uniformly received and credited, and numerous are the victims to its authority recorded in the mournful annals of human depravity. Can the practice of receiving it to destroy life, and rejecting it where a compensation is sought for a civil injury, derive any sanction from reason, justice, or analogy? And though no direct precedent may exist to guide the Court, yet it must be recollected that the law consists of principles, which precedents only tend to illustrate and confirm."

56 47 N. C. 41 (1854). Battle, J. wrote: "The importance of preserving it has no doubt restricted the admission of dying declarations to the criminal cases only
Such a restriction has nothing but history to support it. Though the homicide situation might be one where necessity for the admission of the statement of the victim is particularly strong, the circumstantial guaranty of reliability is just as strong in other kinds of cases, civil and criminal, and thus the removal of this limitation seems to be justified.\textsuperscript{67} Kansas has abolished the restriction to homicide cases by decision\textsuperscript{68} and Colorado has done so by statute.\textsuperscript{69} Two states, one of them being North Carolina, have broadened the exception by admitting dying declarations in civil actions for wrongful death.\textsuperscript{70}

There are two other limitations generally recognized which stem from the majority rule limiting dying declarations to criminal cases involving homicide. One is that the defendant in the present trial must be charged with the death of the declarant. That is, the dying declaration of someone killed in the same fight in which the person was killed with whose killing the defendant is charged is not admissible under the orthodox exception.\textsuperscript{61} This illogical limitation is also abolished under the proposal. Similarly, the usual view is that a dying declaration is admissible only so far as it relates to the act of killing and the circumstances attending and leading up to the killing.\textsuperscript{62} This quibble is also rejected in the proposed exception.

It is usually held that the dying declarant must have had personal knowledge of the declared facts.\textsuperscript{63} Such a requirement is omitted from
the proposed exception, though it would seem sound to limit the exception to those things which the declarant would have been competent to testify concerning had he been a witness at the trial.

It has long been settled that dying declarations will be received on behalf of the defendant as well as the state. Also, the findings of fact on which the admissibility of such statements depends are for the trial judge, his ruling being reviewable only to determine whether there was evidence tending to show the facts necessary to the decision to admit the declaration. These principles will not be affected by adoption of the proposed exception.

It is felt that the changes in the exception for dying declarations which the proposal would effect are wholesome and needed.

XII

STATEMENTS AS TO PEDIGREE AND FAMILY HISTORY

One of the oldest exceptions to the hearsay rule is that for statements about family relationships, descent, births, marriages, deaths, and the like. Unavailability of the declarant is a requirement everywhere, but some jurisdictions such as North Carolina insist that the declarant be dead. There is also a requirement that the statement have been made before the origin of the present controversy. There is some disagreement about whether the person making the statement must have been a member of the family whose history is concerned, the rule in North Carolina apparently being that family relationship is necessary, though not necessarily a blood relationship. Such statements may be oral or they may be entries in family Bibles or on tombstones.

Rule 63 (23) provides an exception for a statement by one concerning his own family history. Rule 63 (24) creates an exception for a statement by a person concerning the family history of another. Rule 60 "Falknor, The Hearsay Rule and Its Exceptions, 2 U. C. L. A. L. Rev. 43, 66-7 (1954)."  
McCormick, Evidence § 261; Stansbury, N. C. Evidence § 146 n. 94.  
Stansbury, N. C. Evidence § 149 n. 69. There is support for the position that other grounds of unavailability should be recognized. 5 Wigmore, Evidence § 1481.  
McCormick, Evidence § 297, Stansbury, N. C. Evidence § 149 n. 72; 5 Wigmore, Evidence § 1483.  
“"A statement of a matter concerning a declarant’s own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable.”  
“"A statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant if the judge (a) finds that the declarant
63 (25) creates an exception for double hearsay in this area.\textsuperscript{72}

It will be noted, first, that forms of unavailability within the definition in Rule 62 (7) other than death of the declarant are recognized. Also, greater liberality is shown in that a strict requirement of family relationship is not insisted upon if the declarant was intimately associated with the family concerned. There is no requirement that the statement have been made prior to the origin of the present controversy. These extensions appear to be justified in view of the difficulty of proving such matters in any other way where unavailability of the declarant does exist. Experience would seem to support the view that such statements have considerable reliability even in the absence of cross-examination. Even so, the failure to incorporate a requirement that the statement must have been made ante litem motam may be questioned. Statements made after the controversy had arisen would certainly not be as trustworthy as those made before. The Commissioners point out that "at common law much evidence of slight value may be admissible to prove facts relating to pedigree, and it is in cases of this sort that Rule 45 may be applied to exclude what amounts to gossip or rumor or is otherwise of trifling worth."\textsuperscript{73}

It is recognized that there is some overlapping with the general exception based on unavailability, for some statements concerning family history could qualify under that exception as well.\textsuperscript{74} The counterpart of this exception in the \textit{Model Code} was Rule 524 which was much more complicated.

\textbf{XIII}

\textbf{Conclusion}

There are several other matters relating to the hearsay rule which should be mentioned. First, the Rules permit the impeachment of a declarant whose hearsay statement is admitted into evidence under an exception to the hearsay rule.\textsuperscript{75} This is the generally recognized rule

\begin{quote}
A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses.
\end{quote}

\textsuperscript{72} \textit{Uniform Rules of Evidence}, rule 63 (23), Comment.

\textsuperscript{73} \textit{Uniform Rules of Evidence}, rule 63 (4) (c).

\textsuperscript{74} "Evidence of a statement or other conduct by a declarant inconsistent with a statement received in evidence under an exception to Rule 63, is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement. Any other evidence tending to impair or
and is followed in North Carolina. The fairness of such impeachment is immediately apparent, but uncertainties have arisen concerning whether impeachment by the use of prior inconsistent statements should be permitted where the laying of a foundation would normally be required. No foundation can be laid where the declarant is absent. So the Rules sensibly dispense with any requirement that he be asked about his prior statement. Of course, cross-examination of the declarant for the purpose of impeachment is not possible, but other impeaching evidence is admissible if it would have been admissible had the declarant been a witness.

The hearsay provisions of the *Model Code of Evidence* depended, in part, on definitions which distinguished between first-hand hearsay and other hearsay. Distinctions of this sort are made where needed in the hearsay provisions of the *Uniform Rules*, but such confusing, albeit logical, definitions are not perpetuated. As in the *Model Code*, there is a specific provision dealing with multiple hearsay.

There is no provision in the *Uniform Rules* for an exception dealing with recorded past recollection. There is a view, of course, that such a writing is incorporated by reference in the testimony of the witness who vouches for its correctness and, therefore, is not hearsay. The preferred approach seems to be, however, that it is hearsay since the writing is a statement made out of court which is offered to prove the truth of the matters recited therein. In any event, the principle is generally recognized. The omission of any specific provision concerning it in the *Uniform Rules* will cause no difficulty because the exception provided by Rule 63 (1) making admissible previous statements of persons present and subject to cross-examination will admit such evidence without any specific exception being provided for it.

It is hoped that this study of the hearsay provisions of the *Uniform Rules* will help stimulate a consideration of the Rules as a whole to the end that their adoption might be realized. There has been a great deal of reform in the field of procedure, but the law of evidence is still

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76 *Id. Comment; Stansbury, N. C. Evidence § 39.*
78 "A statement within the scope of an exception to Rule 63 shall not be inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception." *Uniform Rules of Evidence, rule 66.*
79 *McCormick, Evidence § 276; Morgan, Hearsay and Preserved Memory, 40 Harv. L. Rev. 712 (1927).*
80 *McCormick, Evidence § 276; Stansbury, N. C. Evidence § 33; 3 Wigmore, Evidence §§ 734-57.*
largely untouched. The two modern attempts at codification of modern and rational rules of evidence show that reform by this method is possible, and there is little doubt but that there is demand for simplified and less obstructive rules.

The main objections to the *Model Code of Evidence* have been overcome in the *Uniform Rules*, so the way would seem to be clear for legislative consideration of evidence reform. In order that local modifications might be considered and the *Rules* subjected to close scrutiny for the purpose of making legislative recommendations, it is suggested that an agency such as the General Statutes Commission or the Judicial Council appoint a committee to begin such a study. It will not be easy to effect reform in this field, but it is not going to be easy to do without it. Certainly, without a beginning there is little hope for improvement in the law of evidence in any jurisdiction.