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Evidence—Witnesses—Deadman Statute—Corroboration

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EVIDENCE—WITNESSES—DEADMAN STATUTES—CORROBORATION.*—In all but five American jurisdictions the common law disqualification of interested persons as witnesses is retained only in suits against a decedent's estate.¹ The primary purpose of these Dead Man Statutes² is to protect the estate from fraudulent claims. In five jurisdictions³ the disqualification is completely abolished. In four jurisdictions, including New Mexico,⁴ the interested person's testimony is insufficient to support a verdict unless it is corroborated.⁵ The New Mexico type statute represents an attempt to retain some safeguard against fraudulent claims⁶ while avoiding the frustration of valid claims that frequently results from absolute disqualification. Both types of statutes present an initial problem of determining applicability. In addition, the New Mexico type statute requires the courts to fashion a standard for corroboration. The definition of corroborative evidence and the amount required to satisfy statutory standards has varied considerably, despite similarity in statutes.⁷

In *Porter v. Porter*,⁸ the most recent decision by the New Mexico Supreme Court involving this statute, the plaintiff, divorced from his wife seventeen years prior to her death, sought a declaratory judgment that certain property was separate and not community property. The defendants were children of the marriage. The supreme court held, one justice dissenting,⁹ that the statute was applicable to the suit, and it accepted the trial court's finding that the plaintiff's testimony was not corroborated.¹⁰

* *Porter v. Porter*, 65 N.M. 14, 331 P.2d 360 (1958).

1. Wigmore, Evidence § 575 (3d ed. 1940).

2. Wigmore, Evidence § 578 (3d ed. 1940). The statutes are collected in Wigmore, Evidence § 488 (3d ed. 1940).

3. Conn. Gen. Stat. Rev. § 52-145 (1958); La. Civ. Code Ann. art. 2282 (Dart 1945); Mass. Ann. Laws ch. 233, § 20 (1956); R.I. Gen. Law Ann. § 9-17-12 (1956); S. D. Code § 36.0101 (Supp. 1960).

4. D. C. Code Ann. § 14-302 (1951); N.M. Stat. Ann. § 20-2-5 (1953); Va. Code Ann. § 8-286 (1950); Ore. Rev. Stat. § 116.555 (1953), (requires "some competent satisfactory evidence other than the testimony of the claimant"). Ontario had one of the first statutes of this type. See Ont. Rev. Stat. c. 119, § 11 (1937). New Mexico was the first U. S. jurisdiction to adopt the intermediate approach. See N.M. Sess. Law, 1880, ch. 12, § 8.

5. Before the 1949 amendment the statute read: "In a suit by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence." N.M. Stat. Ann. § 20-2-5 (1953). It was amended to read: "In a suit by or against the heirs, executors, administrators or assigns of a deceased person, a claimant, interested or opposite party shall not obtain a judgment or decision on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is supported by some other material evidence tending to corroborate the claimant or interested person." N.M. Stat. Ann. § 20-2-5 (Supp. 1959).

6. Wigmore, Evidence § 578, at 697 (3d ed. 1940).

7. See text *infra* at notes 24-25.

8. 65 N.M. 14, 331 P.2d 360 (1958).

9. McGhee, J. urged that the statute did not apply because the suit was not against an estate but was merely to determine the ownership of property. 65 N.M. 14, 19, 331 P.2d 360, 363 (1958). See discussion in text at note 14 *infra*.

10. Plaintiff contended that the separate property that he owned prior to his marriage

The courts are faced with a logical dilemma in making the initial determination on the question of the applicability of the Dead Man Statute. The California and Idaho Dead Man Statutes¹¹ which refer to actions "upon a claim or demand against the estate" of a decedent, have been construed as limited to actions for a money judgment.¹² Thus these states conclude that their statutes are inapplicable to cases involving the issue of ownership of property,¹³ thereby appearing to avoid a determination for the purpose of trial that the property in question belongs to one of the parties.¹⁴ These courts reason that in such cases the plaintiff is merely pursuing his own property.¹⁵ This approach is explainable, at least in part, by the fact that these states have a broad Dead Man Statute and the courts are anxious to avoid its proscriptions.¹⁶ The broader wording of the New Mexico statute which applies to a "suit by or against"¹⁷ an estate would make the narrow construction adopted by California and Idaho difficult. Furthermore, it would be undesirable to adopt the fiction used in those states because it runs counter to the policy of the statute of preventing fraudulent claims. Such claims may arise in a suit like *Porter* as well as others. Furthermore, the California position that the plaintiff in a *Porter* type suit is merely pursuing his own property does not avoid a determination of ownership for the purpose of trial. It determines that the property belongs to the plaintiff—thus eliminating the protection the statute was intended to afford the estate. Because

in 1905 was the source of all the property in question. To corroborate his testimony he offered: (1) testimony of two women that he owned a drugstore and had another business and appeared to be a man of means before his marriage, Record, p. 255-59, *Porter v. Porter*, 65 N.M. 14, 331 P.2d 360 (1958); (2) testimony of a farmer that he had business transactions with the plaintiff before the latter's marriage and that the plaintiff had operated the drugstore for 3 or 4 years after which it was sold and another business purchased, Record, p. 178-79; (3) stock certificates issued to him in the businesses with which he was associated during his marriage, Record, p. 190-216; (4) testimony of plaintiff's bookkeeper of the increase of the plaintiff's business and his income from the business, Record, p. 158-59.

11. Cal. Civ. Proc. Code § 1880; Idaho Code Ann. § 9-202 (1947).

12. *Myers v. Reinstein*, 67 Cal. 89, 7 Pac. 192 (1885).

13. *Bollinger v. Wright*, 143 Cal. 292, 76 Pac. 1108 (1904); *Myers v. Reinstein*, 67 Cal. 89, 7 Pac. 192 (1885); *Cunningham v. Stoner*, 10 Idaho 549, 79 Pac. 228 (1905).

14. *Ibid.*

15. *Brunson v. Babb*, 145 Cal. App. 2d 214, 302 P.2d 647 (1956); *Cunningham v. Stoner*, 10 Idaho 549, 79 Pac. 228 (1905); compare Justice McGhee's dissenting opinion in *Porter v. Porter*, 65 N.M. 14, 19, 331 P.2d 360, 363 (1958).

16. E.g., *Brunson v. Babb*, note 15 *supra*. (The statute was not applied in a suit against an estate to recover the reasonable value of services rendered to the decedent because the plaintiff alleged a trust theory instead of a debt.) *Accord*, *Holland v. Bank of Italy Nat'l Trust and Sav. Ass'n*, 115 Cal. App. 472, 1 P.2d 1031 (1931) (Plaintiff sued executor on two counts for \$11,500, the first for money loaned to decedent; the second count alleging that the same money was held in trust for plaintiff by the decedent. The statute prevented plaintiff's testimony on the second count from being considered on the first count.) See *Adams v. Herman*, 106 Cal. App.2d 92, 234 P.2d 695 (1951) in which the Dead Man Statute was held to be applicable because the allegations were insufficient to support trust theory. One California writer terms this result incongruous and irrational. *Chadbourn, History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization*, 4 U.C.L.A. L. Rev. 175, 189 (1957).

17. N.M. Stat. Ann. § 20-2-5 (Supp. 1959).

the New Mexico statute permits the *corroborated* testimony of the claimant to sustain a verdict, it is unnecessary to limit the application of the statute to avoid its effects. Therefore, the view adopted in *Porter* is more consistent with the language of the statute and its purpose than the view adopted in California and Idaho.

The second problem raised by *Porter* concerns the corroboration requirement. Prior to the 1959 amendment,¹⁸ the governing New Mexico statute provided that the interested person's testimony was insufficient to sustain a verdict unless "corroborated by some other material evidence." In *Porter* the court reiterated the rule in New Mexico that "corroborating evidence must be such as would, standing alone and unsupported by the evidence of the claimant, tend to prove the essential allegations or issues raised by the pleading."¹⁹ This formulation originally stemmed from the court's rejection of the definition of general corroboration in *Gildersleeve v. Atkinson*,²⁰ and from its construction of the statutory requirement of materiality.²¹ This formulation was not required by the wording of the statute²² or to accomplish its purpose.²³ Decisions prior to *Porter* extended

18. Note 5 supra.

19. 65 N.M. 14, 16, 331 P.2d 360, 362 (1958).

20. *Gildersleeve v. Atkinson*, 6 N.M. 250, 27 Pac. 477 (1891) established the definition of corroborative evidence under this statute that has been followed or at least stated by most cases concerned with the statute. The court found two types of corroboration, general, and special or technical. It said that general corroborative evidence is for "no other function than to aid other evidence of a like or different character in giving it additional weight. Such other evidence, so aided, may or may not be sufficient of itself; that is the question for the jury." Id. at 257, 27 Pac. at 479. Technical corroborating evidence on the other hand is "a substantive quantum of evidence without which the case of the party who is compelled to produce it must inevitably fail." 6 N.M. at 257, 27 Pac. at 479. Because technical corroboration was required in certain criminal cases, and was thought to be analogous the rule in the criminal cases was adopted and that corroborative evidence was "something other than that which goes to the credibility of the witness solely." 6 N.M. at 259, 27 Pac. at 479. The rule the court stated was: "Corroborating evidence is such evidence as tends, in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegation or issue, if unsupported, would be fatal to the case; and such corroborating evidence must of itself, without the aid of any other evidence, exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports. And such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or point in issue." 6 N.M. at 260-61, 27 Pac. at 480 (1891).

21. The *Gildersleeve* court in originally construing the statute found that the corroborating evidence required must tend to prove a substantive fact and stated its rule "keeping in mind . . . that the evidence must be 'some other material evidence. . .'" *Gildersleeve v. Atkinson*, 6 N.M. 250, 260, 27 Pac. 477, 480 (1891). The rule stated by the court, supra note 20, is itself consistent with the definition of material evidence in *Black, Law Dictionary* 1128 (4th ed. 1951) ("Such as is relevant and goes to the substantial matters in dispute . . .").

22. Ontario's statute, Ont. Rev. Stat. c. 119, § 11 (1937), is nearly identical to N.M. Stat. Ann. § 20-2-5 (1953); that court held that "the corroboration the statute requires is not corroboration of every material fact which is required to be proved in order to entitle the party to succeed, but only of such material facts as lead to the conclusion that the testimony of the party is true." *McGregor v. Curry*, 20 D.L.R. 706, 709 (1914).

23. Virginia, which has the same type statute as New Mexico, Va. Code Ann. § 8-286 (1950), holds that the "law does not require the testimony of such an adverse witness

the *Gildersleeve* rule. Despite the fact that the court in *Gildersleeve* said simply that the corroboration must go to "some" essential allegation,²⁴ subsequent decisions appear to hold that *every* essential allegation must be corroborated.²⁵ This requirement places an undue burden on the claimant and seems to ignore the primary purpose of the New Mexico statute, *i.e.*, to alleviate the inequities created by the typical Dead Man Statute.²⁶

to be corroborated in every particular" *Burton's Ex'r. v. Manson*, 142 Va. 500, 509, 129 S.E. 356, 359 (1925).

24. Note 20 *supra*. N.M. Stat. Ann. § 20-2-5 (1953) also required only "some other material evidence." (Emphasis supplied.) Ontario found under an identical statute that the corroboration requirement did not apply to each essential allegation. *McGregor v. Curry*, 20 D.L.R. 706 (1914).

25. *Vehn v. Bergman*, 57 N.M. 351, 258 P.2d 734 (1953) (evidence offered in corroboration did not refer to the details of the oral agreement relied upon by the plaintiff); *Gillespie v. O'Neil*, 38 N.M. 141, 28 P.2d 1040 (1934) (indicates that evidence tending to show issue not sufficient unless other matters also corroborated); *In re Cardoner's Estate*, 27 N.M. 105, 196 Pac. 327 (1929) (evidence that plaintiff had a claim in some amount did not corroborate allegation of a claim for \$3500); *Childers v. Hubbel*, 15 N.M. 450, 110 Pac. 1051 (1910) (unpaid checks not corroboration for allegation that checks were for a certain purpose). But see *Lusk v. Daugherty*, 61 N.M. 157, 280 P.2d 1053 (1955) (court admitted that every claim not corroborated in every detail); *In re Baldwin's Will*, 58 N.M. 370, 271 P.2d 404 (1954) (testimony that claimant had not received payment of note not corroborated).

26. Although the New Mexico rule precluded the use of evidence tending only to show credibility as corroborative evidence, other states with similar statutes hold that such evidence is corroborative. See *McGregor v. Curry*, 20 D.L.R. 706 (1914); *Voyer v. Lepage*, 19 D.L.R. 52 (1914), interpreting Ont. Rev. Stat. c. 119, § 11 (1937) ("In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.") and *Burton's Ex'r. v. Manson*, 142 Va. 500, 129 S.E. 356 (1925), interpreting Va. Code Ann. § 8-286 (1950) ("no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony . . ."). Virginia requires that there be such corroboration "as would confirm and strengthen the belief of the jury in the testimony of the witness," *Id.* at 509, 129 E.E. at 359, and that the testimony of the claimant need not be corroborated in every particular, *Rorer v. Taylor*, 182 Va. 49; 27 S.E.2d 923 (1943).

The ad hoc nature of the Virginia approach seems undesirable. The rule stated is: "Whether corroboration exists and the degree and quality required are to be determined by the facts and circumstances of the particular case." *Clay v. Clay*, 196 Va. 997, 1002, 86 S.E. 2d 812, 815 (1955) (action by surviving husband to recover on alleged oral promise by deceased wife to devise real estate); *Nicholson v. Shockey*, 192 Va. 270, 64 S.E.2d 813 (1951) (action by children of testatrix against testatrix' son and attorney who claim the proceeds of a transaction he handled for her as a gift); *Crum v. Gilliam*, 190 Va. 935, 59 S.E.2d 72 (1950) (suit to confirm deed to plaintiff by deceased wife).

Compare the Oregon rule that requires that the corroborative evidence establish a prima facie case for the claimant. *Seaton v. Security Savings and Trust Co.*, 131 Ore. 261, 282 Pac. 556 (1929) and *Fields v. Rogers*, 128 Ore. 661, 275 Pac. 598 (1929) so construe Ore. Rev. Stat. § 116.555 (1953) which permits use of an interested party's testimony only upon "some competent, satisfactory evidence other than the testimony of the claimant." Thus the claimant's testimony can be used only for persuasion. The Oregon rule seems distinguishable from the Ontario and Virginia rules on the wording of the statutes.

The New Mexico court has focused its attention on what must be corroborated, but has virtually ignored the question of sufficiency of corroboration.²⁷ Despite some unusual decisions,²⁸ the quantity of corroborative evidence that is required remains unclear.²⁹ It is possible that the rule being followed is that the corroborating evidence must be sufficient in and of itself to support the claim. If this is true then the District of Columbia Court of Appeals correctly characterized the New Mexico rule when it said that it amounts "to saying that a survivor's testimony may be considered only when it is not essential to the result." It correctly concluded that "such a view clearly nullifies the statute."³⁰

See *Rosinski v. Whiteford*, 184 F.2d 700, 701 (D.C. Cir. 1950) construing D.C. Code Ann. § 14-302 (1951) which provides that "no judgment or decree shall be rendered in favor of the plaintiff founded on the uncorroborated testimony of the plaintiff. . . ." Accord, *Davis v. Carmody*, 154 A.2d 132 (D.C. Mun. Ct. App. 1959).

27. But see *Gildersleeve v. Atkinson*, 6 N.M. 250, 260, 27 Pac. 477, 480 (1891) ("The rule . . . goes simply to the introduction of the evidence, not to its weight. The court is first to determine whether there is any corroborating evidence; its weight is then for the jury." This seems to indicate that any amount of admissible evidence may be sufficient.) Compare the statement in *Lusk v. Daugherty*, 61 N.M. 196, 203, 297 P.2d 333, 337 (1956) that the testimony offered in corroboration "if accepted by the court, was of a character . . . as did 'tend to prove the essential allegations or issue raised by the pleadings'" and thus met the "statutory test of sufficiency." This seems to confuse the two requirements of sufficiency and quality of the evidence recognized in the *Gildersleeve* case.

28. In *Craig v. Cox*, 56 N.M. 658, 248 P.2d 659 (1950), evidence offered in corroboration was treated as if it must be sufficient to sustain the claim. The credibility of the evidence offered in corroboration was considered and the corroborating evidence was also weighed with other evidence offered to rebut the claim against the estate. A similar attitude is illustrated by cases requiring the details of an oral agreement relied upon by the claimant to be set out by corroborating evidence, thus making proof of such a claim possible only on evidence independent of the claimant's. *Vehn v. Bergman*, 57 N.M. 351, 258 P.2d 734 (1953); *Childers v. Hubbell*, 15 N.M. 450, 110 Pac. 1051 (1910); compare *Craig v. Cox*, 56 N.M. 658, 248 P.2d 659 (1950) which seemed to require that the corroborative evidence be precise and certain as to the terms of the agreement; cf. *Rasmussen v. Martin*, 60 N.M. 180, 289 P.2d 327 (1955) (corroborative evidence relied upon did not refer to details of oral agreement).

29. One writer has suggested that formulation of a general rule is useless since the issue of sufficiency of corroboration is litigated in virtually every case under such a statute. *Legislation, Qualifying the Interested Survivor as a Witness*, 46 Harv. L. Rev. 834, 835 n.12 (1933). For an example of the disparity of results in New Mexico compare *Rasmussen v. Martin*, 60 N.M. 180, 289 P.2d 327 (1955) (corroborating testimony consisted of evidence that a transaction had taken place between plaintiff and decedent without any details of the transaction) and *In re Baldwin's Will*, 58 N.M. 370, 371, 271 P.2d 404, 405 (1954) ("We agree with the jurors who tried the case that this was sufficient corroboration . . . [T]he jury evidently believed the statement" of the plaintiff) with *Vehn v. Bergman*, 57 N.M. 351, 258 P.2d 734 (1953) (requiring the corroborating evidence to set out the details of the oral agreement relied upon by plaintiff) and *Craig v. Cox*, 56 N.M. 658, 248 P.2d 659 (1952) (rejecting other evidence relating to the details of the alleged oral agreement).

30. *Rosinski v. Whiteford*, 184 F.2d 700, 701 (D.C. Cir. 1950). The conclusion reached by the District of Columbia court would be correct only if the evidence necessary to corroborate each essential allegation were required to be enough for the jury to find that fact. It is conceivable that each allegation could be corroborated by evidence not sufficient for the jury to find it to be true.

The 1959 amendment to the New Mexico Dead Man Statute was drafted to prevent the extreme results reached under the old statute. The amended statute³¹ provides that a claimant may not prevail on his own evidence unless it is "supported by some other material evidence tending to corroborate the claimant." (Emphasis supplied) This change was intended to prevent holdings that require the corroborative evidence to be sufficient in itself to support the claim.³² Furthermore, the provision that the testimony of the claimant need only be "supported" by evidence "tending" to corroborate *him* suggests that corroborative evidence is sufficient if it supports the claimant's credibility and need no longer independently corroborate the elements of his claim.³³ It is clear that the amendment was intended to reject the definition of corroboration used in *Porter*.³⁴ The new language permits "a judgment based essentially on the survivor's testimony if there is other evidence from which reasonable men might conclude that his testimony is probably true."³⁵ This view, originated by the District of Columbia, should be adopted by New Mexico.³⁶

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31. *Supra* note 5.

32. See letter on file in Natural Resources Journal office, The University of New Mexico School of Law, from sponsor of amending bill in the legislature. The sponsor was counsel for plaintiff in *Porter v. Porter*, 65 N.M. 14, 331 P.2d 360 (1958).

33. See text accompanying notes 19-25, *supra*.

34. *Supra* note 32.

35. *Rosinski v. Whiteford*, 184 F.2d 700, 701 (D.C. Cir. 1950) construing D.C. Code Ann. § 14-302 (1951) which provides that "no judgment or decree shall be rendered in favor of the plaintiff founded on the uncorroborated testimony of the plaintiff . . ." *Accord*, *Davis v. Carmody*, 154 A.2d 132 (D.C. Mun. Ct. App. 1959).

36. This standard is nearly identical to the standard used in most jurisdictions to determine whether evidence is sufficient to permit a jury to decide a question of fact, and thus should not be difficult to apply. McCormick, *Evidence* § 306, at 636 (1954) states that test as follows: ". . . it must be such that a reasonable man could draw from it the inference of the existence of the particular fact to be proved." See 9 *Wigmore, Evidence* § 2494 at 299 & n. 17 (3d ed. 1940).

The similarity between the pre-amendment New Mexico statute, *supra* note 5, and the Virginia, Ontario, and District of Columbia statutes *supra* note 26, and the liberal constructions placed upon those statutes, indicate that the New Mexico position was unreasonable before the amendment.

The only other context in which corroboration is used in New Mexico is regarding the testimony of a complainant in a rape case. See e.g., *State v. Baca*, 56 N.M. 236, 242 P.2d 1002 (1952). Thus no New Mexico precedent stands in the way of the suggested test.

It should not be overlooked that the New Mexico type statute has been attacked as merely causing litigation. Legislation, *Qualifying the Interested Survivor as a Witness*, 46 *Harv. L. Rev.* 834 (1933). Also, even the liberal District of Columbia approach does not answer the criticisms of Dead Man Statutes by leading scholars who recommend the abolition of all such restrictions on the competency of witnesses. McCormick, *Evidence* § 65 (1954); Vanderbilt, *Minimum Standards of Judicial Administration* 334 (1949); *Wigmore, Evidence* § 578 (3d ed. 1940); Ladd, *The Dead Man Statute: Some Further Observations and a Legislative Proposal*, 26 *Iowa L. Rev.* 207 (1941); *Model Code of Evidence* rule 101 (1942). Because of the other safeguards against fraud, such as cross-