had been procured by the defendant, testimony given at a previous trial on a different indictment could be used at the subsequent trial.[203] The Court had also recognized the admissibility of dying declarations [204] and of testimony given at a former trial by a witness since deceased.[205] The prosecution was not permitted to use a judgment of conviction against other defendants on charges of theft in order to prove that the property found in the possession of the defendant now on trial was stolen.[206] A prosecutor, however, may comment on a defendant's presence at trial, and call attention to the defendant's opportunity to tailor his or her testimony to comport with that of previous witnesses.[207]

For years the Court has struggled with the relationship between hearsay rules and the Confrontation Clause. In a series of decisions beginning in 1965, the Court seemed to equate the Confrontation Clause with the hearsay rule, positing that a major purpose of the clause was "to give the defendant charged with crime an opportunity to cross-examine the witnesses against him," unless one of the hearsay exceptions applies.[208] Thus, in *Pointer v. Texas*,[209] the complaining witness had testified at a preliminary hearing at which he was not cross-examined and the defendant was not represented by counsel, and by the time of trial, the witness had moved to another state and the prosecutor made no effort to obtain his

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[203] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879).

[204] Kirby v. United States, 174 U.S. 47, 61 (1899); Robertson v. Baldwin, 165 U.S. 275, 282 (1897).

[205] Mattox v. United States, 156 U.S. 237, 240 (1895).

[206] Kirby v. United States, 174 U.S. 47 (1899), and Dowdell v. United States, 221 U.S. 325 (1911), recognized the inapplicability of the clause to the admission of documentary evidence to establish collateral facts, admissible under the common law, to permit certification as an additional record to the appellate court of the events of the trial.

[207] Portuondo v. Agard, 529 U.S. 61 (2000).

[208] Pointer v. Texas, 380 U.S. 400, 406–07 (1965); Douglas v. Alabama, 380 U.S. 415, 418 (1965). "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." Barber v. Page, 390 U.S. 719, 725 (1968). Unjustified limitation of the defendant's right to cross-examine witnesses presented against him at trial may constitute a confrontation clause violation, Smith v. Illinois, 390 U.S. 129 (1968), or a denial of due process, Alford v. United States, 282 U.S. 687 (1931); and *In re* Oliver, 333 U.S. 257 (1948).

[209] 380 U.S. 400 (1965). Justices Harlan and Stewart concurred on due process grounds, rejecting the "incorporation" holding. Id. at 408, 409. *See also* Barber v. Page, 390 U.S. 719 (1968), in which the Court refused to permit the state to use the preliminary hearing testimony of a witness in a federal prison in another state at the time of trial. The Court acknowledged the hearsay exception permitting the use of such evidence when a witness was unavailable but refused to find him "unavailable" when the state had made no effort to procure him; and Mancusi v. Stubbs, 408 U.S. 204 (1972), in which the Court permitted the state to assume the unavailability of a witness then living in Sweden, and to use the transcript of the witness' testimony at a former trial.