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# Waiver of Ohio Dead Man Statute

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practitioner; third, this opportunity is especially true in professions such as architecture and engineering wherein the client relationship is not confidential; fourth, the advantages and disadvantages of the corporate form could be made available as a matter of choice without disturbing, and perhaps enhancing, the image of the architect in the client's eyes; fifth, the trend is toward statutes permitting the corporate practice not only of architecture, but also of other professions; and last, the practitioners would undoubtedly be well rewarded by an objective and reasoned analysis of the problem.

Almost four decades elapsed before the resistance to contemporary design was overcome among the architects themselves; indeed, there are many who still resist. The same indiscretion well might keep the profession forty years behind the economic metamorphosis of the atomic age. An analysis made too late may be extensive and nevertheless be too little. All too applicable, then, would be the epitaph: *Sic transit gloria mundi*.<sup>75</sup>

GEORGE M. WHITE

## *Waiver of Ohio Dead Man Statute*

### HISTORY

At common law, one interested in the outcome of litigation was incompetent to testify.<sup>1</sup> In 1850, the Ohio legislature removed interest as a disqualification for a witness;<sup>2</sup> however, interest as a disqualification for a party remained until 1853.<sup>3</sup> In that year, parties were made generally competent to testify, with a few major exceptions. Foremost among these was the disability of a party to testify against the executor or administrator of a deceased person as to facts occurring prior to the deceased's death.<sup>4</sup> Between the time of its enactment and the present date, other disqualifying provisions were added to the Dead Man Statute. Today, the statute provides as follows:

A party shall not testify when the adverse party is the guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person.<sup>5</sup>

From time to time, the legislature modified the scope of the statute by adding exceptions to the basic disqualification clause quoted above. These exceptions will be discussed in subsequent sections of this note.

In order to appreciate the problems incident to waiver, it is first necessary to examine in detail the nature of the disqualification imposed by the Dead Man Statute.

75. THOMAS À KEMPIS, *IMITATIO CHRISTI*, ch. 3 § VI (1450).

## PURPOSE

The Ohio Supreme Court has stated that the Dead Man Statute was enacted (1) to protect the estate from fraud and perjury,<sup>6</sup> and (2) to place the parties to an action upon an equal basis with respect to the admission and exclusion of evidence.<sup>7</sup>

In removing the bar of incompetency from witnesses and parties generally, the legislature was guided by the principle that the adverse party was able to protect himself by his own testimony, and that the matter of interest affected only the party's credibility.<sup>8</sup> However, with respect to testimony of a party against the estate of a deceased person, the legislature apparently believed that justice could best be served by sealing the lips of the adverse party "when the lips of one party . . . are closed by death."<sup>9</sup>

### JUDICIAL CONSTRUCTION OF THE DISQUALIFICATION CLAUSE

Because the disqualification of an adverse party in the Dead Man Statute constitutes an exception to the general statutory provision making all parties competent witnesses,<sup>10</sup> the courts have consistently stated that the disability provision should be strictly construed in favor of the admissibility of evidence.<sup>11</sup> This maxim would make easy the task of construing the basic part of the statute but for the last sentence of the section which provides as follows:

When a case is plainly within the reason and spirit of this section and sections 2317.01 and 2317.02 of the Revised Code, though not within the strict letter, their principles shall be applied.<sup>12</sup>

Prior to the enactment of the "reason and spirit" clause, and be-

1. See generally WIGMORE, EVIDENCE §§ 575-77 (3d ed. 1940).
2. Act to Improve the Law of Evidence, 48 Ohio Laws 33 (1850).
3. Act to Establish a Code of Civil Procedure, 51 Ohio Laws 57, § 310 (1853).
4. Act to Establish a Code of Civil Procedure, 51 Ohio Laws 57, § 313 (1853).
5. OHIO REV. CODE § 2317.03 (Supp. 1959).
6. *Stream v. Barnard*, 120 Ohio St. 206, 165 N.E. 727 (1929); *Roberts v. Briscoe*, 44 Ohio St. 596, 601-02, 10 N.E. 61, 64 (1887); *Stevens v. Hartley*, 13 Ohio St. 525, 531 (1862).
7. *Roberts v. Briscoe*, 44 Ohio St. 596, 600, 10 N.E. 61, 64 (1887); *Sternberger v. Hanna*, 42 Ohio St. 305, 308 (1884); *Hoover v. Jennings*, 11 Ohio St. 624, 626 (1860); see also *O'Shaughnessy v. Stefft*, 117 N.E.2d 734 (Ohio P. Ct. 1953).
8. *Powell v. Powell*, 78 Ohio St. 331, 335, 85 N.E. 541, 543 (1908).
9. *Roberts v. Briscoe*, 44 Ohio St. 596, 602, 10 N.E. 61, 64 (1887).
10. OHIO REV. CODE § 2317.01.
11. *E.g.*, *Smith v. Barrick*, 151 Ohio St. 201, 207, 85 N.E.2d 101, 104 (1949); *Torrance v. Torrance*, 147 Ohio St. 169, 174-75, 70 N.E.2d 365, 368 (1946); *Stream v. Barnard*, 120 Ohio St. 206, 210-11, 165 N.E. 727, 728 (1929); *Cockley Milling Co. v. Bunn*, 75 Ohio St. 270, 276, 79 N.E. 478, 480 (1906); *Bolen v. Humes*, 94 Ohio App. 1, 6, 114 N.E.2d 281, 284 (1951), *motion to certify denied*, Mar. 19, 1952.
12. OHIO REV. CODE § 2317.03 (Supp. 1959). Section 2317.02 governs the admissibility of privileged communications and acts.

fore the Dead Man Statute was amended to include assignees, a case arose concerning a chose in action which had been assigned by a deceased person. The party adverse to the assignee was not deemed incompetent to testify in view of the fact that the assignee was not an executor, administrator, or grantee.<sup>13</sup> The Ohio Supreme Court held that the party adverse to such assignee was competent to testify that he did not execute the promissory note concerned in the litigation, even though this testimony could not be controverted by that of the payee because of his demise.<sup>14</sup> The court conceded that in order to be consistent with the other provisions of the Dead Man Statute, the assignee of a chose in action from a deceased person should be accorded the same protection as was expressly granted to those persons named in the statute. However, the court considered itself bound by the precise wording of the statute.<sup>15</sup> The next year, the legislature amended the statute by adding the "reason and spirit" clause.

The inference would seem to be reasonable that the legislature by the insertion of the clause intended to abrogate the construction requiring absolute particularity, which had theretofore been applied. . . .<sup>16</sup>

Rather than clarifying the legislative intent as to the construction of the statute, the "reason and spirit" clause created a two-fold dilemma for the courts: (1) Did the legislature, by the enactment of this clause, intend that the courts give a liberal construction to the statutory provision making all parties competent, or a liberal construction to the statutory provisions which disqualify witnesses and evidence?<sup>17</sup> (2) Did the legislature intend the "reason and spirit" clause to apply in favor of the admission of evidence (under the exceptions to the statute) or in favor of the exclusion of evidence (under the disqualifying clause)?

In practice, the "reason and spirit" clause has been given little effect by the courts. An early supreme court case, *Cochran v. Almack*,<sup>18</sup> held that:

. . . [I]f a case is provided for, by the terms of either of the sections, no occasion can arise for invoking the spirit and reason of the statute to supply the omission of its letter or terms.<sup>19</sup>

13. Act to Establish a Code of Civil Procedure, 51 Ohio Laws 57, § 313 (1853).

14. *Elliott v. Shaw*, 32 Ohio St. 431 (1877).

15. *Id.* at 434.

16. *Newman v. Newman*, 103 Ohio St. 230, 236, 133 N.E. 70, 72 (1921).

17. OHIO REV. CODE § 2317.02 excludes privileged communications and acts; OHIO REV. CODE § 2317.03 (Supp. 1959) is the Dead Man Statute. One appellate court, deciding a case under Ohio General Code § 11495, which provided that the "reason and spirit" clause applied to the "next three preceding sections," held that this wording excluded its operation with respect to the Dead Man Statute, which was also contained in General Code § 11495. *Herman v. Soal*, 71 Ohio App. 310, 315, 49 N.E.2d 109, 111-12 (1942).

18. 39 Ohio St. 314 (1883).

19. *Id.* at 316.

In this case, defendant admitted liability on a promissory note, but claimed as a defense payment to an agent of plaintiff. Since the agent had died prior to the trial, plaintiff objected to defendant's testimony on the ground that it was incompetent because of the "reason and spirit" clause, there being no witness to the alleged transaction who was available to contradict defendant's testimony. As indicated above, the majority held that defendant was a competent witness to the transaction, because he was made so by the predecessor to Ohio Revised Code section 2317.01, and his competency was not expressly removed by the Dead Man Statute, which applies only to parties.

To the dissent, "all the evils of permitting one to prove, by his own oath, his claim against a deceased person's estate, applies to the case."<sup>20</sup> As previously noted, one of the judicially ascertained purposes of the statute is to place the parties to an action upon an equal basis with respect to the admission and exclusion of evidence. In view of this, the dissent appears to be well taken. "Indeed, if . . . [defendant] was competent, under such circumstances, to prove the payment by his own oath, I am at a loss to imagine, a case in which the provision should be applied."<sup>21</sup>

In almost every case in which the "reason and spirit" clause has been considered, the court has stated the purpose of the clause to be to broaden the scope of the general competency statute and to liberalize the exceptions to the Dead Man Statute which allow parties to testify.<sup>22</sup> Thus, the courts, in effect, have continued their strict construction of the statute in favor of the admissibility of evidence.

### "A Party"

The statute provides that "a party" shall not testify. The courts have narrowly construed this term. It has been stated that one is not a party to the suit if he does not have "a right to control the proceedings, to make a defense, or to adduce and cross-examine witnesses."<sup>23</sup> Further, one against whom no relief is asked is not a party.<sup>24</sup>

20. *Id.* at 318 (dissenting opinion).

21. *Id.* at 319 (dissenting opinion).

22. See *Loney v. Walkey*, 102 Ohio St. 18, 25, 130 N.E. 158, 160 (1921); *Powell v. Powell*, 78 Ohio St. 331, 339, 85 N.E. 541, 544 (1908); *Cockley Milling Co. v. Bunn*, 75 Ohio St. 270 (1906); *Shaub v. Smith*, 50 Ohio St. 648 (1893); *Keyes v. Gore*, 42 Ohio St. 211 (1884); *Cochran v. Almack*, 39 Ohio St. 314, 317 (1883); *Butler v. Youngflesh*, 68 Ohio App. 342, 41 N.E.2d 147 (1941); *Hess v. Clutz*, 8 Ohio App. 57 (1917). But see *Newman v. Newman*, 103 Ohio St. 230, 133 N.E. 70 (1921) (dictum); *Snow v. Fulton*, 51 Ohio App. 514, 2 N.E.2d 12 (1936) (third party beneficiary not permitted to examine promisee in action against promisor's estate, on basis of analogy to prohibition against testimony of the assignor of a claim where assignee would not be permitted to testify). See note 57 *infra* and accompanying text.

23. *Butler v. Youngflesh*, 68 Ohio App. 342, 344, 41 N.E.2d 147, 148 (1941).

24. *Brocalca Chemical Co. v. Langsenkamp*, 32 F.2d 725 (6th Cir. 1929), *reversing* 21 F.2d 207 (S.D. Ohio 1927).

The courts have defined party so as to exclude from its purview nominal parties of record.<sup>25</sup> Thus, the husband of an heir at law, who was a party of record, was held to be a nominal party and, therefore, competent to testify on behalf of his wife in her action to test the validity of a will.<sup>26</sup> Moreover, the courts have allowed the testimony of one who is not a party of record even though his interests will be directly affected by the result of the litigation. Thus, a general manager,<sup>27</sup> a president,<sup>28</sup> or a director,<sup>29</sup> may testify on behalf of his corporation against the estate of a deceased person.<sup>30</sup> The fact that a corporation can act only through its agents has not swayed the courts from their strict interpretation.<sup>31</sup> Furthermore, the children,<sup>32</sup> parents,<sup>33</sup> or spouse<sup>34</sup> of a party are not incompetent to testify against a decedent's estate,<sup>35</sup> if they are not parties.

As has been noted, in many of these cases a witness has been allowed to testify even though his interests would be affected by the outcome of the litigation. Although this interest has not been deemed to be sufficient to seal his lips, there is dictum to the effect that if the witness was a *necessary* party, or if his rights would be determined by the judgment, then the court might exclude the testimony on the basis of the "reason and spirit" clause.<sup>36</sup>

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25. *In re* Estate of Butler, 137 Ohio St. 96, 28 N.E.2d 186 (1940) (creditor of decedent, whose claim had been paid, held competent to testify in behalf of administrator in action to surcharge the latter). See also Loney v. Walkey, 102 Ohio St. 18, 130 N.E. 158 (1921).

26. Wolf v. Powner, 30 Ohio St. 472 (1876); see also Baker v. Kellogg, 29 Ohio St. 663 (1876), and Bell v. Wilson, 17 Ohio St. 640 (1867), wherein the principal maker of a promissory note was held to be a competent witness in a suit by the administrator of the payee against the maker and the surety. In both cases the principal was not asserting a defense against the administrator and, thus, was deemed not to be a "party" within the meaning of the Dead Man Statute. It should be noted, however, that the same result could have been reached on the basis that the principal, not having asserted a defense, was not really *adverse* in interest to the administrator, thus making the statute inapplicable.

27. Cockley Milling Co. v. Bunn, 75 Ohio St. 270 (1906).

28. Brocalsa Chemical Co. v. Langsenkamp, 32 F.2d 725 (6th Cir. 1929); *In re* Estate of Kennedy, 82 Ohio App. 359, 80 N.E.2d 810 (1948).

29. Lawson & Covode v. Farmer's Bank, 1 Ohio St. 206 (1853).

30. See also First Nat'l Bank v. Cornell, 41 Ohio St. 401 (1884) (*per curiam*); Parker v. Mutual Life Ins. Co., 23 Ohio App. 535, 156 N.E. 231 (1925), where agent of corporation was allowed to testify.

31. Cockley Milling Co. v. Bunn, 75 Ohio St. 270, 277, 79 N.E. 478, 480 (1906).

32. Powell v. Powell, 78 Ohio St. 331, 85 N.E. 541 (1908). *A fortiori*, the agent of a non-corporate party may testify on behalf of his principal in a suit against an administrator with respect to a sale made by him to decedent. Shaub v. Smith, 50 Ohio St. 648, 35 N.E. 503 (1893).

33. Thompson v. Thompson, 18 Ohio St. 73 (1868); Schulte v. Hagemeyer, 16 Ohio App. 1 (1922), *motion to certify denied*, June 6, 1922.

34. Stupp v. Lear, 42 N.E.2d 681 (Ohio App. 1942); Hess v. Clutz, 8 Ohio App. 57 (1917).

35. See also Ryan v. O'Connor, 41 Ohio St. 368 (1884), wherein a trustee, who had conveyed trust property without the settlor's knowledge, was held competent to testify for the settlor in a suit against the heirs of the transferee.

36. Ryan v. O'Connor, *supra* note 35, at 371 (if the trustee would have been a necessary party, the "reason and spirit" clause might have excluded his testimony); Keyes v. Gore, 42

### "Adverse Party"

The statute provides that a party shall not testify when the "adverse party" is any of the following: the guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person; an executor or administrator; one who claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person.<sup>37</sup>

### "Adverse"

The courts have determined that a party is not disqualified by the Dead Man Statute unless his interest is opposed to that of the executor, administrator, heir, or others specifically named by the statute.<sup>38</sup> Thus, in an action by plaintiff to recover for services allegedly rendered the deceased under an implied contract, it was held that the sole legatee, who was a party defendant, was competent to testify on behalf of the executor of the deceased's estate, in that the legatee's interest was adverse to the *plaintiff*, rather than to the *estate*.<sup>39</sup> Further, the parties must be "adversely interested in the determination of the issues, . . . but it matters not whether they are upon the same side or opposite sides of the record."<sup>40</sup>

One area in which the courts have had difficulty in defining the nature of the interests of the parties is in actions to determine heirship. It has been held that one attempting to qualify as a common-law spouse of a deceased person is incompetent to testify as to facts tending to establish the existence of a common-law marriage.<sup>41</sup> The rationale of these decisions appears to be that the qualification of the surviving spouse would decrease the interest of others claiming an in-

Ohio St. 211 (1884) (if action to recover real property would also have conclusively determined widow's rights to dower, she might be barred from testifying even though she was not a party). It should be noted that the personal property of a deceased person does not vest in his heirs upon his death, but is in abeyance until the estate is administered, even if there is but one heir. Thus, an heir in this case would not be a necessary nor a proper party to a suit. *McBride v. Vance*, 73 Ohio St. 258 (1906) (syllabus 2). *But see Bolen v. Humes*, 94 Ohio App. 1, 114 N.E.2d 281 (1951), wherein the wife of decedent was allowed to testify on behalf of the executor in a suit by a legatee under decedent's will excepting to the inventory filed. Plaintiff had been bequeathed a ring, which item was missing from the inventory. The wife testified that she had been given the ring by an inter vivos gift. This decision would appear to be erroneous under the above dictum inasmuch as the judgment would be binding on the wife with respect to the ownership of the ring.

37. OHIO REV. CODE § 2317.03 (Supp. 1959).

38. *Anderson v. Houpt*, 43 Ohio App. 538, 184 N.E. 29 (1932); *Walkey v. Loney*, 13 Ohio App. 393 (1919), *aff'd on another ground*, 102 Ohio St. 18, 130 N.E. 158 (1921); see *Cochran v. Almack*, 39 Ohio St. 314 (1883).

39. *Anderson v. Houpt*, *supra* note 38.

40. *Hubbell v. Hubbell*, 22 Ohio St. 208, 221 (1871).

41. *Lynch v. Romas*, 139 N.E.2d 352 (Ohio Ct. App. 1956); *Dibble v. Dibble*, 88 Ohio App. 490, 100 N.E.2d 451 (1950), *motion to certify denied*, April 19, 1950; *Brawley v. Thomas*, 82 Ohio App. 400, 81 N.E.2d 719 (1947); *In re Estate of Goettge*, 6 Ohio Supp. (N.E. Reporter) 89 (P. Ct. 1940).

terest in the estate, who must be made parties to the action.<sup>42</sup> Thus, one claiming as a common-law spouse is deemed to be adverse in interest to other claimants of the estate, who are protected by the statute. However, at least one court has not applied the same reasoning where a claimant in heirship was a person other than one purporting to be a common-law spouse.<sup>43</sup> In that case, the court allowed the alleged sister of the decedent to testify as to facts tending to prove the relationship in issue. The court distinguished the common-law spouse cases on the tenuous ground that the qualification of one as the sister of the decedent would not decrease the value of the estate; rather, it would only determine among whom the estate would be distributed.<sup>44</sup> It would seem that the true rationale for the distinction is that, as a matter of public policy, the courts hold common-law marriages in disfavor.<sup>45</sup>

### "Guardian"

In most cases, it is clear whether or not the adverse party is a guardian, trustee, or other person protected by the statute. However, in some instances the applicability of the statute has been questioned. The protection of the statute applies where a judicial determination has been made that the person is insane and a guardian has been appointed.<sup>46</sup> Conversely, it does not apply where a guardian *ad litem* defends or prosecutes an action.<sup>47</sup> The reasoning of the court is that to allow the statute to operate in the latter situation would be to encourage fraud, because any party can have a trustee appointed *ex parte*, and thus prevent the testimony of the adverse party.<sup>48</sup>

A party has been held to be incompetent to testify against the guardian of an insane person even though the insanity was not officially declared until after the occurrence which formed the basis of the action.<sup>49</sup> The same result obtains despite the fact that the evidence offered is not within the knowledge of the insane person prior to the appointment of a guardian.<sup>50</sup>

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42. OHIO REV. CODE § 2123.02.

43. O'Shaughnessy v. Stefft, 117 N.E.2d 734 (Ohio P. Ct. 1953).

44. *Id.* at 736.

45. See Brastein v. Sedivy, 153 N.E.2d 541 (Ohio P. Ct. 1957).

46. Sacks v. Johnson, 76 Ohio App. 143, 63 N.E.2d 246 (1943); Nolan v. Haberer, 3 Ohio App. 45 (1914).

47. Torrance v. Torrance, 147 Ohio St. 169, 177-78, 70 N.E.2d, 365, 369 (1946).

48. *Id.* at 175-77, 70 N.E.2d at 368-69. The court stated that a guardian *ad litem* is not the real party in interest nor the adverse party.

49. Nolan v. Haberer, 3 Ohio App. 45 (1862) (syllabus 1).

50. *Ibid.*



### "Grantee"

The statute provides that when the adverse party claims or defends as grantee of a deceased person, the other party shall not testify. It has been held, however, that each grantee of the decedent is competent to testify against the other in an action to determine which land should be sold first to satisfy a mortgage.<sup>51</sup> The court stated that even though both parties were claiming or defending as grantees, the Dead Man Statute was not applicable inasmuch as neither party was directly attacking the grant.<sup>52</sup>

### "Assignee"

When a party claims to be an assignee of a decedent, a question of fact is presented which must be determined by the jury.<sup>53</sup> In this situation, the other party is not an incompetent witness, but may testify generally. However, if the jury finds that the adverse party is in fact an assignee, then the testimony of the other party must be disregarded.<sup>54</sup>

It should be noted that even though the assignor of a chose in action would be a competent witness in an action against the administrator of the estate of a debtor under the Dead Man Statute,<sup>55</sup> the assignor is now barred from testifying by a section of the Privileged Communication Statute.<sup>56</sup> The latter section provides that the assignor may not testify when the assignee is barred from testifying. If, under the Dead Man Statute, the assignee would be incompetent to testify, by the operation of the two statutes, the assignor is also incompetent.<sup>57</sup> The effect is to rectify the prior inequity, whereby one could avoid the operation of the Dead Man Statute merely by assigning his claim against the deceased's estate.<sup>58</sup>

## WAIVER OF THE STATUTE

Over a period of years, a number of exceptions have been appended to the Dead Man Statute. Some of these exceptions limit the

51. *Sternberger v. Hanna*, 42 Ohio St. 305 (1884).

52. *Id.* at 308.

53. *Smith v. Barrick*, 151 Ohio St. 201, 85 N.E.2d 101 (1949).

54. *Ibid.* Mr. Justice Mathias, concurring, said that this determination should be made by the trial judge, rather than by the jury. *Id.* at 209, 85 N.E.2d at 105 (concurring opinion). Mr. Justice Taft, although agreeing in principle with Mr. Justice Mathias, stated that in this particular case the decision should have turned upon a different construction of the pleading. *Id.* at 210, 85 N.E.2d at 106, (concurring opinion). If the latter interpretation were deemed to be correct, the value of this majority opinion as precedent is considerably weakened.

55. *Myres v. Walker*, 9 Ohio St. 558 (1859).

56. OHIO REV. CODE § 2317.02(D).

57. See *Snow v. Fulton*, 51 Ohio App. 514, 2 N.E.2d 12 (1936). See note 22 *supra*.

58. *Myres v. Walker*, 9 Ohio St. 558 (1859) (decided prior to the adoption of § 2317-.02(D)).

scope of the statute, whereas others provide for the waiver of its protection. The following sub-sections, which limit the scope of the statute, provide that a party shall not testify, except:

(1) As to facts which occurred after the appointment of the guardian or trustee of an insane person, and, in the other cases, after the time the decedent, grantor, assignor, or testator died.<sup>59</sup>

(2) When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness, a party may testify on the same subject.<sup>60</sup>

(3) In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with, or admissions by, a partner or joint contractor since deceased, unless they were made in the presence of the surviving partner or joint contractor, and this rule applies without regard to the character in which the parties sue or are sued.<sup>61</sup>

(4) If the claim or defense is founded on a book account, a party may testify that the book is his account book, that it is a book of original entries, that the entries therein were made in the regular course of business by himself, a person since deceased, or a disinterested person, and the book is then competent evidence in any case, without regard to the parties, upon like proof by any competent witness.<sup>62</sup>

While no attempt is made at an extensive discussion of these exceptions, because they bear no relation to waiver, a few of the more salient features of the first exception listed above are deserving of mention.<sup>63</sup> This exception limits the protection of the Dead Man Statute to facts *occurring* prior to the time of the decedent's death or to the appointment of a guardian for an insane person.<sup>64</sup> Thus, in an action against an administrator to recover on an oral contract, the plaintiff was not only held incompetent as to the essence of a conversation allegedly had by him with the deceased, but was also incompetent to testify as to the fact of the conversation.<sup>65</sup> Further, the protection of the statute extends to a fact which *existed* after the death of the deceased, but which *occurred* prior to such death. Therefore, the assignor of a claim<sup>66</sup> was held incompetent to testify with respect to an assignment made prior to decedent's death, and which was in full force and effect subsequent to his death.<sup>67</sup> The Hamilton County Court of Appeals has had difficulty in determining whether

59. OHIO REV. CODE § 2317.03 (A) (Supp. 1959).

60. OHIO REV. CODE § 2317.03 (B) (Supp. 1959).

61. OHIO REV. CODE § 2317.03 (E) (Supp. 1959).

62. OHIO REV. CODE § 2317.03 (F) (Supp. 1959).

63. For a complete discussion of these exceptions, see Note, 4 WEST. REV. L. REV. 61, 66 (1952).

64. *In re Estate of Decker*, 81 Ohio App. 217, 78 N.E.2d 686 (1946).

65. *Southard v. Curson*, 13 Ohio App. 289 (1920) (syllabus 1).

66. For a discussion of the disqualification of an assignor when the assignee is incompetent to testify, see note 56 *supra* and accompanying text.

67. *Price v. Cleveland Trust Co.*, 81 Ohio App. 221, 77 N.E.2d 621 (1947).

testimony with respect to the identification of a signature made prior to the death of the decedent relates to a fact occurring prior to death within the meaning of the statute. In a 1936 case,<sup>68</sup> a surviving partner was held to be incompetent to testify as to the handwriting of a deceased partner in the former's action against the estate. In a 1948 case,<sup>69</sup> the same court held that the plaintiff had not waived the protection of the statute by questioning the defendant as on cross-examination with respect to the genuineness of the defendant's signature, allegedly affixed upon a note as co-signer, prior to the death of the deceased maker. Thus, it appears implicit from the court's decision that the genuineness of the defendant's signature was considered to be a fact occurring subsequent to death. In the earlier case, the reasoning of the court was that identification of the handwriting of a deceased person must be based upon knowledge gained prior to the deceased's death.<sup>70</sup> If this rationale were applied to the later case, the two decisions could be reconciled inasmuch as the party in that case was testifying as to the genuineness of his own signature. However, in each case, the essence of the testimony went to the fact of the writing, which fact, although in existence subsequent to the deceased's death, occurred prior to such death. Therefore, in view of the language of the statute, the testimony should have been excluded in both cases. Although this conclusion may seem to be contrary to the purpose of the statute, so long as it remains in force, it is desirable that the courts' interpretations be consistent with the wording of the statute, thus leaving to the legislature the task of annexing amendments thereto.

It should be noted that with respect to testimony against the guardian of an insane person, the date of the appointment of the guardian strictly controls what facts are admissible. Thus, in an action for personal injury against the guardian of an insane person, the testimony concerning the injury was excluded because the guardian was appointed subsequent to the injury, although the person was in fact insane for some time prior to the injury.<sup>71</sup>

Another exception that severely restricts the protection of the Dead Man Statute provides as follows:

Nothing in this section shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil.<sup>72</sup>

68. *Steigert v. Steigert*, 57 Ohio App. 255, 15 N.E.2d 583 (1936).

69. *Pfister v. Walter*, 83 Ohio App. 156, 82 N.E.2d 768 (1948).

70. *Steigert v. Steigert*, 57 Ohio App. 255, 261, 13 N.E.2d 583, 586 (1936).

71. *Nolan v. Haberer*, 3 Ohio App. 45 (1914). This case illustrates the difficulty of drafting an exclusionary statute which will do justice in every case. The court was also bothered by this, but felt compelled to hold as they did because of a prior case, *Ransom v. Haberer & Co.*, 13 Ohio C.C.R. (n.s.) 511 (1910), *aff'd without opinion*, 85 Ohio St. 483, 98 N. E. 1131 (1912). The court did not even feel that the "reason and spirit" clause would allow them to hold otherwise. See *supra* notes 12-22 and accompanying text.

72. OHIO REV. CODE § 2317.03 (Supp. 1959).

The word "validity" has been narrowly construed by the Ohio Supreme Court as being equivalent in meaning to "legal sufficiency." Consequently, an action which, in essence, is one to engraft a constructive trust upon a deed, has been held not to be an action "involving the validity of a deed."<sup>73</sup>

### *Exceptions Relating to Waiver*

Four exceptions to the statute relate directly or indirectly to the waiver of its protection. One of these is that:

If after testifying orally, a party dies, the evidence may be proved by either party on a further trial of the case, whereupon the opposite party may testify to the same matter.<sup>74</sup>

Prior to the enactment of this exception, the testimony of a deceased person could be introduced by means of a deposition.<sup>75</sup> However, if a person died after testifying, proof of his testimony was inadmissible in a further trial of the case, since it was not offered by deposition.<sup>76</sup> It was to correct this situation that the above exception was enacted. Although the supreme court has not construed this particular exception, there are a number of recent appellate cases which have interpreted a similar provision contained in Ohio Revised Code section 2317.06. The requirement that the testimony sought to be introduced must be "on a further trial of the case," has been narrowly construed.<sup>77</sup> The few lower court cases which have interpreted the "further trial" provision of the Dead Man Statute have similarly restricted its scope.<sup>78</sup> One early common pleas court decision held that the "opposite party" referred to in the statute meant "the party opposing the deceased person and his successor in interest."<sup>79</sup> Under this interpretation, the court permitted the party adverse to the estate to introduce the prior recorded testimony of the deceased party, and then allowed the former to testify as to the same matters.<sup>80</sup> If the interpretation given by this court is correct, then this exception does not in this situation provide for a complete waiver of the protection of the statute. The testimony of the decedent was not offered voluntarily by his personal representative, but, rather, was introduced by the opposing party. It is generally held that waiver can only be

73. *Rieger v. Hotel Rieger Co.*, 124 Ohio St. 152, 177 N.E. 211 (1931).

74. OHIO REV. CODE § 2317.03(G) (Supp. 1959).

75. For a discussion of the exception relating to the introduction of the deposition of a party since deceased, see notes 82-85 *infra* and accompanying text.

76. *Hoover v. Jennings*, 11 Ohio St. 624 (1860).

77. See Note, 11 WEST. RES. L. REV. 471, 475 (1960).

78. *Bender v. Vaughn*, 106 Ohio App. 136, 153 N.E.2d 778 (1958); *Conett v. Squair*, 17 Ohio Dec. (N.P.) 65, 3 Ohio L. Rep. 558 (Munic. Ct. 1906).

79. *Matthews v. Heider*, 22 Ohio Dec. (N.P.) 399, 400 (C.P. 1912).

80. *Ibid.*

created by a voluntary act on the part of the holder of the privilege,<sup>81</sup> which in this case was the personal representative of the decedent. It is an open question whether the introduction of the prior recorded testimony of the decedent by his administrator would constitute a complete waiver of the statute's protection in view of the wording of this exception which permits the other party to "testify to the same matter."

Another exception provides that

If a party dies and his deposition be offered in evidence the opposite party may testify as to all competent matters therein.<sup>82</sup>

It has been held that either party may introduce the deposition of the decedent.<sup>83</sup> Further, the term "opposite party" has been construed to include the party adverse to the estate even though it was the adverse party who offered the deposition in evidence.<sup>84</sup> This is true even though the testimony of the decedent was elicited by deposition as on cross-examination.<sup>85</sup> In this situation, only a limited waiver is created as per the terms of the statute. However, as with the prior exception, the question remains open whether there would be a complete waiver if the deposition were offered by the personal representative of the decedent.

A further exception to the statute states that

If a party offers evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions. . .<sup>86</sup>

There appears to be but one Ohio Supreme Court decision that has interpreted this exception.<sup>87</sup> In this case, decedent's executrix called plaintiff as on cross-examination, and examined him with respect to certain transactions. The trial court then refused plaintiff

81. *Goehring v. Dillard*, 145 Ohio St. 41, 51, 60 N.E.2d 704, 708 (1945) (dissenting opinion); see *Verbsky v. Burger*, 146 Ohio St. 235, 65 N.E.2d 695 (1946) (dictum); *Hickox v. Rogers*, 33 Ohio App. 97, 168 N.E. 750 (1928).

82. OHIO REV. CODE § 2317.03(H) (Supp. 1959).

83. *Goehring v. Dillard*, 145 Ohio St. 41, 60 N.E.2d 704 (1945). However, the competency of the testimony contained therein is determined by the circumstances at the time of trial, not at the time the deposition was taken. *St. Clair v. Orr*, 16 Ohio St. 220 (1865)

84. *Ibid.*

85. *Ibid.*

86. OHIO REV. CODE § 2317.03(D) (Supp. 1959). A 1955 amendment to this subsection (126 Ohio Laws 39 (1955)) provides that "if evidence of declaration against interest made by an insane, incompetent, or deceased person has been admitted, then any oral or written declaration made by such insane, incompetent, or deceased person concerning the same subject to which any such admitted evidence relates, and which but for this provision would be excluded as self-serving, shall be admitted in evidence if it be proved to the satisfaction of the trial judge that the declaration was made at a time when the declarant was competent to testify, concerning a subject matter in issue, and, when no apparent motive to misrepresent appears." Since this amendment relates only to the "hearsay rule," its interpretation and application is not within the scope of this note.

87. *Stream v. Barnard*, 120 Ohio St. 206, 165 N. E. 727 (1929).

the right to testify in general as to all the issues in the case, but, rather, restricted plaintiff to those transactions about which he previously had been questioned by the executrix. The supreme court held this to be reversible error. It stated that the legislature, by the enactment of this exception, did not intend to limit the common-law rule of evidence, that one who is called as on cross-examination by the adverse party may testify in chief as to *all* the issues in the case.<sup>88</sup> The court interpreted the statute as expanding the right of testimony by allowing a party adverse to the executor to testify where the executor has offered evidence of conversations or admissions of such adverse party through a *non-party*. It is only in this situation, which was not provided for at common law, that the limiting phrase, "concerning the *same* conversations or admissions," was intended to apply.<sup>89</sup>

"Conversations or admissions," within the meaning of the statute, have been interpreted to encompass only oral statements.<sup>90</sup> This interpretation would appear to be unnecessarily restrictive in that "conversation" denotes the spoken word, whereas "admission" is broad enough to include written statements.

The final exception to the Dead Man Statute states that:

If a party, or one having a direct interest, testifies to transactions or conversations with another party, the latter may testify as to the same transactions or conversations.<sup>91</sup>

It is clear from the wording of the statute that if one having a direct interest testifies as to transactions or conversations with the party adverse to the estate, a limited waiver occurs which permits the adverse party to testify as to the same transactions only. If the administrator himself testifies, it is equally clear that the testimony of the adverse party which relates to the same transaction cannot be excluded.<sup>92</sup> Whether such testimony by the administrator creates only a limited waiver as per the terms of the statute, or a complete waiver of the statute, must be deemed to be an open question.<sup>93</sup>

On the one hand, it would seem to be giving the administrator an unfair advantage to allow him to testify only with respect to conversations favorable to him, and at the same time limit the adverse party's testimony to the same transaction. On the other hand, such

88. In support of this proposition, the court cited *Legg v. Drake*, 1 Ohio St. 286 (1853).

89. *Stream v. Barnard*, 120 Ohio St. 206, 212, 165 N.E. 727, 729 (1929).

90. *Jackson v. Ely*, 57 Ohio St. 450, 49 N.E. 792 (1897). *Contra*, *Beach v. Baker*, 151 N.E.2d 677 (Ohio Ct. App. 1958).

91. OHIO REV. CODE § 2317.03(C) (Supp. 1959).

92. *Rankin v. Hannan*, 38 Ohio St. 438 (1882).

93. Under the rationale of *Rankin v. Hannan*, *supra* note 92, the limited waiver interpretation would seem to be correct in that the court stated that the exceptions to the Dead Man Statute are "based upon the principle of mutuality of right." *Ibid*. *But see* *Westrick v. Unterbrink*, 90 Ohio App. 283, 105 N.E.2d 885 (1950).

an interpretation conforms to the precise wording of the statute. However, a possible explanation for the enactment of the exception is that the legislature intended to liberalize the rules for admitting testimony by allowing the party adverse to the estate to testify as to conversations or transactions upon which testimony had previously been given on behalf of the administrator "by one having a direct interest" in the action.<sup>94</sup>

### *Non-Statutory Waiver*

In addition to the exceptions noted above which permit waiver under certain circumstances, it is well settled that waiver can be effected through non-statutory means. However, there is still considerable question in some situations as to when and how waiver can arise.

### *Nature of the Privilege*

The landmark case of *Roberts v. Briscoe*,<sup>95</sup> decided in 1887, determined that an administrator may compel a party adverse to the estate to testify as to facts which occurred prior to the death of the decedent. The court held that the language, "a party shall not testify," created a privilege, not a prohibition, and that such privilege could be waived.

[W]hat is intended for the benefit and protection of the estate should not be permitted to operate as a source of injury. . . . The legislature could not have designed to place the estates of deceased persons at such disadvantage by depriving them of evidence, within reach, necessary to their protection against imposition and fraud. The adverse and surviving party, when compelled to testify by the executor or administrator can not reasonably complain; for, though a party, he can then be examined fully in his own behalf. . . .<sup>96</sup>

Ten years after its decision in *Roberts v. Briscoe*, the supreme court was faced with the question of the competency of either party in an action by one administrator against another administrator. In holding that neither party was competent to testify against the other,<sup>97</sup> some shadow may have been cast over the prior holding that the statute created a privilege. It was not until almost fifty years later that the court was again faced with this difficult question.

*Verbsky v. Burger*<sup>98</sup> created dissension among the members of the court and raised serious problems for students of the law. In that case, the opposing parties both claimed as heirs of a deceased person.

94. See note 89 *supra* and accompanying text for the same kind of interpretation of an analogous section.

95. 44 Ohio St. 596, 10 N.E. 61 (1887).

96. *Id.* at 602, 10 N.E. at 64.

97. *Farley v. Lisey*, 55 Ohio St. 627, 45 N.E. 1103 (1897) (syllabus 1).

98. 146 Ohio St. 235, 65 N.E.2d 695 (1946).

Upon objection by the defendant, the trial court refused to permit the plaintiff to examine the defendant as on cross-examination. In affirming the decision of the lower court, Mr. Chief Justice Weygant, speaking for the majority, stated that the Dead Man Statute "provides specifically and unambiguously that 'a party shall not testify' — language too plain to require construction."<sup>99</sup> Further, the Chief Justice reasoned that the proffered testimony did not come within any of the eight exceptions to the statute, and that these exceptions were the exclusive means by which the disqualification of a witness could be removed.<sup>100</sup>

Mr. Justice Mathias<sup>101</sup> and Mr. Justice Hart,<sup>102</sup> in their dissenting opinions, called attention to many cases decided by the supreme court and by the lower courts wherein it had been held that the statute created only a privilege, which privilege was capable of waiver by the decedent's personal representative.<sup>103</sup>

It seems clear that when only one party is protected by the statute, he may waive its protection.<sup>104</sup> If both parties are protected by the statute, the governing principles appear to be the same — the statute *permits* the administrator to protect the estate against fraud by excluding the testimony of the opposite party. However, when he deems it advantageous to allow the adverse party to speak, he should not be precluded from doing so. The fact that both parties are protected by the statute should not alter the nature of the statutory protection: it creates a privilege, not a prohibition.

### *Raising the Privilege*

An early case had held that under the Dead Man Statute the court had the duty of objecting to the competency of a party in the absence of objection by a party protected by the statute.<sup>105</sup> The rationale was that the statute created an absolute prohibition which was incapable of waiver by the protected party. This concept was soon rejected by the Ohio Supreme Court.<sup>106</sup> It is now well settled that a party in whose favor the statute operates can waive its protection, and that a failure to raise the privilege by timely objection constitutes such a waiver.<sup>107</sup> Further, the waiver is not confined to the trial in

99. *Id.* at 237, 65 N.E.2d at 696.

100. *Ibid.*

101. *Id.* at 239, 65 N.E.2d at 697 (dissenting opinion).

102. *Id.* at 242, 65 N.E.2d at 698 (dissenting opinion).

103. See, e.g., *In re Estate of Alger*, 10 Ohio App. 93 (1918) (where both parties are disabled by the statute to testify, if one party calls the other as on cross-examination, a waiver occurs, thereby allowing the other party to testify in his own behalf).

104. See, e.g., *Roberts v. Briscoe*, 44 Ohio St. 596, 10 N.E. 61 (1887).

105. *Brown v. A Raft of Timber*, 1 Handy 13, 12 Ohio Dec. Rep. 1 (Super. Ct. 1854).

106. *Roberts v. Briscoe*, 44 Ohio St. 596, 10 N.E. 61 (1887).

107. *Crowe v. Vickery*, 23 Ohio App. 83, 155 N.E. 247 (1927).



which it occurs, but extends, as well, to a subsequent trial of the same case.<sup>108</sup>

A privilege belongs to the holder thereof, and, thus, any of the parties protected by the statute may claim the privilege or waive it as to themselves.<sup>109</sup> Conversely, there is no privilege in the party adverse to the estate.<sup>110</sup>

When excluding testimony, the objection may be made by the protected party on the ground of the incompetency of the witness or the incompetency of the testimony.<sup>111</sup> However, it is generally held that where the trial court excludes evidence in reliance upon the Dead Man Statute, no proffer is required by the party seeking to introduce the evidence in order to lay a foundation for appeal.<sup>112</sup> This is true because the exclusion of evidence under the statute relates to the incompetency of the witness, rather than to the incompetency of the testimony, and when evidence is so excluded, prejudice will be presumed by the reviewing court.<sup>113</sup> However, when evidence is competent against one party, but incompetent as to another, it is not error to admit such evidence.<sup>114</sup> If the protected party makes only a general objection, which is overruled, it is not error to admit the evidence as against both parties.<sup>115</sup> In order to preserve the protection of the statute, the party against whom the evidence is incompetent may require the court to instruct the jury as to the limited purpose for which such evidence is admitted.<sup>116</sup> If the protected party makes only a general objection, and the objection is sustained, it is then incumbent upon the opposite party to request the admission of the evidence as to the party against whom the evidence is competent. If the oppo-

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108. *Niederlehner v. Weatherly*, 78 Ohio App. 263, 269, 69 N.E.2d 787, 791 (1946). see also *Choteau v. Thompson*, 3 Ohio St. 424 (1854).

109. See *Atley v. Atley*, 20 Ohio App. 497, 152 N.E. 761 (1925) (heir, who was a necessary party, allowed to waive the privilege in suit against executor and the heir).

110. *In re Renee*, 159 Ohio St. 37, 45, 110 N.E.2d 795, 799 (1953) (dissenting opinion).

111. *Farley v. Lisey*, 55 Ohio St. 627, 45 N.E. 1103 (1897) (per curiam). An objection to the testimony on the ground of incompetency was held sufficient, the reason being that with respect to matters coming within the exception, the witness was competent. *Id.* at 631, 45 N.E. at 1103.

112. *Totten v. Estate of Miller*, 139 Ohio St. 29, 37 N.E.2d 961 (1941); *Loney v. Walkey*, 102 Ohio St. 18, 130 N.E. 158 (1921); *Wolf v. Powner*, 30 Ohio St. 472 (1876) (syllabus 2); *Schlarman v. Heyn*, 19 Ohio App. 64 (1923) (syllabus 1). *But see Weaver v. City of Mt. Vernon*, 36 Ohio App. 358, 173 N.E. 249 (1930), wherein the court refused to presume the exclusion of the deceased's prior recorded testimony to be prejudicial, because the testimony related to a non-decisive issue.

113. *Ibid.*

114. *Totten v. Estate of Miller*, 139 Ohio St. 29, 37 N.E.2d 961 (1941); *Hubbell v. Hubbell*, 22 Ohio St. 208 (1871). *Cf. Fielder v. Ohio Edison Co.*, 158 Ohio St. 375, 109 N.E.2d 855 (1952) (two causes of action).

115. Although there appears to be no Ohio decision directly in point, see *Kent v. State*, 42 Ohio St. 426 (1884), which supports this proposition. See generally *Annot.*, 106 A.L.R. 467 (1937).

116. *Hubbell v. Hubbell*, 22 Ohio St. 208 (1871); see *Carl v. Caldwell*, 71 Ohio App. 339, 50 N.E.2d 182 (1942).

site party fails to make such a request, he waives the exclusion of the evidence as a ground for error.<sup>117</sup>

### *Waiver by Cross-Examination*

It is clear that the personal representative of the deceased can call the adverse party as on cross-examination.<sup>118</sup> Further, if testimony is elicited with respect to facts occurring prior to the death of the deceased,<sup>119</sup> the adverse party then becomes competent to testify as to all the issues of the case.<sup>120</sup>

The Ohio Revised Code provides generally that a party can take the deposition of the adverse party as on cross-examination.<sup>121</sup> However, it has been held that the mere taking and filing of the deposition of the party adverse to the estate, *which deposition is not offered in evidence*, does not waive the protection of the Dead Man Statute.<sup>122</sup> From this holding there has evolved a rule of doubtful logic. In 1953, the Ohio Supreme Court held in *In re Renee*<sup>123</sup> that the personal representative of a deceased person could not require the adverse party to give testimony on deposition with respect to matters occurring prior to the death of the deceased. The rationale was that the estate should not be allowed to gain information by way of deposition which would otherwise be unavailable to it without effecting a waiver.<sup>124</sup> It is clear from the language of the court that a waiver for purposes of deposition only is not a sufficient waiver to compel the testimony of the adverse party.<sup>125</sup> However, it is not clear from the court's opinion whether the estate could ever waive the protection of the statute prior to trial, and thereby compel the adverse party to testify.<sup>126</sup> However, in a case decided in 1959,<sup>127</sup> wherein the court

117. *Carl v. Caldwell*, *supra* note 116.

118. *E.g.*, *Roberts v. Briscoe*, 44 Ohio St. 596, 10 N.E. 61 (1887); *Atley v. Atley*, 20 Ohio App. 497, 152 N.E. 761 (1925).

119. See *Pfister v. Walter*, 83 Ohio App. 156, 82 N.E.2d 768 (1948), where the court held that testimony elicited from the party adverse to the estate concerning the genuineness of a signature did not constitute a waiver of the privilege. See discussion note 69 *supra* and accompanying text.

120. *Stream v. Barnard*, 120 Ohio St. 206, 165 N.E. 727 (1929); *Severns v. Boylan*, 75 Ohio App. 15, 20, 22, 60 N.E.2d 521, 524 (1944); *In re Estate of Alger*, 10 Ohio App. 93, 98-99 (1918).

121. OHIO REV. CODE § 2317.07.

122. *Prince v. Abersold*, 123 Ohio St. 464, 175 N.E. 862 (1931).

123. 159 Ohio St. 37, 110 N.E.2d 795 (1953) (4-3 decision).

124. *But see* dissenting opinion of Mr. Justice Taft in *In re Renee*, 159 Ohio St. 37, 44, 110 N.E.2d 795 (1953), wherein he asserts that the right to take a deposition must be distinguished from the right to use the deposition, and, thus, there need be no waiver before the estate can compel the adverse party to testify as on cross-examination. In his opinion, the majority view, in effect, allows the party adverse to the estate to assert the privilege. *Id.* at 45, 110 N.E.2d at 799.

125. *In re Renee*, 159 Ohio St. 37, 40, 110 N.E.2d 795, 797 (1953).

126. *Id.* at 41, 110 N.E.2d at 798.

127. *In re Scholl*, 170 Ohio St. 205, 163 N.E.2d 389 (1959) (per curiam).

followed its holding in *In re Renee*, Mr. Justice Taft, in his concurring opinion, stated:

That case represents at least a holding that, until the executor waives the incompetency of such opposite party, either *expressly* or by offering his testimony at the trial, such opposite party cannot be required to testify as a witness.<sup>128</sup> (Emphasis added.)

It is possible to interpret the language contained in both of these decisions as allowing a complete express waiver of the statute at the time of deposition. Certainly, if the decision in *In re Renee* is to be followed, the result of that decision should not be to withhold from the estate information necessary to the preparation of its case. However, the waiver, once effected, should be binding upon the estate and, thus, should carry over to the trial of the case.<sup>129</sup>

It should be noted that waiver of the statute cannot be effected by the party adverse to the estate calling the personal representative of the deceased as on cross-examination.<sup>130</sup> The rationale of this rule is that a waiver can be effected only by the voluntary testimony of the personal representative. In view of the code provision allowing the adverse party to be called as on cross-examination,<sup>131</sup> a contrary rule would completely nullify the protection of the Dead Man Statute.<sup>132</sup>

#### *Waiver by Direct Testimony*

As has been noted previously,<sup>133</sup> an exception to the Dead Man Statute provides in part that if a party testifies as to "transactions or conversations with another party, the latter may testify as to the same transactions or conversations."<sup>134</sup> As has also been noted, the question is an open one as to whether this exception creates a complete waiver of the statute, or one limited to testimony concerning "the same transactions or conversations."

With respect to facts not within the scope of this exception, *e.g.*, transactions with the deceased rather than with "another party," testimony by the personal representative of the deceased apparently would effect a complete waiver of the statute.<sup>135</sup>

128. *Id.* at 206, 163 N.E.2d at 390 (concurring opinion).

129. The rule of the *Renee* case also prohibits the personal representative of the decedent from requiring the adverse party to produce papers and documents regarding matters occurring prior to the death of the decedent. *In re Renee*, 159 Ohio St. 37, 110 N.E.2d 795 (1953) (syllabus 2).

130. *Hickox v. Rogers*, 33 Ohio App. 97, 168 N.E. 750 (1928). See also *Verbsky v. Burger*, 146 Ohio St. 235, 65 N.E.2d 695 (1946) (dictum).

131. OHIO REV. CODE § 2317.07.

132. *But see* *Goehring v. Dillard*, 145 Ohio St., 41, 60 N.E.2d 704 (1945), wherein the court held that under exception (H) to the Dead Man Statute, a partial waiver was created by the introduction in evidence by the party adverse to the estate of the deposition of the decedent taken as on cross-examination. See note 83 *supra* and accompanying text.

133. See note 91 *supra* and accompanying text.

134. OHIO REV. CODE § 2317.03(C) (Supp. 1959).

135. *Westrick v. Unterbrink*, 90 Ohio App. 283, 105 N.E.2d 885 (1950).

## CONCLUSION

The Dead Man Statute has been a prime source of litigation in Ohio for more than a century, and, yet, from the foregoing, it is apparent that few rules are settled with respect to its application. This uncertainty is particularly manifest with respect to waiver. Although greater consistency and clarity in the decisions by the courts would be of assistance, that is not a complete solution. The decisions have been incapable of prediction and have frequently turned upon tenuous grounds because of the language of the statute. Still, it would be difficult to word a statute which would clearly convey the intention of the legislature to protect estates from fraudulent claims, and at the same time, to allow testimony in situations wherein justice would best be served. Perhaps the basic deficiency in the statute is the policy consideration upon which it is based, the validity of which is not free from question.

"Statutes which exclude testimony on this ground [protection of the estates of the dead] are of doubtful expediency. There are more honest claims defeated by them, by destroying the evidence to prove such claim, than there would be fictitious claims established if all enactments were swept away and all persons rendered competent witnesses. To assume that in any event many false claims would be established by perjury is to place an extremely low estimate on human nature, and a very high estimate on human ingenuity and adroitness."<sup>136</sup>

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 it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words.<sup>137</sup>

These passages quoted from Wigmore's famous treatise on the Law of Evidence strike at the very heart of the problem.

Because of its dissatisfaction with the basic disqualification provision of the Dead Man Statute, the legislature has seen fit to enact numerous exceptions. The result has been a chaotic mass of litigation. Neither the legislative enactment nor the judicial decisions have achieved the purpose for which all rules of evidence are promulgated — the orderly administration of justice.

The solution lies not in the enactment of more exceptions, but in the abolition of the Dead Man Statute.

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136. 2 WIGMORE, EVIDENCE § 578 (3d ed. 1940) quoting from *St. John v. Lofland*, 5 N.D. 140, 143, 64 N.W. 930, 931 (1895).

137. 2 WIGMORE, *op. cit. supra* note 136, § 578.