



1950

Evidence--Admissibility of a Survivor's Testimony Under the Kentucky Dead Man's Statute

John L. Larkin
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Evidence Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Larkin, John L. (1950) "Evidence--Admissibility of a Survivor's Testimony Under the Kentucky Dead Man's Statute," *Kentucky Law Journal*: Vol. 38 : Iss. 3 , Article 8.
Available at: <https://uknowledge.uky.edu/klj/vol38/iss3/8>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

EVIDENCE—ADMISSIBILITY OF A SURVIVOR'S TESTIMONY UNDER THE KENTUCKY DEAD MAN'S STATUTE

In a suit brought in Kentucky on a contract action against the estate of a decedent, the testimony of the survivor of the transaction is inadmissible. However, if the proceeding against the estate of the decedent is founded in tort, the testimony of the survivor is admissible.¹

The purpose of this note is to review the history concerning the development of the dead man's statutes, to investigate the dead man's statute in Kentucky, and to suggest a solution to the problems arising as a result of the application of the Kentucky dead man's statute.

Under common law rules, a person who had a pecuniary interest in a cause of action was disqualified under the general rules of incompetency.² The fundamental rationalization of the disqualification was that the pecuniary interest would cause an interested party to give perjured testimony and thereby induce the jury to reach an improper verdict.³

The common law jurist followed this rule, evidently believing that the jury could not detect perjured testimony when fully aware that the party had a pecuniary interest in the action.⁴ As a result of the exclusion of the testimony, the courts were ignoring those claimants who were honest, thus following the false assumption that all men are dishonest when tempted with pecuniary gain. These fallacies, however, were later recognized and statutory provisions permitted the party or witness to testify.⁵

The abolition of the disqualification of persons having a pecuniary interest was not without some repercussion. In abrogating the common law rule, the legislature created an exception to the interest precept and excluded testimony of the survivor of a transaction in a legal proceeding against the estate of a dead man.⁶ The exception was created because it was believed that if the survivor gave his version of the facts it would be impossible to expose omissions, mistakes, and falsehoods.⁷ Furthermore, it was hoped to prevent dishonest claimants from plundering the estates of the deceased.⁸

This statutory exception, the so-called dead man's statute, was adopted by the Kentucky Legislature. The code provision disqualifying the survivor's testimony provided, "no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, an infant under fourteen years of age, or by one who is of unsound mind or dead when the testimony is offered to be given, except for the purpose, and to the

¹ "no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by an infant under fourteen years of age, or by one who is of unsound mind or dead when the testimony is offered to be given except for the purpose, and to the extent, of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted, and except 'in actions for personal injury, death or damage to property by negligence or tortious acts'" KY. CODES, CIV. PROC. sec. 606 (2) (1948).

² 5 CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE sec. 3669 (1911).

³ See *Burk v. Louisville & Nashville R. R.*, 219 Ky. 163, 165, 292 S. W. 486, 487 (1926); 4 JONES, COMMENTARIES ON THE LAW OF EVIDENCE sec. 725 (1914).

⁴ See *Burk v. Louisville & Nashville R. R.*, 219 Ky. 163, 165, 292 S. W. 486 (1926).

⁵ 5 CHAMBERLAYNE, *op. cit. supra* note 2, sec. 3669 (1911).

⁶ 5 CHAMBERLAYNE, *op. cit. supra* note 2, sec. 3670 (1911).

⁷ 4 JONES, COMMENTARIES ON THE LAW OF EVIDENCE sec. 773 (1914).

⁸ *Ibid.*

extent, of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statement, or who was present when such transaction took place, or when such act was done or omitted."⁹ It is noticed at the time of the adoption of the code provision, all testimony concerning a transaction with the three specified classes was incompetent in an action by the survivor against the estate of either. Prior to any modification of this code provision, the Court of Appeals had expressed its dissatisfaction with its terms. In *Burk v. Louisville & Nashville Railroad Company*,¹⁰ the plaintiff sued the defendant railroad for injury received due to the alleged negligence of the defendant's engineer. Between the first and second trial of the case, the engineer died and the defendant relied upon an earlier Kentucky case¹¹ in which the court refused to allow the injured party's testimony where the defendant's engineer had died before the trial. In order to circumvent the applicability of the statute, the court held that the defendant railroad was present through the conductor when the act occurred and the testimony was admissible even though the engineer who caused the injury had since died. The court, after reviewing various legal writers' criticisms of the dead man's statute, stated: "The evident wishes of these great men do not make the law, but when we consider what they have said, and remember that each of the acts of the legislative branch of our government upon this subject has been an enabling act, we are persuaded that every witness offered should be allowed to testify, unless his exclusion is clearly required by our statutes."¹²

Six years after the *Burk* case in 1926, the dead man's statute was amended.¹³ The amendment excepted actions for personal injury, and death or damage to property by negligence or tortious acts.¹⁴ Available material concerning the amendment fails to reveal the basic reasoning for allowing testimony concerning an action founded in tort, while excluding testimony in other actions against the estate of the deceased. An influential member of the legislature at the time the amendment was adopted has suggested that the primary reason for its enactment was to allow testimony of the survivor of an automobile accident, as many claims were prevented because the surviving party was the sole witness.

The code provision as it now exists allows the survivor's testimony if the gravamen¹⁵ of the action sounds in tort but the testimony is inadmissible if the gravamen is in contract.¹⁶ This being true, in many factual situations, inconsistencies will result in the application of the code provision. Such an inconsistency might arise where a contract cause of action is co-existent with a tort cause of action.¹⁷ For instance, where a carrier-passenger relationship exists, if the passenger is injured through the negligence of the carrier he may sue for breach of contract or elect to sue in tort for the wrongful act.¹⁸

A more interesting situation arises where the tort committed has resulted in the unjust enrichment of the survivor at the expense of the deceased.¹⁹ The per-

⁹ KY. CODES, CIV. PROC. sec 606 (2) (1876).

¹⁰ 219 Ky. 163, 292 S. W 486 (1926).

¹¹ *Illinois Central R. R. v. Martin*, 33 Ky. L. Rep. 666, 110 S. W 815 (1908).

¹² *Burk v. Louisville & Nashville R. R.*, 219 Ky. 163, 165, 292 S. W 486, 487 (1926).

¹³ Ky. Acts c. 59, sec. 1 (1926).

¹⁴ *Ibid.*

¹⁵ Pomeroy points out the difficulty of determining the gravamen of an action. "It is sometimes impossible to decide which class of allegations constitute the gravamen of the action, and which is to be regarded as surplusage." POMEROY, CODE REMEDIES sec. 452 (5th ed. 1929).

¹⁶ *Browns, Bell & Cowgill v. Soper*, 287 Ky. 17, 152 S. W 2d 278 (1941).

¹⁷ POMEROY, CODE REMEDIES sec. 458 (5th ed. 1929).

¹⁸ PROSSER, TORTS 203 (1941).

¹⁹ *Id.* at 1118.

sonal representative of the deceased may choose which theory to pursue. He may bring an action in quasi contract and although no actual contract exists, the action must proceed upon the contract theory as a contract is implied by law.²⁰ Testimony of the survivor in this instance would be inadmissible. However, the personal representative may frame his cause of action in tort and the testimony of the survivor would be admissible under the exception excluding tort actions.

Therefore, in these situations as well as others,²¹ where a tort action is co-existent with a contract action and one of the parties has died subsequent to the transaction, it may be contended that the manner in which the cause of action is framed would be the determining factor as to whether the testimony would be admitted.

Furthermore, the exception of the code pertaining to tort actions has proved difficult for the courts to interpret and apply.²² In a recent federal case,²³ the court through dictum suggested that this difficulty could be eliminated by basing the admissibility of the evidence upon what the statement itself pertained to.

" If the statement was made in connection with a wrongful act and addressed itself to some phase of tort, it seemingly is competent. If it addressed itself to the contract, to a construction of or a waiver or a consideration of its terms, the exception created by the amendment does not apply and the statement is incompetent."²⁴ To admit the testimony on this theory is questionable. By the express terms of the amendment, is not the Legislature concerned with the form of the action as pleaded? The exception provides "except in actions for personal injury, death or damage to property by negligence or tortious acts." The emphasis placed upon "actions" would seem to refer to the form of the action as pleaded. Moreover, in the same case a part of the survivor's statements coming within the exception would be admissible and the other statements inadmissible. It is doubted whether this situation would eliminate the difficulty in applying the exception.

Due to the existing fallacies, it is contended that a definite change should be made regarding the Kentucky dead man's statute. It is suggested that either the tort exception be repealed and the testimony of the survivor be prohibited in all cases; or else the code provision should be repealed in its entirety and the testimony of the survivor be admitted in all cases. It is contended that the latter solution is the proper one to adopt. " a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule."²⁵ It is believed that two centuries of experience derived from the application of the dead man's statute have shown the fallacy of such a rule.

The statutes have not aided in protecting the estates of the deceased. The false claimant, in spite of the dead man's statute, if determined to prey upon the estate could make out a case sufficient to sustain a decision by getting testimony before the tribunal that is not within the exclusion. Therefore, the code provision has not to any great extent prevented the dishonest party from establishing his claim, and yet, it has prevented the truthful claimant from establishing a justifiable demand.

To permit the survivor of any transaction to testify will not result in large scale perjury. This has been proved in Kentucky where the testimony is admissible

²⁰ *Id.* at 1119.

²¹ *Id.* at 204.

²² See *Niles v. Luttrell*, 61 F. Supp. 778, 783 (W. D. Ky. 1945).

²³ *Niles v. Luttrell*, 61 F. Supp. 778 (W. D. Ky. 1945).

²⁴ *Id.* at 783.

²⁵ *Funk v. United States*, 290 U. S. 371, 381 (1933).

in tort cases. The cases fail to reveal any indication that the estates of the deceased have been attacked by false claimants.²⁹ It is only reasonable and logical that in those cases where the survivor gives his version of the facts, the court and jury will realize the peculiar situation and be extremely cautious in considering such testimony in arriving at a verdict.

Furthermore, even though the testimony of the survivor is admitted, the representative of the estate of the deceased is not left helpless against the survivor. In most cases, a substantial amount of evidence will be available to the representative of the deceased. Cross examination will also prove effective in revealing inconsistencies and falsehoods in the survivor's testimony. Moreover, since human nature is such that the dishonest statements of a person soon become generally evident, the reputation of the survivor for truth and veracity may be presented to the jury to discredit the survivor's testimony. After balancing the good and the bad effects of the dead man's statute, it is contended that the Kentucky statute should be repealed, thereby making the testimony of the survivor concerning a transaction with a deceased person admissible in evidence.

In conclusion, it is submitted that the dead man's statute in Kentucky works an injustice in many situations. The need for a change is evident, and in order to accomplish the desired result, Section 606 (2) should be repealed in its entirety and testimony of the survivor of a transaction with a deceased person should be admitted in any cause of action against the latter's estate.

JOHN J. LARKIN

²⁹ *Browns, Bell & Cowgill v. Soper*, 287 Ky. 17 152 S. W. 2d 278 (1941); *Hughes v. Bates' Adm'r.*, 278 Ky. 592, 129 S. W. 2d 138 (1939); *Kinsella v. Meyer's Adm'r.*, 267 Ky. 508, 102 S. W. 2d 974 (1937); *Melton's Adm'r. v. Robinson*, 270 Ky. 621, 110 S. W. 2d 428 (1937); *City of Catlettsburg v. Sutherland's Adm'r.*, 261 Ky. 535, 88 S. W. 2d 19 (1935); *Colston's Adm'r. v. Cincinnati, N. O. & T P R. R.*, 253 Ky. 512, 69 S. W. 2d 1072 (1934); *Warfield Natural Gas Co. v. Clark's Adm'r.*, 257 Ky. 724, 79 S. W. 2d 21 (1934).