

12-1976

The Dead Man's Statute Before and After the Florida Evidence Code -- A Step in the Right Direction

Linda Jones Wells

Follow this and additional works at: <http://ir.law.fsu.edu/lr>

 Part of the [Evidence Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Linda J. Wells, *The Dead Man's Statute Before and After the Florida Evidence Code -- A Step in the Right Direction*, 4 Fla. St. U. L. Rev. 480 (2014).
<http://ir.law.fsu.edu/lr/vol4/iss4/3>

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

NOTES

THE DEAD MAN'S STATUTE BEFORE AND AFTER THE FLORIDA EVIDENCE CODE—A STEP IN THE RIGHT DIRECTION

INTRODUCTION

As a general rule all persons are competent to testify in any Florida court and before any judicial officer.¹ One major exception to this rule has long been recognized: parties to an action, or persons interested in the event of an action, are incompetent to testify against the estate of a decedent concerning transactions or communications with the decedent.² This exception was formerly embodied in a proviso of section 90.05, Florida Statutes, commonly known as the Dead Man's Statute.³ In June 1976, the Florida Legislature enacted the Florida Evidence Code.⁴ The Code repealed section 90.05 and replaced it with two new sections.⁵ Contrary to the urgings of experts in the field of evidence,⁶ these two sections preserve rather than abolish the Dead Man's Statute; they do, however, ameliorate the Statute's effect by limiting its application to oral communications.⁷

1. FLA. STAT. § 90.05 (1975) provides in part: "No person, in any court, or before any officer acting judicially, shall be excluded from testifying as a witness by reason of his interest in the event of the action or proceeding, or because he is a party thereto"

2. FLA. STAT. § 90.05 (1975) provides in part:

[P]rovided, however, that no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party, or interested person, derives any interest or title, by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, or administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic; but this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or committeeman shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence.

3. FLA. STAT. § 90.05 (1975).

4. Fla. Laws 1976, ch. 76-237.

5. Section 90.05 was replaced by Fla. Laws 1976, ch. 76-237, §§ 90.601 and 90.602.

6. M. Ladd, *Admission of Evidence Against Estates of Deceased Persons*, 19 IOWA L. REV. 521, 538 (1933-34); M. Ladd, *The Dead Man Statute: Some Further Observations and a Legislative Proposal*, 26 IOWA L. REV. 207 (1940-41); 2 J. WIGMORE, EVIDENCE § 578 (3d ed. 1940).

7. Fla. Laws 1976, ch. 76-237, § 90.601, provides: "Every person is competent to be a witness, except as otherwise provided by statute."

Under the provisions of section 90.05 interested persons and parties were incompetent to testify concerning both transactions and communications with the deceased. The new proviso pertains only to oral communications, removing transactions and nonoral

The legislature's refusal to abolish the Dead Man's Statute reflects both a misunderstanding of the historic basis and development of the Dead Man's Statute and a failure to recognize its obsolescence today. This note will explore the history and development of the Dead Man's Statute to determine whether its survival is supportable and examine the treatment of the rule by Florida courts. It will also briefly review the treatment that the Dead Man's Statute has received in the Federal Rules of Evidence, and ways in which other states have resolved the Dead Man's Statute dilemma.

I. HISTORICAL PERSPECTIVE

Disqualification of witnesses was virtually unknown until the time of the Tudors, when the jury ceased to give a verdict from its own knowledge and the modern "fact witness" began to appear.⁸ Prior to that time, jury members and witnesses played such interrelated roles that it was difficult to distinguish their functions.⁹ Following the Norman invasion of England, a system of "popular justice" evolved.¹⁰ Popular justice involved the summoning of a number of neighbors who knew the truth of the matter to be decided.¹¹ The courts that convened to hear these witnesses resembled a "town-meeting of judges"; these "popular courts" required rigid adherence to forms, and there were no rational modes of proof.¹² Popular justice usually took one of four forms: (1) trial by witnesses; (2) trial by party's oath; (3) trial by ordeal; or (4) trial by battle.¹³ Each of these modes

communications from the scope of the Dead Man's Statute. Fla. Laws 1976, ch. 76-237, § 90.602 provides in part:

(1) No person interested in an action or proceeding against the personal representative, heir-at-law, assignee, legatee, devisee, or survivor of a deceased person, or against the assignee, committee, or guardian of an insane person, shall be examined as a witness regarding any oral communication between the interested person and the person who is deceased or insane at the time of the examination.

8. IX W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW*, 178 (3d ed. 1966) (hereinafter cited as HOLDSWORTH). See also Rowley, *The Competency of Witnesses*, 24 IOWA L. REV. 482 (1939).

It appears that by the 1400's the "modern witness" had begun to take his place as a witness and not as part of the jury. See J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE* 120-24 (1898) (hereinafter cited as THAYER); 2 J. WIGMORE, *EVIDENCE* § 575 (3d ed. 1940) (hereinafter cited as WIGMORE). During the 1400's no disqualification because of interest appears, but by the 1600's "ideas have plainly changed" and disqualification because of interest is apparent. *Id.*

9. See 45-46 CHL.-KENT L. REV. 36 (1968).

10. THAYER 8.

11. *Id.* at 7; Rowley, *supra* note 8, at 486.

12. THAYER 8. Trial by witness is a good example of the use of "forms." The witness was present to give his oath in a formalistic, set ritual; failure to adhere to the form—the ritual—quite often meant defeat. *Id.* at 8-16.

13. *Id.* at 16.

of trial, with the exception of trial by ordeal, accepted the interested witness; indeed, in most cases interest was a prerequisite to witness competence.¹⁴

Trial by witness involved one-sided proof; there was no cross-examination, and the oath itself, rather than the probative quality of what was said, was all important.¹⁵ At the time this mode of trial was at its zenith—approximately the 13th century—certain transactions required witnesses;¹⁶ the sworn statement of one of these witnesses before the popular court settled the matter.

In a case of 1219 . . . the defendant alleged the minority of the plaintiff, the plaintiff replied that he was of full age, and thereof he put himself on the inspection of the judges, and if they should doubt about it he would prove it either by his mother and his relatives, or otherwise The judges were in doubt, and ordered that he prove his age by twelve legal men [T]he proof "is by twelve legal men . . . some of whom are of the family" First, one of them swears that the party is or is not twenty-one . . . and then in turn each of the others swears that the oath thus taken is true.¹⁷

In the instant case it is difficult to differentiate the witnesses from the jurors. Eventually, however, these twelve community witnesses appear to have evolved into a form of jury.¹⁸ Clearly this mode of trial did nothing to omit witnesses interested in the suit; to the contrary, the witnesses were interested partisans.

Trial by oath, a medieval form of trial, involved the use of oath-helpers—compurgators.¹⁹ These "fellow-swearers" were not witnesses; they "swore . . . to the truthfulness of another person's oath, or . . . to their belief of the truth."²⁰ In this instance it was not necessary that the compurgators have firsthand knowledge of the facts.²¹ They might have been, and probably were, kinsmen of the party.²² This mode of trial steadily declined in use and was eventually survived by trial by jury.²³

14. *Id.*

15. *Id.* at 17.

16. "Certain transactions, like sales, had to take place before previously appointed witnesses." *Id.* Age, death and property in a movable chattel were also provable by "formal witness-proof." *Id.* at 18.

17. *Id.* at 19.

18. *Id.* at 20.

19. *Id.* at 25.

20. *Id.*

21. *Id.* This mode of trial became known as "wager of law." The name was derived from those giving pledges to appear and give their oath. *Id.* at 28.

22. *Id.* at 25.

23. *Id.* at 28-29.

Trial by ordeal was convenient whenever other modes of trial were unavailable.²⁴ Such a trial did not involve witnesses; indeed it may have been invoked for lack of witnesses.²⁵ Trial by ordeal had its basis in the belief that God would save the innocent; He would give

24. *Id.* at 34-36. Thayer summarized an account of the ordeals found in PATETTA, *Ordealie*:

After speaking of the situation where there are neither writings nor witnesses, and of the examination of the defendant, it is said that "If reasonable inference also leads to no result," the defendant is to be put to the ordeal. "He whom the blazing fire burns not, whom the water soon forces not up, or who meets with no speedy misfortune must be held veracious in his testimony on oath. Let ordeals be administered if an offence has been committed in a solitary forest, at night, in the interior of a house, and in cases of violence and of denial of a deposit. . . . The balance, fire, water, poison, and sacred libation are said to be the five divine tests for the purgation of suspected persons." Then follows an account of each of these ordeals. 1. After describing the scales and the first weighing of the accused, it is said: "And having adjured the balance by imprecations, the judge should cause the person accused to be placed in the balance again. 'O balance, thou only knowest what mortals do not comprehend. This man being arraigned in a cause is weighed upon thee. Therefore mayest thou deliver him lawfully from his perplexity.' . . . Should the individual increase in weight, he is not innocent; if he be equal in weight or lighter, his innocence is established." 2. In the ordeal of fire seven circles with a diameter equal to the length of the man's foot, and thirty-two inches distant from each other, are marked on the ground. The circles are smeared with cows' dung, and the man, having fasted and made himself clean, has seven *aquattha* leaves laid on his hands and fastened there, and takes in his hands a smooth ball of red-hot iron, weighing fifty *palas*, and walks slowly through the seven circles. He then puts the ball on the ground. "If he is burnt, his guilt is proved; but if he remain wholly unburnt, he is undoubtedly innocent. . . . 'Thou, O fire, dwellest in the interior of all creatures, like a witness. Thou only knowest what mortals do not comprehend. This man is arraigned in a cause and desires acquittal. Therefore mayest thou deliver him lawfully from his perplexity.'" 3. In the ordeal of water, the man wades out into the water up to his navel, and another shoots an arrow. The man dives or ducks into the water, and if he remains wholly under while a swift runner gets and fetches back the arrow he is innocent. The adjuration to the water is similar to the above, in the case of fire and the balance. 4. In the ordeal by poison elaborate directions are given about the choice of the poison and the time of year for administering it. The invocation runs: "Thou, O poison, art the son of Brahma, thou art persistent in truth and justice; relieve this man from sin, and by thy virtue become as ambrosia to him. On account of thy venomous and dangerous nature thou art the destruction of all living creatures; thou art destined to show the difference between right and wrong like a witness," etc., etc., much as in the other cases above. "If the poison is digested easily, without violent symptoms, the king shall recognize him as innocent, and dismiss him, after having honored him with presents." 5. In the ordeal by sacred libation, "the judge should give the accused water in which an image of that deity to whom he is devoted has been bathed, thrice calling out the charge with composure. One to whom any calamity or misfortune happens within a week or a fortnight is proved to be guilty."

Id. at 35-36.

25. *Id.* at 36.

the innocent the strength and ability to endure physical ordeal.²⁶ Those who successfully undertook the ordeal were deemed innocent; those who failed were deemed guilty. This mode of trial was short-lived, lasting about a century and a half after the Norman Conquest.²⁷

Trial by battle was also brought to England by the Normans and proved to be unpopular with the Anglo-Saxons.²⁸ Where "rude and unrational" methods of trial failed, battle was frequently resorted to.²⁹ The plaintiff would offer a champion who usually spoke from personal knowledge. This champion would swear to the truth of his own testimony and was ready to fight for it.³⁰ The defendant would also offer a champion to fight for his testimony. Initially it was forbidden to hire a champion, but eventually the requirement that the champion be a witness was abandoned and hiring became acceptable.³¹ This system of hiring champions worked great hardship on the poor; a rich man could afford to pay the finest champions, and this put the poor man at a disadvantage.³² The inadequacy of trial by battle played a large part in the advancement of modern juries. Because of the hazardous nature and obvious inequities of trial by battle, Henry II found it necessary to promote a new mode—the jury trial.³³

Thus, until the advent of the jury trial in the 15th century, witnesses were not disqualified from testifying because of interest.³⁴ Indeed, disinterested persons were treated as improper witnesses.³⁵ In many instances the witnesses and the jury were indistinguishable, and frequently juries were chosen from those in the neighborhood who were familiar with the facts.³⁶ But as the jury trial became the accepted judicial procedure, the functions of jury and witnesses became separated.³⁷ The period between 1500 and 1650 saw a marked change in attitude toward the witness.³⁸ No longer a member of the

26. *See id.* at 38.

27. *Id.* at 38. Thayer states that both trial by ordeal and compurgation are misunderstood. The ordeal, for example, was a means of giving a culprit a chance of escaping punishment. The ordeal usually followed the verdict of a jury and was a means of "clearing one's self of a charge." *Id.* at 39.

28. *Id.* at 40.

29. *Id.* at 41.

30. *Id.* at 43.

31. *See id.*

32. *Id.* at 41.

33. *Id.*

34. WIGMORE § 575. *See also* text accompanying notes 17, 20, 21, 22, and 31 *supra*.

35. WIGMORE § 575.

36. THAYER 100.

37. *Id.*; WIGMORE § 575.

38. WIGMORE § 575.

jury, the witness became the chief source of information and interest a basis for disqualification.³⁹

There is evidence that as early as the 12th century, canon law designated certain persons as incompetent:

[A]ll males under fourteen and females under twelve, of the blind and the deaf and dumb, of slaves, infamous persons, and those convicted of crime, of excommunicated persons, of poor persons and women in criminal cases, of persons connected with either party by consanguinity and affinity, or belonging to the household of either party, of the enemies of either party, and of Jews, heretics and pagans.⁴⁰

Prior to the 15th century, when Henry II began to promote the jury trial,⁴¹ these rules of incompetency were utilized to challenge jurors as well as witnesses.⁴² In the following century, the Act of 1562-63 created the statutory offense of perjury and provided for compulsory attendance of witnesses. This Act marked the beginning of an era characterized by questions involving witness competency.⁴³ The 16th and 17th centuries saw the advent of a new class of witnesses and new rules governing competency.⁴⁴

The disqualification of parties because of interest appeared as early as 1582.⁴⁵ Under common law rules, four "classes" of witnesses were incompetent to testify: "(1) Those insensible to the obligation of an oath; (2) Those wanting in capacity or understanding; (3) Those having a pecuniary interest in the issue; (4) Parties to the issue . . ."⁴⁶ The rationale for disqualification dates back to the 1400's and trial by oath or wager of law. In wager of law a party had the benefit of his own oath,⁴⁷ as well as the aid of compurgators and others who might go out with the jury to help them decide.⁴⁸ This advantage was not permitted in jury trials.⁴⁹ Jury trial and party's oath could not be mixed together; a person could not offer both his oath and be a witness at a jury trial.⁵⁰ The disqualification of interested persons

39. *Id.*

40. HOLDSWORTH at 186, quoting SALMOND, *ESSAYS IN JURISPRUDENCE*; Rowley, *supra* note 8, at 488.

41. See text accompanying Note 33 *supra*.

42. HOLDSWORTH 185.

43. *Id.*

44. *Id.* at 186-87; Rowley, *supra* note 8, at 488.

45. WIGMORE § 575.

46. 5 B. JONES, *COMMENTARIES ON THE LAW OF EVIDENCE* § 2084 (2d ed. 1926).

47. WIGMORE § 575.

48. *Id.*

49. *Id.*

50. See WIGMORE § 575.

followed the disqualification of parties,⁵¹ but it did not appear before 1640.⁵²

The demise of the old forms of trial brought with it the end of the oath swearer, compurgator, and *secta*.⁵³ With the separation of witness and jury came the rejection of the interested witness. All persons interested in a litigation were disqualified from testifying.⁵⁴ Such disqualification was based on two assumptions: that an interested witness tends to put a gloss on his testimony to make it most favorable to himself and that if self-interest conflicts with truth, truth is unlikely to prevail.⁵⁵ Disqualification because of interest was viewed as a means of preventing perjury.

In the 15th and 16th centuries this reasoning was of great import. Because the old modes of trial had embraced the interested witness, refinements in methods of proof and in the introduction of evidence were virtually nonexistent. Thus at the time of their formulation, the rules governing competence may have been well founded, but since that time the rules of evidence have advanced. Four centuries of change have made anachronistic the old rules governing competency.

II. THE DEAD MAN'S STATUTE: NOT ANCIENT HISTORY IN FLORIDA

Witness incompetence has long been recognized in Florida. In 1829, Florida adopted the common law of England⁵⁶ and in doing so became

51. *Id.*

52. WIGMORE § 575.

53. The *secta* was a complaint-witness and part of a formal system of proof. The party who was to "go to the proof" produced his *secta*. The *secta* as a "witness" had little to do with the trial; he only took part in the pleading. THAYER 10-13. "It was the office of the *secta* to support the plaintiff's case in advance of any answer from the defendant." *Id.* at 13.

54. WIGMORE § 576; see *Jensen v. Lance*, 88 So. 2d 762, 764 (Fla. 1956); *Adams v. Board of Trustees*, 20 So. 266, 273 (Fla. 1896); *Pollock v. Kelly*, 125 So. 2d 109 (Fla. 1st Dist. Ct. App. 1960). See generally *Brooker, The Decedent Comes to Court*, 23 FLA. L. J. 108 (1949); Ehrhardt, *A Look At Florida's Proposed Code of Evidence*, 2 FLA. Sr. U.L. REV. 681, 702 (1974); Note, *Evidence; Legislative Reform for the "Dead Man's Statute,"* 18 U. FLA. L. REV. 693 (1966).

55. GILBERT, EVIDENCE, 119 (Lofft's ed. 223):

[T]herefore, from the nature of human passions and actions, there is more reason to distrust [*sic*] such a biased testimony than to believe it. It is also easy for persons, who are prejudiced and prepossessed, to put false and unequal glosses upon what they give in evidence; and therefore the law removes them from testimony, to prevent their sliding into perjury

quoted in WIGMORE at § 576; *P & N Investment Corp. v. Rea*, 153 So. 2d 865, 867 (Fla. 2d Dist. Ct. App. 1963); *Day v. Stickle*, 113 So. 2d 559, 560 (Fla. 3d Dist. Ct. App. 1959).

56. Act of Nov. 6, 1829, ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA 8-9 (1829). The most recent version provides:

The common and statute laws of England which are of a general and not a local

heir to English rules governing witness incompetence. Under the common law Florida denied the interested witness the right to testify until 1866, when the legislature enacted the predecessor of Florida Statutes sections 90.601 and 90.602.⁵⁷ Although this statute abrogated the common law by providing that no person be disqualified from testifying because of interest, it disqualified some witnesses whose testimony involved the estates of deceased persons. The 1866 statute, unlike section 90.05 and more recently sections 90.601 and 90.602, referred only to contract actions involving an administrator or an executor.⁵⁸ In 1870, this statute was repealed and replaced by a statute which contained no provision for the protection of decedents' estates.⁵⁹ But in 1874 such a provision—a Dead Man's Statute—was written back into the law;⁶⁰ this proviso remained virtually unchanged until June 1976,

nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

FLA. STAT. § 2.01 (1975).

57. Law of January 16, 1865, ch. 1472, §§ 1-2, [1866] Fla. Laws 35-36 (repealed 1870) provided:

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Florida in General Assembly convened,* That in all civil cases now depending, or that may hereafter be instituted in any of the courts of this State, whether at law or in equity, the parties to the same shall not be disqualified to testify as witnesses therein, either in his or their own favor or in favor of the opposite party or parties when introduced as witness or witnesses by him or them, and their relation to the cause or interest therein shall not operate against their competency, but shall go only to their credibility, which shall be a matter for the determination of the jury, or of the court, when the trial is not by jury.

Section 2. *Be it further enacted,* That either party may offer himself or themselves, or the adverse party, or both, as a witness or witnesses in the cause, or he, she or they, thus offered, shall be competent to testify in the same manner as if he, she or they were entirely disinterested in or disconnected therewith; saving the question of credibility, to be determined by the jury or court, as the case may be as aforesaid: *Provided,* That the provisions of this act shall not apply where one of the parties is an executor or administrator, and the action is founded upon a contract entered into by his testator or intestate; and in all such cases the executor or administrator may offer the adverse party as a witness touching any point in the case, and when so offered, the said adverse party may proceed to testify in his own favor concerning all the facts involved.

58. *Id.* The 1866 statute, unlike sections 90.05 and more recently section 90.602, referred only to contract actions involving an administrator or an executor. *Id.*

59. Law of June 1, 1870, ch. 1816, [1870] Fla. Laws 13 (Special Session):

The people of the State of Florida, represented in Senate and Assembly, do enact as follows: In the courts of Florida there shall be no exclusion of any witness in a civil action because he is a party to, or interested in, the issue tried. In all the criminal prosecutions the party accused shall have the right of making a statement to the jury, under oath, of the matter of his or her defense.

The Act entitled, "An Act concerning testimony approved January 16, 1866," is hereby repealed.

60. Law of February 14, 1874, ch. 1983, § 1, [1874] Fla. Laws 39:

when the legislature enacted the Florida Evidence Code.⁶¹ Prior to the adoption of the new evidence code, any party or person interested in the event of an action was disqualified from testifying about transactions or communications with a person deceased, insane, or lunatic.⁶² The new evidence code, although expressly preserving the Dead Man's Statute as an exception to the general rule of witness competence, limits the application of the Dead Man's Statute to exclude the testimony of an interested person only when it concerns *oral communications* with a person deceased or insane.⁶³ The Dead Man's Statute has survived for over a century; it has been repealed, reenacted, and revised. The 1976 revision of the Dead Man's Statute approaches abandonment, the only remaining step in this proviso's evolution and decline.

III. INTERPRETATION AND CONSTRUCTION OF THE DEAD MAN'S STATUTE

According to the canons of statutory construction, the Dead Man's Statute should be narrowly construed.⁶⁴ Before disqualifying a witness under this provision, a court should carefully examine the disqualifying

The people of the State of Florida, represented in Senate and Assembly, do enact as follows: Section 1. No person offered as a witness in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto: *Provided, however,* That no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person desires any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and the person at the time of such examination deceased, insane, or lunatic against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such insane person or the assignee or committee of such insane person or lunatic

61. See note 7 *supra*.

62. See note 2 *supra*. Although this Note is primarily concerned with the protection afforded decedents' estates under the provisions of section 90.05, as a general rule this discussion applies to estates of lunatic or insane persons as well.

63. See note 7 *supra*.

64. Provisos which restrict the general effect of a statute, or provisos which create exceptions to the general rule of the statute, should be strictly construed. 2A D. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.08 (4th ed. 1973) states:

Provisos, which serve the purpose of restricting the operative effect of other statutory language to less than what its scope of operation would be otherwise, are construed according to the same general criteria of decision as are applied to other kinds of provisions. Where there is doubt, however, as to the extent of the restriction imposed by a proviso on the scope of another provision's operation, the proviso is strictly construed. The reason for this is that the legislative purpose set forth in the main or dominant body of an enactment is assumed to express the legislative policy, and only those subjects expressly exempted by the proviso should be freed from the operation of the statute (footnotes omitted).

criteria. Such an examination will require a review of case law developed under section 90.05 until July 1977, when sections 90.601 and 90.602 become effective.⁶⁵ Even then, case law construing and applying section 90.05 should, for the most part, remain valid, since this section and the provisions of the new evidence code are similar.⁶⁶

Under the provisions of section 90.05, a witness is disqualified from testifying when that person: (1) is a party, interested person, person from, through, or under whom a party or interested person took interest; (2) is examined about a transaction or communication between himself and the party now deceased; and (3) offers testimony against the estate of the deceased.⁶⁷ Under section 90.602, a witness will be disqualified from testifying when that person: (1) is interested in an action or proceeding; (2) is examined as a witness about any oral communication between himself and the party now deceased; and (3) offers testimony against the estate of the deceased.⁶⁸ While there are dissimilarities in the phrasing of these two sections, with the exception noted below they are fundamentally the same.⁶⁹

A Dead Man's Statute is primarily concerned with the disqualification of the interested witness. Under the provisions of section 90.05 parties to an action are automatically deemed interested without inquiry into the nature of that interest.⁷⁰ But persons other than parties are treated differently; a nonparty is not disqualified absent a showing of the requisite interest.⁷¹ Section 90.602, unlike section 90.05, does not distinguish parties from other persons interested in an action against the decedent's estate.⁷² The new section disqualifies all persons interested in such actions. It thus appears that requisite interest is no longer imputed to parties. It is difficult, however, to imagine a party to an action who has no interest in that action; yet the fact remains that parties are no longer treated as a separate group who automatically possess disqualifying interest. Therefore, under 90.602, parties must meet the same tests for interest as other persons.

In 1896, the Florida Supreme Court adopted the following test for the determination of interest:

65. See Fla. Laws 1976, ch. 76-237.

66. Compare note 2 *supra* with note 7 *supra*.

67. See note 2 *supra*.

68. See note 7 *supra*.

69. See note 66 *supra*.

70. "[N]o party to such action or proceeding, nor any person interested in the event . . ." were allowed to testify. FLA. STAT. § 90.05 (1975). Parties and nonparties obviously received separate treatments.

71. *Id.*

72. Section 90.602 does not distinguish any classes; it only mentions "[any] person interested." See note 7 *supra*.

The true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain, and vested interest, and not an interest uncertain, remote, or contingent.⁷³

Disqualification did not necessarily follow when this test was met. Under section 90.05, there are two types of interest: disqualifying interest in the event of an action, and nondisqualifying interest in the question to be decided.⁷⁴ A two-pronged test for the determination of disqualifying interest exists: first, a nonparty witness has to be interested in the event, rather than in the question; second, the nonparty witness must either gain or lose by the direct legal operation of the judgment, or must meet the other criteria of the Florida Supreme Court's definition of interest. An examination of Florida cases dealing with the Dead Man's Statute under section 90.05 suggests that the event/question distinction can be distilled into the following general rule: interest in the event can be equated with pecuniary interest, and interest in the question can be equated with nonpecuniary interest.⁷⁵

*Madison v. Robinson*⁷⁶ and *Jensen v. Lance*⁷⁷ illustrate the event/question, pecuniary/nonpecuniary dichotomy. In *Madison*, two parties claiming title to a house as the sole heirs of Robin Robinson brought an ejectment action against Francis Madison, who also claimed to be Robinson's heir and the title holder of the house.⁷⁸ Madison claimed she was Robinson's legitimate daughter, which depended on the validity of her mother's marriage to Robinson. When Madison placed her mother on the stand to testify about the marriage, the plaintiffs objected, contending that the witness was disqualified by the Dead

73. *Adams v. Board of Trustees of Internal Improvement Fund*, 20 So. 266, 273 (Fla. 1896), quoting S. GREENLEAF, *THE LAW OF EVIDENCE* § 390 (1842). This test has been used extensively by Florida courts. See, e.g., *Jensen v. Lance*, 88 So. 2d 762 (Fla. 1956); *Madison v. Robinson*, 116 So. 31 (Fla. 1928); *Shoemaker v. Powers*, 82 So. 751 (Fla. 1919); *In re Lynagh's Estate*, 177 So. 2d 256 (Fla. 2d Dist. Ct. App. 1965); *Broward Nat'l Bank v. Bear*, 125 So. 2d 760 (Fla. 2d Dist. Ct. App. 1961); *Leighton v. Harmon*, 111 So. 2d 697 (Fla. 2d Dist. Ct. App. 1959).

74. See, e.g., *Madison v. Robinson*, 116 So. 31 (Fla. 1928); *Adams v. Board of Trustees*, 20 So. 166 (Fla. 1896).

75. See note 73 *supra*. Disqualification because of interest has long been premised upon the belief that "[p]ersons having a pecuniary interest in the event of the cause are specially likely to speak falsely . . ." WIGMORE § 576. It appears that interest in the event and pecuniary interest have historically been interchangeable concepts.

76. 116 So. 31 (Fla. 1928).

77. 88 So. 2d 762 (Fla. 1956).

78. 116 So. at 32.

Man's Statute.⁷⁹ The court held that the witness was competent to testify because her interest was in the question to be decided and not in the event of the action.⁸⁰ This holding was based on a determination that the witness would gain nothing from the outcome of an action in ejectment. "But would the judgment in this ejectment suit give or take away her dower? Would the record in this ejectment suit, even if judgment went for the defendant, be legal evidence in her favor on a proceeding for admeasurement of dower? Clearly not."⁸¹ The court quite clearly determined that Mrs. Madison's interest was in the question to be decided and not in the event, but its method for arriving at this conclusion is unclear. A determination of the legal effect of the judgment on Mrs. Madison does nothing to distinguish her interest in the question from her possible interest in the event. Mrs. Madison appears to have had no direct pecuniary stake in the outcome of the litigation, and because her interest was nonpecuniary it was classified as interest in the question, a nondisqualifying interest.⁸²

In *Jensen v. Lance*,⁸³ the court's decision to disqualify a witness rested solely on pecuniary considerations.⁸⁴ Mrs. Jensen had paid Lance \$10,000 to obtain a liquor license. In a separate transaction, her son paid Lance \$3,600 to obtain a lease on a building under construction.⁸⁵ Lance died without securing the liquor license or securing the lease; Mrs. Jensen brought suit to recover the money she had paid him. At trial, she sought to introduce her son's testimony to verify her transaction with Lance. The court refused to allow the testimony although it was clear that her son would neither gain nor lose by the direct legal effect of the judgment. The court admitted that, "[i]n a strict technical sense the witness was not directly interested in the outcome of this particular suit"⁸⁶ But the court realized that if the son were allowed to testify for the mother in this action, the mother would then be allowed to testify for the son in another action.⁸⁷ As a result, they both had a good opportunity to recover, and each had

79. *Id.* at 32-33.

80. *Id.* at 35-36.

81. *Id.* at 35.

82. *Id.* at 38.

83. 88 So. 2d 762 (Fla. 1956).

84. There was no other interest involved; the son would neither gain nor lose as a result of the action, and the trial record could not be introduced into evidence against him in another action. Thus, the criteria set forth in section 90.05, Florida Statutes do not appear to be met. But because he could testify for the mother, and the mother could testify for him in another action, he was disqualified for pecuniary interest.

85. 88 So. 2d at 763.

86. *Id.* at 764.

87. *Id.*

a pecuniary interest in the litigation of the other. The court, on the sole basis of pecuniary interest, disqualified Mrs. Jensen's son. It simply equated pecuniary interest with interest in the event and took the position that pecuniary interest, no matter how indirect, is sufficient to disqualify a witness.

This confusion over interest in the event and interest in the question apparently originated in the wording of section 90.05, which mentions interest "in the event" of an action.⁸⁸ Section 90.602 does not utilize these words and may thus avoid perpetuation of the confusion they caused. But section 90.602 does not differ significantly from 90.05 where interest is involved; the purpose of both sections is the disqualification of the interested witness. As noted in *Madison* and in *Jensen*, pecuniary interest is the key to disqualification under section 90.05; there is no indication that it will not continue to be an important, if not the sole factor in disqualification under section 90.602. Although the courts may no longer rely on the distinction between interest in the event and interest in the question, the determining factor—pecuniary interest—is likely to remain the same.

Interest alone does not disqualify a witness under section 90.05. Under this provision an interested witness may testify about any matter so long as it does not involve a transaction or a communication with the decedent.⁸⁹ Any matter outside the definition of these terms is unprotected by the Dead Man's Statute. In reality, very little is unprotected since "[t]ransactions and communications embrace every variety of affairs which can form the subject of negotiation, interviews or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition or language of another."⁹⁰ Under this broad definition, virtually any action of one person affecting the rights of another constitutes a transaction. Oral and written communications, contracts, loans, and the observation of handwriting⁹¹ are all within this definition. Almost all contact between an interested person and the decedent is either a transaction or a communication and is excluded

88. See note 2 *supra*.

89. *Id.*

90. *Holliday v. McKinne*, 22 Fla. 153, 163 (1886), quoting *Holcomb v. Holcomb*, 95 N.Y. 316 (1884); see *Knowles v. Boylston*, 137 So. 6 (Fla. 1931); *Chapin v. Mitchell*, 32 So. 875 (Fla. 1902); *Day v. Stickle*, 113 So. 2d 559 (Fla. 3d Dist. Ct. App. 1959).

91. *Jensen v. Lance*, 88 So. 2d 762 (Fla. 1956) (oral agreement, or contract, to obtain a liquor license); *Pickard v. Miggins*, 311 So. 2d 686 (Fla. 3d Dist. Ct. App. 1975) (promissory note and loan); *Howland v. Strahan*, 219 So. 2d 472 (Fla. 3d Dist. Ct. App. 1969) (written inter vivos transfer); *Matthews v. Matthews*, 177 So. 2d 497 (Fla. 2d Dist. Ct. App. 1965) (identification of handwriting from past observations is a transaction).

from testimony. There is, however, one instance in which an interested witness—party or nonparty—may testify about a transaction or communication with the deceased. If the witness does not participate in the transaction or the communication but is a bystander or an observer, he may testify thereto.⁹² The reason for this exception is unclear; it appears that the incentive to perjure exists whether the transaction or communication is direct or indirect. Perhaps the distinction lies in the possible corroboration by a disinterested third person in the case of indirect transactions and communications. This rationale is, however, unsatisfactory since it would be simpler to allow the third person, rather than the interested person, to testify.⁹³

Thus the scope of the Dead Man's Statute, under the provisions of section 90.05, is virtually unlimited. The same cannot be said of section 90.602. The Dead Man's Statute no longer encompasses transactions, and the protection afforded communications has been limited to oral communications.⁹⁴ The impact of the Dead Man's Statute has been significantly reduced; it no longer embraces every action of one person that affects the rights of another. It now includes only a small portion of personal interaction—oral communications.

There is one final element which must be satisfied before a witness may be disqualified under the Dead Man's Statute: the offensive testimony must be offered against the estate of the deceased.⁹⁵ The protection afforded the decedent's estate is not restricted to actions brought against the estate; indeed, the protection attaches whether the decedent's estate is party plaintiff or defendant.⁹⁶ The requirement here is that the testimony itself be offered against the decedent's estate. In this instance, the requirements of sections 90.05 and 90.602 are similar. The protection of "the estate of the deceased" extends to the personal representative, heir at law, assignee, legatee, devisee and the

92. *Withers v. Sandlin*, 32 So. 829 (Fla. 1902).

93. There were then two situations in which a party or interested person could testify. The first occurred when the testimony concerned neither a transaction nor a communication. *Farley v. Collins*, 146 So. 2d 366 (Fla. 1962), involved an automobile accident in which the court held that automobile accidents did not constitute transactions. Thus, the survivor of an automobile accident was allowed to testify against the decedent's estate even though he was interested in the event of the action. The second occurred when the witness testified about a transaction or communication in which he did not participate. *See Withers v. Sandlin*, 32 So. 829 (Fla. 1902).

94. *See note 7 supra*.

95. *See note 2 supra*; *McDougald v. Couey*, 9 So. 2d 187 (Fla. 1942).

96. *See, e.g., Jensen v. Lance*, 88 So. 2d 762 (Fla. 1956) (action brought against decedent's estate); *Broward Nat'l. Bank v. Bear*, 125 So. 2d 760 (Fla. 2d Dist. Ct. App. 1961) (action brought by decedent's estate).

survivor of the deceased.⁹⁷ Parties not within this class find no protection under this proviso.⁹⁸

Parties protected by the Dead Man's Statute may waive their protection in several ways: (1) if they testify on the subject; (2) if they cross-examine the opposing party on the subject; or (3) if by other conduct "evidenced in the record, [they] clearly indicat[e] that they, knowing their rights under the statute, wished to waive the protection afforded thereby."⁹⁹ Undoubtedly, when the party protected by the statute testifies as to a transaction or communication with the deceased, he thereby waives the protection of the statute as to that transaction or communication;¹⁰⁰ the adverse party is then free to call witnesses who would otherwise have been incompetent,¹⁰¹ or to cross-examine the protected party on the subject matter in question.¹⁰² The protected party may also waive his statutory protection on redirect by going beyond the scope of direct or cross-examination or by failing to object to such actions on the part of the adverse party.¹⁰³ The protected party also waives his statutory protection when he calls a witness who is incompetent under the statute and questions him concerning transactions or communications with the deceased,¹⁰⁴ thereby opening the door to cross-examination by the opposing party. The protection of the Dead Man's Statute is similarly waived when the protected

97. See notes 2, 7 *supra*.

98. FLA. STAT. § 90.05 (1975) specifically lists those parties for whom the protection of the Dead Man's Statute was devised. Those persons falling outside this class are not protected by this proviso. 2A D. SANDS, *supra* note 64 at § 47.23 (4th ed. 1973), states, in his section dealing with the "expressio unius est exclusio alterius" rule of statutory construction:

As the maxim is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions . . .

. . . .

. . . The enumeration of exclusions from the operation of a statute indicates that it should apply to all cases not specifically excluded. [Footnotes omitted.]

99. *Doing v. Riley*, 176 F.2d 449 (5th Cir. 1949); *Rich v. Hunter*, 185 So. 141, 146 (Fla. 1938).

100. *E.g.*, *Mayer v. Mayer*, 54 So. 2d 105 (Fla. 1951); *McMullen v. St. Lucie County Bank*, 175 So. 721 (Fla. 1937); *Kings County Trust Co. v. Hyams*, 152 N.E. 129 (N.Y. 1926); *In re Cozine*, 93 N.Y.S. 557 (App. Div. 1905); *Hackstaff v. Hackstaff*, 31 N.Y.S. 11 (Sup. Ct. 1894).

101. *E.g.*, *Mayer v. Mayer*, 54 So. 2d 105, 106 (Fla. 1951); *Macknet v. Rogers*, 119 So. 2d 72 (Fla. 2d Dist. Ct. App. 1960).

102. *McMullen v. St. Lucie County Bank*, 175 So. 721 (Fla. 1937).

103. *Sessions v. Summers*, 177 So. 2d 720 (Fla. 1st Dist. Ct. App. 1965); *Robinson v. Miller*, 296 So. 2d 58 (Fla. 2d Dist. Ct. App. 1974).

104. *Small v. Shure*, 94 So. 2d 371 (Fla. 1957); *Herring v. Eiland*, 81 So. 2d 645 (Fla. 1955); *Embrey v. Southern Gas & Elec. Corp.*, 63 So. 2d 258 (Fla. 1953); *Josephson v. Kuhner*, 139 So. 2d 440 (Fla. 1st Dist. Ct. App. 1962).

party develops testimony concerning a transaction or communication with the deceased on cross-examination.¹⁰⁵

Cross-examination of a person incompetent to testify under the Dead Man's Statute does not necessarily result in the waiver of its protection. If a protected party objects to the testimony of an incompetent witness and the objection is overruled, the protected party may freely cross-examine on the subject without waiving the protection of the Dead Man's Statute.¹⁰⁶ The protected party neither makes the incompetent witness his own nor waives the Dead Man's Statute by his cross-examination.¹⁰⁷ After the protected party's objection has been overruled, it would be inequitable to require him to remain silent and to forego cross-examination in order to assure the protection of the Dead Man's Statute.¹⁰⁸ Under these circumstances, if an appeal court finds the lower court erred in overruling the protected party's objection, it should strike the testimony admitted contrary to the provisions of the Dead Man's Statute.¹⁰⁹

Clearly the failure of a protected party to object when the adverse party introduces testimony concerning transactions or communications with the deceased results in waiver of the protection of the statute.¹¹⁰ Thus the protected party may waive the protection of the Dead Man's Statute by either eliciting incompetent testimony himself—on either direct, cross, or redirect—or by failing to object to the introduction of such testimony when elicited by the adverse party.

Waiver of the protection of the Dead Man's Statute may occur as early as a hearing for summary judgment. The taking of depositions and admissions from a person incompetent to testify under the provisions of the Dead Man's Statute does not waive its protection,¹¹¹ but the use of such depositions and admissions, either in support of or in defense of a motion for summary judgment, will usually effect such a waiver.¹¹² The adverse party is then free to introduce all "relevant

105. *In re Thompson's Estate*, 199 So. 352 (Fla. 1940); *Rich v. Hunter*, 185 So. 141 (Fla. 1938); *see Land v. Hart*, 109 So. 2d 589 (Fla. 1st Dist. Ct. App. 1959).

106. *Land v. Hart*, 109 So. 2d 589 (Fla. 1st Dist. Ct. App. 1959).

107. *Id.*

108. *See id.*

109. *Id.*

110. *Rich v. Hunter*, 185 So. 141 (Fla. 1938); *Robinson v. Miller*, 296 So. 2d 58 (Fla. 2d Dist. Ct. App. 1974); *Sessions v. Summers*, 177 So. 2d 720 (Fla. 1st Dist. Ct. App. 1965).

111. *Small v. Shure*, 94 So. 2d 371 (Fla. 1957); *Booth v. Cureton*, 81 So. 2d 662 (Fla. 1955); *Herring v. Eiland*, 81 So. 2d 645 (Fla. 1955); *Bordacs v. Kimmel*, 139 So. 2d 506 (Fla. 3d Dist. Ct. App. 1962).

112. *Herring v. Eiland*, 81 So. 2d 645 (Fla. 1955); *Barber v. Adams*, 208 So. 2d 869 (Fla. 2d Dist. Ct. App. 1968); *Bordacs v. Kimmel*, 139 So. 2d 506 (Fla. 3d Dist. Ct. App. 1962).

and germane' parts of the deposition.¹¹³ It is equally clear that a failure by the protected party to object to the introduction of such depositions and admissions by the adverse party will also result in waiver.¹¹⁴ Further, waiver of the Dead Man's Statute at the summary judgment level results in its waiver on the same subject for all subsequent proceedings in the same action.¹¹⁵

IV. PROTECTION FOR THE DECEASED AT THE COST OF THE SURVIVOR

The Dead Man's Statute is objectionable for several reasons. First, it is founded on faulty logic. The exclusion of an interested witness's testimony is predicated on an eighteenth-century syllogism: "Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; Persons having a pecuniary interest in the event of the cause are specially likely to speak falsely; Therefore such persons should be totally excluded."¹¹⁶ Neither of the premises of this syllogism is sound. Interest does not always result in prevarication, and exclusion of testimony does nothing to insure that a just decision will result.¹¹⁷

Second, both honest and dishonest claims are eliminated. In *Broward National Bank v. Bear*,¹¹⁸ the executors of the decedent's estate sued the makers of a promissory note, Bear and Kinsey, for payment. The makers of the note admitted executing it but pleaded the defense of payment. At trial the defendants were allowed to admit into evidence, over plaintiff's objections, a cancelled check they claimed to have delivered to the deceased as payment of the note. The trial judge, who heard the cause without a jury, entered judgment for the defendants; on appeal, the decision of the trial court was reversed and the case remanded for a new trial.¹¹⁹ By doing so, the district court of appeal dismissed the Florida Supreme Court's statement in *Terwilligar v. Ballard*¹²⁰ that "[p]roofs of payment to a deceased person may be made without violating the statutory or common-law rules of evidence" as "merely dictum and . . . taken out of the context of the case."¹²¹ Based on this reasoning, the court found that

113. *Herring v. Eiland*, 81 So. 2d 645, 648 (Fla. 1955).

114. *Boling v. Barnes*, 216 So. 2d 804 (Fla. 2d Dist. Ct. App. 1968); *Bordacs v. Kimmel*, 139 So. 2d 506 (Fla. 3d Dist. Ct. App. 1962).

115. *Id.*

116. WIGMORE § 576.

117. *Id.*

118. 125 So. 2d 760 (Fla. 2d Dist. Ct. App. 1961).

119. *Id.* at 760.

120. 59 So. 244, 246 (Fla. 1912).

121. 125 So. 2d at 761.

proof of payment—the defendants' check—was barred by the Dead Man's Statute.¹²² Thus this defense, which the trial court had found to be meritorious and supported by ample credible evidence, could not be considered. The Dead Man's Statute offers no mechanism for distinguishing between honest and dishonest claims.

Finally, the Dead Man's Statute is objectionable because it is too easily misapplied. In *Pickard v. Miggins*,¹²³ an action was brought to recover on a promissory note made by Rod Pickard and delivered to the decedent Polonko. At the trial, Pickard contended that he gave a check to Luis Salis, who was to cash the check and pay Polonko. Salis testified he cashed Pickard's check and paid Polonko but failed to obtain a receipt therefor. After hearing the testimony, the jury found for Pickard. The court set the verdict aside, finding that it lacked competent evidentiary support.¹²⁴ Pickard was disqualified from testifying under the Dead Man's Statute since he was a party to an action in which he attempted to testify against a decedent's estate concerning a transaction with the decedent. It is unclear, however, why the court disqualified Salis or failed to find support in his testimony for the jury's verdict. The appellate court agreed with the trial court's finding that Salis was interested but stated no reasons for its concurrence.¹²⁵ Salis was not a party, and he does not appear to satisfy the criterion of an interested person: he had no pecuniary interest in the litigation. Although Salis' testimony was sufficiently credible to support a finding by the jury in Pickard's favor, it was nevertheless found insufficient by the trial judge. While the decision in this case may have been equitable, the extension of the Dead Man's Statute to embrace a situation clearly not within its scope is undesirable. The Dead Man's Statute should not be relied upon in any event to give an advantage to the decedent's estate. The evidence presented by both parties should be admitted and given consideration based on its credibility and probative value.

V. ALTERNATIVES TO THE DEAD MAN'S STATUTE

There is ample reason for discontent with the Dead Man's Statute. The statute is aimed at eliminating false claims against decedent's estates, yet it eliminates honest claims as well.¹²⁶ It assumes interested

122. *Id.* at 762.

123. 311 So. 2d 686 (Fla. 3d Dist. Ct. App. 1975).

124. *Id.* at 688.

125. *Id.*

126. *Id.* at 687. Brooker, *Let's Repeal the Dead Man Act*, 38 FLA. B.J. 181 (1964); Ehrhardt, *supra* note 54, at 703.

survivors will perjure themselves to the detriment of decedents' estates. Perhaps most importantly, the Dead Man's Statute is easily misapplied. In its effort to protect the decedent's estate, the Dead Man's Statute overlooks both modern discovery methods and cross-examination.

Discovery procedures tend to equalize the positions of litigants.¹²⁷ The surviving party can look to the decedent's records and documents to corroborate testimony.¹²⁸ The decedent's estate may avail itself of the same discovery tools in an effort to defend against the survivor's claims. Cross-examination is a valuable tool not only for testing the credibility of a witness, but also for determining the truthfulness of his testimony.¹²⁹

The establishment of truth is best facilitated by the inclusion of all relevant evidence. Under the Dead Man's Statute, the competency of a witness is a question of law to be decided by the court.¹³⁰ The court determines whether or not the witness meets the criteria of the Dead Man's Statute and consequently whether or not the witness is competent to testify. If the Dead Man's Statute were to be abolished, the witness would testify and the jury would determine the veracity of the evidence as a question of fact.¹³¹ If a jury can determine the truthfulness of testimony in litigation between two living parties, it can make the same determination where only one party survives.

As discussed above, Florida has adopted, in section 90.602 of the Florida Statutes, one of several alternatives to the Dead Man's Statute;¹³² there are, however, other alternatives which facilitate the introduction of all relevant evidence. The best of these is repeal of the Dead Man's Statute, completely abolishing incompetence by reason of interest.¹³³ Any advantage bestowed upon the survivor by repeal could be counter-

127. Note, 18 U. FLA. L. REV. 693 (1966).

128. FLORIDA CIVIL PRACTICE BEFORE TRIAL § 16.19 provides:

Subject to the orders of the court for protection of the parties upon a showing of good cause and subject to the provisions of RCP 1.310(b), an adverse party may be required to produce and permit the inspection and copying or photographing of certain documents, papers, books, accounts, letters, photographs, objects or tangible things, RCP 1.350. The item must not be privileged and must constitute or contain evidence relating to a matter within the scope of examination permitted by RCP 1.280.

129. WIGMORE § 1395.

130. See Note, *supra* note 127, at 697.

131. *Id.*

132. Under FLA. STAT. § 90.602 (Supp. 1976), only oral communications are excluded from testimony. This alleviates half the problem by allowing testimony on transactions. See note 7 *supra*.

133. CONN. GEN. STAT. ANN. § 52-145 (1958) provides: "Interested witness not disqualified; credibility—No person shall be disqualified as a witness in any action by reason of his interest in the event of the same as a party or otherwise"

acted by the enactment of a statutory exception to the hearsay rule allowing the decedent's estate to introduce declarations made by the party now deceased.¹³⁴ This possibility is attractive since it allows all relevant evidence to be introduced for consideration by the jury.

A second possibility is modification of the Dead Man's Statute to allow the surviving party to testify if he is able to produce corroborating testimony or evidence.¹³⁵ This choice is less attractive than repeal

134. CONN. GEN. STAT. ANN. § 52-172 (1958) provides:

In actions by or against the representatives of deceased persons, and by or against the beneficiaries of any life or accident insurance policy insuring a person who is deceased at the time of the trial, the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence. In actions by or against the representatives of deceased persons, in which any trustee or receiver is an adverse party, the testimony of the deceased, relevant to the matter in issue, given at his examination, upon the application of such trustee or receiver, shall be received in evidence.

New Hampshire has a similar provision; it is, however, predicated on a finding by the court that the deceased had actually made the statement in question. N.H. REV. STAT. ANN. § 516:25 (1974) provides:

Declarations of Deceased Persons. In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was made in good faith and on decedent's personal knowledge.

Oregon has another modification of the hearsay exception type rule to the Dead Man's Statute which permits the admission of hearsay declarations made by the deceased when the survivor has testified. ORE. REV. STAT. § 41.850 (1975):

The declaration, act or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is admissible as evidence to that extent against his successor in interest. When a party to an action, suit or proceeding by or against an executor or administrator appears as a witness in his own behalf, or offers evidence of statements made by deceased against the interest of the deceased, statements of the deceased concerning the same matter in his own favor may also be proven.

135. N.M. STAT. ANN. ch. 20-2-5 (1953), *repealed*, N.M. Laws ch. 223 § 2 (1973) provided:

Transactions with decedent—Corroboration required.—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.

VA. CODE ANN. § 8-286 (1950) provides:

Corroboration required and evidence receivable when one party incapable of testifying.—In an action or suit by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; and in any such action or suit, if such adverse party testifies, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence.

because it assumes that uncorroborated testimony is false.¹³⁶ It is, however, superior to total exclusion of such evidence under the Dead Man's Statute. A third choice is the exclusion of the interested person's testimony unless injustice will result.¹³⁷ The practical problem presented by this alternative is that "injustice" must be determined subjectively by the court. Therefore the most attractive alternative to the Dead Man's Statute appears to be repeal rather than modification. Though Florida has opted for a modification that allows survivors to testify about transactions, the federal courts have taken the preferred choice and abandoned the Dead Man's Statute.

VI. FEDERAL COURTS AND THE DEAD MAN'S STATUTE

Prior to the enactment of the Federal Rules of Evidence, no uniform body of evidentiary rules for federal courts existed.¹³⁸ On January

136. In *Bujac v. Wilson*, 196 P. 327 (N.M. 1921), the New Mexico Supreme Court recognized that the valid claim of the party was barred because he could not corroborate it.

137. ARIZ. REV. STAT. ANN. § 12-2251 (1956) provides:

In an action by or against executors, administrators or guardians in which judgment may be given for or against them as such, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward unless called to testify thereto by the opposite party, or required to testify thereto by the court. The provisions of this section shall extend to and include all actions by or against the heirs, devisees, legatees or legal representatives of a decedent arising out of any transaction with the decedent.

MONT. REV. CODES ANN. § 93-701-3.3 (1947) provides:

Persons who cannot be witnesses.—Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, as to the facts of direct transactions or oral communications between the proposed witness and the deceased, excepting when the executor or administrator first introduces evidence thereof, or when it appears to the court that, without the testimony of the witness, injustice will be done.

138. See Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts, 30 F.R.D. 79, 81, 114 (1961); Rothstein, *The Proposed Amendments To The Federal Rules of Evidence*, 62 GEO. L.J. 125, 126 n.8 (1973).

Congress authorizes the Supreme Court to promulgate rules of court. 18 U.S.C. § 3402 (1970) provides: "The Supreme Court shall prescribe rules of procedure and practice for the trial of cases before magistrates and for taking and hearing of appeals to the judges of the district courts of the United States." For other enabling acts see, e.g., 18 U.S.C. § 3771 (1970) (power to prescribe rules in criminal cases); 28 U.S.C. § 2072 (1970) (power to prescribe rules in civil actions, admiralty and maritime cases); 28 U.S.C. § 2075 (1970) (power to prescribe rules under the Bankruptcy Act).

These statutes which enable the Supreme Court to issue rules governing procedure have been construed as granting the authority to issue rules of evidence. See Preliminary Study, *supra*, at 73, 101.

In 1965, the Advisory Committee on the Rules of Evidence was appointed at the

2, 1975, Congress approved the Federal Rules of Evidence for United States Courts and Magistrates.¹³⁹ Federal Rule of Evidence 601 made "[e]very person . . . competent to be a witness except as otherwise provided in these rules."¹⁴⁰ The rules do not provide an exception for the exclusion of witnesses based on interest.

There may, however, be occasions when a Dead Man's Statute is recognized in federal courts. When the proposed rules were submitted to Congress, no provision was made for the inclusion of a federal Dead Man's Statute.¹⁴¹ The Advisory Committee¹⁴² on the Rules of Evidence clearly desired the omission of the Dead Man's Statute from the federal rules, but both the House of Representatives and the Senate believed that some such provision was necessary.¹⁴³ The

direction of the Judicial Conference of the United States. 1965 Reports of the Proceedings of the Judicial Conference of the United States 54; *See also* Preliminary Study, *supra*, at 73, 75; Rothstein, *supra*, at 125 n.3.

The Judicial Conference of the United States obtains its power to appoint such a committee from 28 U.S.C. § 331 (1970):

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

. . . .

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

Over a period of 7 years, this committee circulated at least two drafts of the proposed rules. Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969); Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315 (1971).

In November 1972, the Supreme Court approved a set of uniform evidence rules to be used in federal courts. Rules of Evidence for United States Courts and Magistrates, Amendments to Federal Rules of Civil Procedure and Amendments to Federal Rules of Criminal Procedure, 56 F.R.D. 183 (1972). Both houses of Congress recommended amendments to these proposals. 4 U.S. CODE CONG. & AD. NEWS 7055, 7078 (1974). For the most part, the House amendments were adopted by conference committee. *Id.* at 7098. This was the case with respect to rules 501 (privilege) and 601 (competence). *Id.* at 7100-101.

139. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 28 U.S.C., Appendix at 1954 (Supp. IV, 1974)). Although approved Jan. 2, 1975, the rules did not take effect until the 180th day after their enactment. *Id.*

140. FED. R. EVID. 601.

141. *See* FED. R. EVID. 602, 605, 606. These are the only exceptions to rule 601: those who lack knowledge, judges, and jurors.

142. The Advisory Committee was appointed by the Judicial Conference of the United States to promulgate federal rules of evidence. *See* note 138 *supra*.

143. In civil actions and proceedings, the House bill provides that state competency law applies "to an element of a claim or defense as to which State law supplies

House Committee on the Judiciary felt that "where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest" ¹⁴⁴ The committee proposed an amendment which later became part of rule 601: "Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law." ¹⁴⁵

The Senate Committee on the Judiciary predicted "considerable litigation" concerning what constitutes "an element of a claim or a defense." ¹⁴⁶ Because of these concerns the Senate committee proposed its own amendment, which was eventually rejected in favor of the House recommendation. ¹⁴⁷

According to the Conference Report, in which the House amendment was adopted, in nondiversity-jurisdiction civil cases federal competency law will apply. In diversity cases state law will generally apply. ¹⁴⁸ When a federal court adopts or incorporates state law to fill gaps in federal statutory provisions, federal competency law will apply, ¹⁴⁹ but where state law supplies the rule of decision as to a claim or element of a defense, state competency law must be applied. ¹⁵⁰ As evidenced by the Senate Committee's concerns, rule 601 will entail some confusion as to when state competency law is to be applied in a federal court. In practice, then, the Dead Man's Statute has not seen its last day in federal court.

Regardless of the necessity for applying state law in federal courts, the elimination of the Dead Man's Statute from the Federal Rules of Evidence is commendable. Its elimination recognizes the desirability

the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b) the competency of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

Conference Report, 4 U.S. CODE CONG. & AD. NEWS 7101 (1974).

144. Report of the House Committee on Judiciary, 4 U.S. CODE CONG & AD. NEWS 7075, 7083.

145. FED. R. EVID. 601.

146. 4 U.S. CODE CONG & AD. NEWS 7058 (1974). The Senate Committee on Judiciary treated rule 601 as it did rule 501 on privilege, and for discussing the committee's comments, rule 501 must be considered. *Id.* at 7059.

147. *Id.* at 7100-01.

148. *Id.*

149. *Id.*

150. *Id.*

of subjecting all relevant evidence to the scrutiny of the jury and the court.

CONCLUSION

Disqualification based on interest has been a part of Florida's law for over a century and a half.¹⁵¹ Initially, all interested witnesses were incompetent to testify,¹⁵² but eventually this class was narrowed to include only those interested in the event of an action against the estate of a deceased person.¹⁵³ In this instance, the fear of perjury was the greatest; the word of the survivor was uncontested, and testimony was suppressed to achieve equality.

In 1976, the Florida Legislature further narrowed the scope of the Dead Man's Statute to include only those who wished to testify about oral communications with a person now deceased.¹⁵⁴ This action not only indicates that modern discovery techniques and cross-examination have diminished the fear of perjury where transactions are involved, but it also acknowledges the inadequacy of those tools in preventing perjury concerning oral communications. The modification, rather than the abolition, of the Dead Man's Statute admits an inability of judge and jury to determine witness truthfulness. Through a conservative respect for tradition, the legislature has given the estates of the dead an advantage not enjoyed by the living.

The adoption of the Florida Evidence Code has alleviated some of the injustices of the Dead Man's Statute under section 90.05. But many changes have occurred since the initial appearance of witness incompetence and the Dead Man's Statute; trials have changed, juries have changed, and the rules of evidence have changed. The Dead Man's Statute is no longer a necessity in any form; it should be abandoned.

LINDA JONES WELLS

151. See note 56 *supra*.

152. See text accompanying note 56 *supra*.

153. See note 57 *supra*.

154. See note 7 *supra*.