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# A Survey of the Illinois Dead Man's Act

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# NOTES AND COMMENTS

## A SURVEY OF THE ILLINOIS DEAD MAN'S ACT

### HISTORICAL BACKGROUND

Our judicial system, with its plethora of pleading technicalities and rules of evidence, is designed to ferret out truth from the mire of human behavior. It leans heavily on the jury system to accomplish this goal.

Originally, witnesses and jurors were identical. Jurors were the persons in the community who had knowledge of the controversy to be decided. They met, discussed the facts among themselves, and then reached a decision on the merits, acting as jurors. Over a period of time, as population increased and concentrated in cities, the two functions became separated. The system went full circle, and the attempt was made to have controversies decided by jurors who knew nothing about the dispute, except as it was revealed to them by witnesses.[1]

Though purporting to rely on the common sense of the fabled twelve men, tried and true, the courts guarded those twelve from error by erecting an elaborate wall of evidentiary rules around them. In his work, The Law Of Evidence In Civil Cases, Professor Burr Jones commented that although the common law judges were relentless in their praise of the jury system, the rules of evidence they constructed suggest "a profound distrust of the capacity of jurors to perform their function."[2] The distrust is most evident in the rules of law surrounding the competency of witnesses to testify.

At common law, there were four classes of witnesses who were deemed incompetent[3] to give testimony. The four classes were:

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; and
4. Parties to the issue.

Constitutional provisions, such as Article II of the Illinois Constitution of 1870, have provided that no person shall be rendered incompetent to give evidence because of his opinion concerning religion. To a large extent these provisions have obviated incompetency under category 1 above. In addition, the common law disability of convicted felons, who also were placed in category 1, has been removed in many states.[4]

1 Humble, Principles of the Law of Evidence 44 (1934).

2 3 Jones, The Law of Evidence in Civil Cases 1598 (1896).

3 *Id.* at 1574; Humble, *op. cit. supra* note 1, at 52. There is a distinction between the general incompetency of a witness and the privilege of suppressing certain testimony, as, *e.g.*, communications between attorney and client or husband and wife.

4 3 Jones on Evidence § 753 (5th ed. 1958); 58 Am. Jur., *Witnesses* § 140 (1948).

Category 2—those wanting in capacity and understanding—still exists. However, the strict interpretation of the common law has been liberalized to a great extent. Thus, in most states, small children are not automatically and arbitrarily barred from testifying. The determination of a child's capacity to testify is not based on his age alone, but by the understanding and intelligence of the individual child.[5] Likewise, insane or weak minded witnesses are not excluded by those facts alone, but are allowed to testify if it appears that their afflictions do not prevent them from understanding the nature and obligation of an oath or from relating the facts of the case.[6]

Those witnesses described in categories 3 and 4 were often lumped together. Both "parties to the issue" and "those having a pecuniary interest in the issue" have a financial concern in the outcome of the case. Baron Gilbert, in 1788, stated that as to persons interested in the matter in question "the General Rule is, that no Man can be a witness for himself, but he is the best Witness that can be against himself."[7] Gilbert explained that there is more reason to disbelieve the testimony of one who is interested in the outcome than there is to trust such testimony. Gilbert noted that by human nature man is shortsighted and looks to his immediate benefit rather than the long term benefit to the world. For this reason, the law forbade him to testify in order to prevent his sliding into perjury.

What did the common law consider to be an interest? It was said that an interest existed where the witness would receive either a benefit or a disadvantage, depending on the outcome of the law suit.[8] The witness' interest had to be a legal and beneficial one. The test applied was whether the witness would gain or lose by the direct legal operation and effect of the judgment or whether the record would be legal evidence for or against the witness in some other action.[9]

However, the prejudice or bias resulting from friendship or hatred, or from consanguinity, or domestic or social relationship, went only to the credibility of a witness and did not disqualify him.[10] At common law then, though blood was thicker than water, it was thinner than gold.

The application of these common law ideas produced some rather unhappy results. Though the jury was shielded from the possible falsehoods of interested persons, it was also shielded from much light that these same

5 3 Jones on Evidence § 757 (5th ed. 1958); 58 Am. Jur., *Witnesses* § 129 (1948). Even very young children have been allowed to testify. *See, e.g.*, Featherstone v. People, 194 Ill. 325, 62 N.E. 684 (1901) (6 yr. old); Hill v. Skinner, 81 Ohio App. 375, 79 N.E.2d 787 (1947) (4 yr. old).

6 3 Jones on Evidence § 760 (5th ed. 1958); 58 Am. Jur., *Witnesses* §§ 118-119 (1948). The burden of proof rests on the person asserting the incompetency, since the witness is presumed sane and competent to testify. 3 Jones on Evidence § 760 (1958).

7 Gilbert, The Law of Evidence 114 (5th ed. 1788).

8 *Id.* at 120.

9 Rapalje, A Treatise on the Law of Witnesses 51 (1887).

10 *Id.* at 56; Humble, Principles of the Law of Evidence 50 (1934).

witnesses could bring to bear on the issues. For example, it was held that a party could not be a witness to prove that he had already repaid the money which the other party was suing to recover.[11] Also, a plaintiff was not permitted to prove an acknowledgment or new promise by a defendant in order to remove the bar of the Statute of Limitations.[12]

The inexorable logic of the common law carried the rule to its bitter end. "In all public Prosecutions, the Party injured may be a Witness where there is only a Fine to the King, and no private Advantage arising to himself by such a prosecution; but if there be any Advantage of Private Benefit to accrue by the Prosecution, the Party is equally excluded as in a private action."[13] Thus, before the passage of the statute, 3 & 4 Wm. IV., ch. 42, §§ 26-7, the victim of an assault and battery could not testify, for he had an indirect interest in the record. That statute removed the indirect interest by making the verdict in the criminal case inadmissible by the witness or one claiming under him in a subsequent suit.[14]

The magnitude of the interest was irrelevant. If the interest was real and of a legal nature, it made no difference how small that interest was. Thus, a guardian ad litem was deemed incompetent to testify, since, if the decision were against his cause, he would be liable for costs.[15]

In England, Lord Denman's Act[16] abolished the disqualification because of interest, except to parties of record and other minor instances. The proviso as to parties of record was removed by a later statute.[17]

These statutes were enacted too late to become part of Illinois' common law. As late as 1864, in Illinois, a plaintiff was not allowed to testify in his own behalf. As was said in *Mixell v. Lutz*,[18] "We are aware of no adjudged case which sanctions such a practice, and we have no power, even if so inclined, to change the rule."

In 1867, the Illinois Legislature passed an enabling act, the forerunner of today's chapter 51, §§ 1 *et seq.*[19] In light of the common law background of witness incompetency, it is now easy to see that the statute does not *impose* incompetency upon an interested witness who testifies in his own behalf against a deceased party. Rather, the statute *removes* the incompetency imposed by the common law on interested parties, felons, and others. Section 1 clearly says that "No person shall be disqualified . . . by reason of his or her interest in the event . . . , or by reason of his or her conviction of any

11 Rapalje, *supra* note 9, at 32.
12 Weed v. Bishop, 7 Conn. 128 (1828).
13 Gilbert, The Law of Evidence 123 (5th ed. 1788).
14 Rapalje, *supra* note 9, at 150.
15 3 Jones, The Law of Evidence in Civil Cases 1599 (1896).
16 6 & 7 Vict. c. 85 (1843).
17 Lord Brougham's Act, 14 & 15 Vict. c. 99 (1851).
18 34 Ill. 382, 388 (1864).
19 Ill. Rev. Stat. c. 51, §§ 1 *et seq.* (1867), amended in 1951.

crime."[20] However, section 2 exempts from this removal of incompetency the situation where one of the parties is dead, insane, or otherwise not able to testify for himself.[21] Thus, the Illinois statute, known as the Dead Man's Act, continues, in part only, the policy of the common law by deeming interested person incompetent when they attempt to testify in their own behalf and against the interest of the deceased or incapable person.

Today, it is recognized that jurors are capable of weighing the testimony of convicted felons, interested persons and parties of record. The weight to be given to the testimony of such individuals is left to the properly instructed jury. The general rules of evidence and the always present opportunity to cross examine are thought to be adequate to prevent unjust verdicts from being reached due to perjured testimony. The policy of the law is to allow both the plaintiff and the defendant to testify in their own behalf, the feeling being that so much more light is brought to bear upon the issues this way that preventing the testimony on the grounds of possible perjury is not justified.

The exception to this rule is the Dead Man's Act. When one of the parties cannot testify because of death, insanity or infancy, the law forbids the other to testify to certain facts surrounding the case.[22] The reason is that since one interested party cannot testify, the jury will hear only one side of the case from the lips of an interested person. In that kind of situation, it is felt that cross examination is not an adequate safeguard and the chances of undetected perjury are thus increased. Furthermore, biased statements cannot be evaluated properly when equally self-serving adverse evidence cannot be heard. As was said in *Louis v. Easton*,[23] "If death has closed the lips of one party, the policy of the law is to close the lips of the other."

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20 Ill. Rev. Stat. c. 51, § 1 (1967).
21 Ill. Rev. Stat. c. 51, § 2 (1967).
22 See generally 46 Harv. L. Rev. 834 (1933).
23 50 Ala. 471 (1874).