

Washington University Law Review

Volume 23 | Issue 3

January 1938

The “Dead Man's Statute” in Missouri

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Recommended Citation

M. J. Garden, *The “Dead Man's Statute” in Missouri*, 23 WASH. U. L. Q. 343 (1938).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol23/iss3/9

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NOTES

THE "DEAD MAN'S STATUTE" IN MISSOURI

At common law all parties to the record¹ and parties interested in the event² were disqualified as witnesses. The foundation for this extensive disqualification³ was the belief that men are generally so corrupted by their interest that they will perjure themselves for it, and, therefore, that their testimony is worthless. Because of the many resulting hardships, the miscarriages of justice, and the strong doubt as to the soundness of the principle behind this rule, the legislatures in almost every jurisdiction have abolished this general rule,⁴ retaining, however, a vestige of this former disqualification in a form of exception.⁵

The Missouri statute on this subject is as follows

No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility: *Provided*, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided, and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator: *Provided further*, that in actions for the recovery of any sum or balance due on account, and when the matter at issue and

1. 1 Greenleaf, *Evidence* (16th ed. 1899) sec. 329.

2. *Id.*, sec. 386; Note (1933) 46 Harv. L. Rev. 834.

3. 1 Wigmore, *Evidence* (2nd ed. 1923) 999, sec. 576; Note (1864) 4 Amer. L. Reg. (N. S.) 74, 75; Note (1933) 46 Harv. L. Rev. 834.

4. 1 Wigmore, *op. cit.*, sec. 578; *Lampe v. Franklin Amer. Trust Co.* (Mo. 1936) 96 S. W. (2d) 710, 714; *Signaigo v. Signaigo* (Mo. 1918) 205 S. W. 23, 30.

5. 1 Wigmore, *op. cit.*, 1006-1007, sec. 578; Note (1933) 46 Harv. L. Rev. 834.

on trial is proper matter of book account, the party living may be a witness in his own favor so far as to prove in whose handwriting his charges are, and when made, and no farther.⁶

The difficulty in understanding and reconciling many of the decisions under this statute is quite evident from the following statements by our courts

The statute has not been construed with any considerable degree of consistency, nor upon any uniform theory.⁷

The statute is plain as it reads, but judicial glosses have made it obscurer than any other on our books.⁸

Our statute * * * has been prolific of decisions, which we despair of reconciling.⁹

A presentation of some of the specific problems which have arisen in applying the so-called "Dead Man's Statute" will illustrate this confusion and shed some light upon the factors responsible for this condition.

THE PURPOSE OF THE STATUTE—ITS EFFECT ON DECISIONS

The legislative policy behind this enactment is, fundamentally, that which underlay the common-law rule, namely, to prevent an interested living party from obtaining undue advantages against the representatives or successors in interest of the deceased party to the contract or cause of action in issue and on trial, who is unable to confront the survivor, or give his version of the affair, or expose the omissions, mistakes, or falsehoods of such survivor. The temptation to perjure and conceal when the other party is dead is considered too great to permit the survivor to testify in his own behalf. To allow him to testify, it is believed, would place in great peril the estate of the deceased, and would in fact make it an easy prey for the dishonest and unscrupulous.¹⁰ A

6. R. S. Mo. (1929) sec. 1734. Prior to 1865 this section simply provided generally that no one should be excluded as a witness because of his interest in the action. R. S. Mo. (1855) p. 1576. Its main features were added in 1865 by copying from the laws of Vermont. G. S. 1865, p. 586. The amendment of 1887, Laws 1887, p. 287, added the provision in regard to suits by parties claiming under persons who are disqualified from testifying, and the words "to such contract or cause of action" to the first proviso.

7. Fink v. Hey (1890) 42 Mo. App. 295, 297; see also Dougherty v. Strong (1926) 313 Mo. 35, 281 S. W. 445, 448; Lieber v. Lieber (1911) 239 Mo. 1, 143 S. W. 458, 465.

8. McMorrow v. Dowell (1905) 116 Mo. App. 289, 90 S. W. 728, 731.

9. Supreme Council Royal Arcanum v. Bevis (1904) 106 Mo. App. 429, 80 S. W. 739, 740.

10. Lieber v. Lieber (1911) 239 Mo. 1, 143 S. W. 458, 461; Scott v. Burfeind (Mo. App. 1906) 92 S. W. 175, 176; Stone v. Hunt (1893) 114 Mo. 66, 21 S. W. 454, 455.

second purpose is to place the interested parties to a suit upon terms of substantial equality in regard to the opportunities of presenting testimony, by establishing a rule of mutuality, *i. e.*, when the lips of one are closed by death, the lips of the other are silenced by law.¹¹ And a third function of the statute is to prevent the delayed assertion and dragging on of claims in the hope that the other parties thereto will die, in order to secure the advantage of evidence on one side which can no longer be challenged by the other.¹²

There is a subtle, but nonetheless effective human factor in the practical application of this statute, and many decisions which seem logically impossible of reconciliation may be explained by the fact that the approach in one case differed from that in another.¹³ Some courts have construed the statute with an eye to its spirit and purposes. They have felt that to carry the statute to its literal and logical extreme would turn it into an instrument of injustice, and, consequently, have often admitted or rejected testimony in a manner attributable largely to their belief that the *spirit* of the statute thereby would be more effectively satisfied.¹⁴ Other judges have realized that the surviving party in the particular case before them had either a just or an improper claim, and have, therefore, strained both the letter and the spirit of the statute in order to admit or reject the testimony as the moral circumstances impelled.¹⁵ Still others have felt that the statute as a whole imposes unjust and undesirable restrictions upon the introduction of testimony, and that it should be abolished or revised. They have, therefore, gradually rendered these restrictions ineffective by declaring new exceptions, and

11. *Scott v. Cowen* (1917) 274 Mo. 298, 195 S. W. 732, 735; *Hattersley Brokerage & Comm. Co. v. Hume* (1916) 193 Mo. App. 120, 182 S. W. 93, 95; *Galvin v. Knights of Father Mathew* (1913) 169 Mo. App. 496, 155 S. W. 45, 51.

12. *Freeman v. Berberich* (1933) 332 Mo. 831, 60 S. W. (2d) 393, 399; *Crow v. Crow* (1907) 124 Mo. App. 120, 100 S. W. 1123, 1125.

13. For an excellent presentation of the importance of this fact see Judge Lamm's opinion in *Bishop v. Brittain Inv. Co.* (1910) 229 Mo. 721, 129 S. W. 668, 675.

14. In *Stone v. Hunt* (1893) 114 Mo. 66, 21 S. W. 454, 455, the court said, "Accordingly the course of our decisions has been to follow the spirit, rather than the strict letter of the law." See also *Atkinson v. Hardy* (1908) 128 Mo. App. 349, 107 S. W. 466, 467.

15. *Freeman v. Berberich* (1933) 332 Mo. 831, 60 S. W. (2d) 393, 401. Our courts generally do not expressly state that they adhere to any particular theory in deciding the case before them. A study of the decision reached, the arguments of counsel accepted and rejected, and the tenor of the opinion, however, immediately informs the reader as to the approach followed by that court.

finding new interpretations.¹⁶ The more recent cases seem to have stressed this latter construction of the statute.¹⁷ Other decisions have placed a strict interpretation upon the statute, and have considered the letter and logical sequence as being all-important.¹⁸ Considering these conflicting philosophies of judges and the fact that the statute is very technical and difficult to understand, let alone apply, it is not surprising that the decisions are conflicting and frequently impossible of reconciliation.

CONSTRUCTIONS OF STATUTE—BASIS OF DISQUALIFICATION

There have been from time to time three lines of decisions in this state construing the relationship of the provisos of the statute to the general enacting clause.¹⁹ One group of decisions which follow *Rood v. Banking House*²⁰ have held that the death of one party to the contract or cause of action in issue and on trial was the sole basis for the disqualification of the other party thereto. It was unimportant that the survivor to the contract or cause of action in issue and on trial lacked an interest in the suit. In this respect, the statute was disabling as well as enabling, since a party who had no interest in the litigation, was a competent witness at common law.²¹ This construction, it seems, not only greatly limited the competent testimony admissible under the statute, but imposed a hardship not intended by the framers, since the primary purpose of this enactment is directed against the testimony of the interested party, who, supposedly, has an incentive to be biased and to perjure himself, rather than against that of a disinterested witness, who, although a survivor to the

16. *Id.* at 400; see also *Chapman v. Dougherty* (1885) 87 Mo. 617, and note the manner in which it overruled *Bradley v. West* (1878) 68 Mo. 69.

17. For a discussion of this general trend see *Freeman v. Berberich* (1933) 332 Mo. 831, 60 S. W. (2d) 393, and *Signaigo v. Signaigo* (Mo. 1918) 205 S. W. 23.

18. In *Poague v. Mallory* (1921) 208 Mo. App. 395, 235 S. W. 491, 495, the court in rejecting a very tenable construction, and in following the more logical and severe one said: "The answer to this is that we are not dealing with what is fair, but with the command of a statute." See also *Norwell v. Cooper* (1911) 155 Mo. App. 445, 134 S. W. 1095, 1095.

19. Note (1925) 10 ST. LOUIS LAW REVIEW 101.

20. (1896) 132 Mo. 256, 33 S. W. 816, 817. The important part of the decision is the determination that where *A* contracts with *B* who is the agent of *C*, the death of *A* disqualifies *B* whether *B* is interested in the event or not. The *Rood* case has been followed in *Green v. Ditsch* (1898) 143 Mo. 1, 44 S. W. 799; *Edmonds v. Scharff* (1919) 279 Mo. 78, 213 S. W. 823; *Lawhon v. St. Joseph Laboratories* (Mo. 1923) 252 S. W. 44.

21. *McMorrow v. Dowell* (1905) 116 Mo. App. 289, 90 S. W. 728, 732. "But it is a disabling statute, too, and we think that in providing for the disability of the survivor of two parties to an agreement the Legislature was not greatly concerned about whether or not he would have been competent to testify at common law."

contract or cause of action, has no interest in the suit.²² It was the interest of the witness and not the survivorship which disqualified the witness at common law, and the statute was passed to abolish this general disqualification, retaining it, however, in the instances embodied in the provisos.²³

Following a second construction, the Supreme Court *in banc* in the recent case of *Bernblum v. Travelers Insurance Co. of Hartford, Conn.*,²⁴ definitely settled this long controversy by re-affirming those cases which had overruled the *Rood* case,²⁵ and held that the statute is intended to be a qualifying and not a disqualifying enactment, except where it adds a new specific disqualification of its own.²⁶ In permitting an agent to testify, although he was the surviving party to the contract in issue and on trial, the court said

The result of holding that the original party to the contract, within the meaning of the statute, whose death disqualifies the other party, is the person (contracting agent) who negotiated the contract, rather than the person in whose interest it was made, necessarily makes the death of the agent disqualify the original party, who contracted with him and who was disqualified at common law because of his interest as a party; but the death of an original party does not necessarily require the disqualification of the contracting agent (of the other party) who was a competent witness at common law and is not specifically disqualified by the statute.²⁷

Under this ruling, therefore, any witness competent at common law, remains competent under the statute, with the exception noted. It follows, therefore, that unless the statute specifically provides to the contrary, two factors must combine before a witness is disqualified, namely, he must be the surviving party to the contract or cause of action in issue and on trial, and he must have an interest in the event.

22. *Supra*, note 10.

23. *Supra*, note 3.

24. (Mo. 1937) 105 S. W. (2d) 941. Here the agent who negotiated the contract was held competent to testify thereto, although the other party to the contract was dead.

25. This second construction had been followed in *Signaigo v. Signaigo* (Mo. 1918) 205 S. W. 23; *Wagner v. Binder* (Mo. 1916) 187 S. W. 1128; *Clark v. Thias* (1903) 173 Mo. 628; 74 S. W. 623; *Stanton v. Ryan* (1867) 41 Mo. 510.

26. The statute expressly provides that a witness cannot testify in favor of a party claiming under him, although the witness is no longer interested in the event and would have been competent at common law.

27. *Bernblum v. Travelers Ins. Co. of Hartford, Conn.* (Mo. 1937) 105 S. W. (2d) 941, 945.

It is possible under this construction, however, for a party to be both the survivor to the contract or cause of action in issue and on trial and interested in the suit, and yet be a competent witness in his own favor. This results from the fact that at common law there existed certain exceptions to the disqualification-for-interest rule, and since it is not the purpose of the statute to disqualify witnesses who were not disqualified before its enactment, except where the statute adds a new specific disqualification of its own, these witnesses remain competent under the statute. These common-law exceptions are the following:²⁸ (1) interested witnesses were permitted to prove, by their own oath, their books of original entries, in order to maintain actions of account or *assumpsit*;²⁹ (2) a party to the suit who had already proved that the deceased, against whom the evidence was offered, had been guilty of some fraud, or other tortious and unwarrantable act of intermeddling with the complainant's goods, and no other evidence could be had of the amount of damages, could testify to such damages;³⁰ (3) a witness for the prosecution was admitted to testify, though he was entitled, upon conviction of the offender, to a reward from the government, a restoration of the property claimed as stolen, or a portion of the fine or penalty inflicted;³¹ (4) a party was not deprived of testimony of a witness whose interest had arisen by his own act, and without the interference of the party calling him, after the fact happened concerning which he was called to testify;³² (5) an interested witness was competent to prove the loss of a written instrument;³³ and, (6) interested agents, carriers, brokers, or servants, when called to prove acts done for their principals in the course of their employment.³⁴ This last exception has caused a great deal of difficulty.³⁵

It is obvious that inasmuch as the statute is now construed to be an enabling one, in these latter few instances, its principal

28. 1 Greenleaf, *op. cit.*, sec. 411; *Wagner v. Binder* (Mo. 1916) 187 S. W. 1128, 1152-1153.

29. The extent of this exception is stated in *Phenix v. Prindle* (Conn. 1787) Kirby 207, 207. "Regularly, it goes no farther than to the quantity, quality, and delivery of the articles charged."

30. 1 Greenleaf, *op. cit.*, sec. 348.

31. *Id.* at 899, sec. 412. The basis of this exception is stated to be that "The public has an interest in the suppression of crime, and the conviction of criminals."

32. *Id.*, sec. 418.

33. *Id.*, sec. 349; *Hamra v. Orten* (1921) 208 Mo. App. 36, 233 S. W. 495, 495.

34. 1 Greenleaf, *op. cit.*, secs. 416-417.

35. *Infra* subtopic E. Interest As Agent—Officer Of Corporation—Stockholder—Partner.

purposes will be utterly unaccomplished. The surviving party to the contract or cause of action in issue who is also interested in the event in these situations is permitted to present evidence in his own behalf, often without fear of contradiction or explanation—the very condition which the statute attempts to prevent.

A third construction, seldom followed by our courts, had been to regard the provisos as exceptions to the general remedial provision which precedes them. In other words, death was the underlying reason for the disqualification, but the disqualification became operative only in the presence of an interest on the part of the survivor. In this respect, the statute disqualified the survivor to the contract or cause of action who was interested in the event, regardless of his competency at common law.³⁶ Under this view, an equitable result seemed attainable, since the survivor who had no interest remained competent, as he was at common law, but *all* surviving parties who had an interest in the suit, and would, therefore, be calculated to perjure themselves, were disqualified. This construction, in other words, retained the desirable result reached in the *Bernblum* case of not disqualifying disinterested survivors to the contract or cause of action, and further eliminated the few instances in which an interested survivor to the contract or cause of action is permitted to testify.

The statute expressly provides two situations in which a witness is disqualified, although he is not the surviving party to the contract or cause of action in issue and on trial, and also interested in the event. They are, first, where the survivor, although no longer interested in the event, desires to testify "in favor of any party to the action claiming under him," and, second, a party to the "suit or proceeding," although not the survivor to the contract or cause of action in issue and on trial "whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification."

NATURE OF DISQUALIFYING INTEREST

A. In General

In determining the nature of the disqualifying interest, our courts³⁷ have adhered to the common-law test, which is as follows³⁸

36. *Martin v. Abernathy* (1926) 220 Mo. App. 76, 278 S. W. 1050, 1050; *Allen v. Jessup* (Mo. 1917) 192 S. W. 720, 723-24; *Daniels v. Goeke* (Mo. App. 1915) 176 S. W. 301, 303.

37. *Wagner v. Binder* (Mo. 1916) 187 S. W. 1128, 1151, where the common-law criterion of interest and its application under our statute is clearly presented.

38. 1 Greenleaf, *op. cit.*, sec. 386.

The disqualifying interest, however, must be some legal, certain, and immediate interest, however minute, either in the event of the cause itself,³⁹ or in the record as an instrument of evidence, in support of his own claims, in a subsequent action.⁴⁰ It must be a legal interest, as distinguished from the prejudice or bias, resulting from friendship or hatred, or from consanguinity, or any other domestic or social or any official relation, or any other motives by which men are generally influenced.

A reference to the common-law cases which have presented the question of whether an interest in the event did or did not exist supplies one with a voluminous source of authority as to the nature of the interest necessary to disqualify.⁴¹ Liability of the witness to a like action, or where the witness has a claim arising out of the same facts to which he is called to testify, does not disqualify the witness providing the verdict in that suit cannot be given in evidence for or against him in the subsequent action to which he is to be a party. Such a witness is interested in the question only, and not in the event of the cause in issue and on trial.⁴² Additional typical situations in which the witness was held not to have such an interest in the event so as to be disqualified are the following:⁴³ (1) a mother or father in favor of their children;⁴⁴ (2) children in favor of their parents;⁴⁵ (3) an attorney in behalf of his client, although the facts showed conclusively that the client's only hope of remunerating the attorney was to succeed in the action in issue and on trial;⁴⁶ (4) the wit-

39. *Id.* at 883, sec. 390. "That he will either gain or lose by the direct legal operation and effect of the judgment * * *. It must be a present, certain and vested interest, and not an interest uncertain, remote, or contingent."

40. *Id.*, sec. 404.

41. *Id.*, secs. 386-406.

42. Thus where *A* and *B* each claim *separate* gifts from the deceased, *A* may testify as to the deceased's gift to *B*, and *B* may testify as to the deceased's gift to *A*, although neither may testify to his own gift from the deceased. *Bank v. Fennewald* (Mo. App. 1928) 2 S. W. (2d) 207; *Townsend v. Schaden* (1918) 275 Mo. 227, 204 S. W. 1076, 1079. The same result is reached where *A* and *B* are plaintiffs in the same action providing their claims are separate. *Allen Estate Ass'n v. Boeke & Son* (1923) 300 Mo. 575, 254 S. W. 858.

43. Although the witness may be interested in the event, if he is not also the survivor to the contract or cause of action in issue and on trial, he is competent to testify in his own behalf, since the statute is expressly limited to such survivors.

44. *O'Neil v. Stratton* (C. C. A. 8, 1933) 64 F. (2d) 911; *Curtis v. Alexander* (Mo. 1923) 257 S. W. 432.

45. *Anderson, Adm'r of Gentry v. Hance* (1871) 49 Mo. 159.

46. *Birge v. Rhinhart* (1873) 36 Iowa 369, in which the common-law criterion of interest was followed.

ness who would avoid the necessity of bringing another suit if the party for whom he testified succeeded;⁴⁷ (5) an heir apparent;⁴⁸ (6) where the result of a verdict for demandant in an action involving a boundary would be to establish that the demandant's patent did not conflict with that of the witness;⁴⁹ (7) to testify to a contract of marriage between the witness and the deceased, in order to establish the plaintiff's legitimacy and right to take as heir of the deceased, thus practically assuring the witness of dower rights in the estate;⁵⁰ (8) an attorney for his client, although the fee was contingent upon the successful termination of the particular litigation;⁵¹ and, (9) to testify to the parol dedication of land by the deceased to the city, where the witness owned the adjoining property and was interested in having the street remain a public thoroughfare, so that the market value of his property would not decrease.⁵²

These cases illustrate that the test of the interest necessary to disqualify is merely a rule of thumb, rather than one based on whether the witness is *actually* interested. The fact that the witness will positively be enriched or benefited is not always sufficient to exclude him. It must appear that such enrichment or benefit will result from an interest in the event.

If a witness was equally interested in both sides, he was not incompetent at common law; yet if there was a certain excess of interest on one side, he was incompetent to testify for that party; for he was interested to the amount of the excess, in procuring a verdict for the party in whose favor his interest preponderated.⁵³ Inasmuch as our statute is an enabling one, and our courts follow the common-law standard of the interest necessary to disqualify, these rules would probably be followed by our courts.

The interest necessary to disqualify must exist at the date of the trial, and it is immaterial that a witness may have been interested and incompetent at some time previous thereto.⁵⁴ Thus an interested disqualified witness may be rendered competent by a release of his interest in the event prior to the time of suit.⁵⁵ A

47. *Franklin v. Kidd* (1916) 219 N. Y. 409, 114 N. E. 839, 840.

48. *Tucker v. Gentry* (1902) 93 Mo. App. 655, 67 S. W. 723.

49. *Masters v. Varners Ex'rs* (Va. 1848) 5 Gratt 168.

50. *McCullough v. McCullough* (1860) 31 Mo. 226, 229.

51. *Mott v. Bernard* (1902) 97 Mo. App. 265, 70 S. W. 1093.

52. *City of Puxico v. Harbin* (Mo. App. 1923) 252 S. W. 393, 394.

53. 1 *Grenleaf, op. cit.*, sec. 420.

54. See *Fink v. Hey* (1890) 42 Mo. App. 295, 297, for an excellent presentation of the operation of this rule.

55. 1 *Greenleaf, op. cit.*, 426, sec. 419; *Hogg v. Breckenridge* (1849) 12 Mo. 369.

witness, however, remains incompetent if he is testifying in favor of a party "claiming under him," although he lacks an interest in the event at the time of the suit, since the statute expressly so provides.

In the following situations the witness has been held to be interested in the event: (1) liability over, *e. g.*, for bail or surety. It is sufficient that the witness is bound to indemnify the party calling him against the consequence of some fact essential to the judgment. It is not necessary that there should be an engagement to indemnify him generally against the judgment itself;⁵⁶ (2) heirs at law of a deceased party;⁵⁷ (3) a party having an equitable interest in the subject matter in issue and on trial;⁵⁸ (4) distributees of an estate;⁵⁹ and, (5) where the witness had a contract with the plaintiff to receive half of the profits of the plaintiff's contract with the deceased.⁶⁰

B. Liability For Costs, Trustee, Guardian Ad Litem, etc.

The common-law rule excluding parties from being witnesses applied to all cases where the party had any interest in the event, even though it was only a liability for costs.⁶¹ "Such was the case of a *prochein ami*, a guardian, an executor or administrator, and so also of trustees and the officers of corporation, whether public or private, wherever they are liable in the first instance for the costs, though they may have a remedy for reimbursement out of the public or trust funds."⁶² This rule had been held applicable also to actions in equity, although costs were discretionary.⁶³ Although this point has not been directly ruled upon in Missouri,⁶⁴ other jurisdictions which adhere to the common-law test of the interest necessary to disqualify, have uniformly held such a party to be incompetent,⁶⁵ and there is little doubt but that our courts would reach the same conclusion, since we unswerv-

56. 1 Greenleaf, *op. cit.*, sec. 397.

57. *Graves v. Ravenscraft, Adm'r v. Priest* (1822) 1 Mo. 214.

58. *Fink v. Hey* (1890) 42 Mo. App. 295, 298-299.

59. *Hyde v. Honiter* (Mo. App. 1903) 158 S. W. 83.

60. *McClure v. Clements* (1911) 161 Mo. App. 23, 143 S. W. 82.

61. 1 Greenleaf, *op. cit.*, secs. 401-402.

62. *Id.*, secs. 347, 401 and 402.

63. *Id.*, sec. 402.

64. In *McCullough v. McCullough* (1860) 31 Mo. 226, 229, the beneficiary rather than the trustee brought the action, and the court held the trustee competent as a witness on the basis that since he was not liable for costs he was not interested in the event. This suggests a means of rendering the trustee competent in behalf of his trust estate.

65. Comment (1927) 27 Col. L. Rev. 739, 740; *Crocker v. New York Trust Co.* (1927) 245 N. Y. 17; *Smith v. Perry* (1897) 52 Neb. 738, 73 N. W. 282.

ingly follow the common-law criterion of interest.⁶⁶ Thus we find that witnesses, who actually have nothing to lose, are disqualified on the basis of their interest in the event, whereas witnesses who actually have everything to gain are competent because they lack an interest in the event.

A "nominal" or "unnecessary party" to a suit who is not liable for costs is not incompetent, since, in any event, he stands to gain or lose nothing by the judgment, and, therefore, is not interested in the event.⁶⁷

C. Interest Must Be Adverse

The surviving party to the contract or cause of action in issue and on trial has been held competent to testify against his interest,⁶⁸ or where his interest with the deceased was of a "joint or mutual nature."⁶⁹

D. Husband And Wife

Since the 1921 enactment, a husband and wife have been competent witnesses for or against each other in all civil cases, except as to confidential communications.⁷⁰ The test of their competency in behalf of each other under the "Dead Man's Statute," therefore, is the same as applies to the ordinary witness, with the exception noted. The difficulty arises, however, in determining whether one has an interest in the event when the other is a party to the suit.

In an action involving personalty, either spouse is competent to testify in behalf of the others, since a judgment for or against the one is not *directly* or by its immediate effect of any benefit or detriment to the other.⁷¹ Where a husband sues to secure or retain the possession of land, however, the wife has a substantial interest in the case itself to the extent of her vested marital rights in said land.⁷² There is authority in other jurisdictions for the proposition that the wife's inchoate estate of dower which

66. If, however, the trustee is indemnified against all possible costs, he is no longer interested in the event, and is competent as in other instances where the witness is released of his interest. 1 Greenleaf, *op. cit.*, sec. 401, and sec. 347 fn. 2; *supra*, note 55.

67. Nordquist v. Nordquist (1929) 321 Mo. 1244, 14 S. W. (2d) 583, 588; Paris v. Erisman (Mo. 1927) 300 S. W. 487, 489.

68. Dougherty v. Strong (1926) 313 Mo. 35, 281 S. W. 445, 448.

69. Milligan v. Milligan Grocer Co. (1921) 207 Mo. App. 473, 233 S. W. 506, 509, where the surviving directors were held competent to testify to the transaction with the deceased director on the basis that directors are charged "jointly and mutually, and not adversely."

70. R. S. Mo. (1929) sec. 1728. Laws 1921, p. 392.

71. Ragsdale v. Achuff (1930) 324 Mo. 1159, 27 S. W. (2d) 6.

72. R. S. Mo. (1929) sec. 318.

would accrue should the husband succeed in the action instituted is an interest in the event so as to disqualify her.⁷³ Missouri courts, however, adhere to the general rule which does not disqualify the wife in favor of her husband on the basis that her marital rights may be eventually gained or lost by such suit, because the judgment does not, by its own terms, bind her to recognize or give up such rights, and therefore, according to the common-law definition, she has merely an interest in the question, rather than an interest in the event.⁷⁴ Practically, however, the possibility of an independent suit by the wife to regain such marital rights when the husband has lost in the first action is, to say the least, very remote. The wife, it seems, is vitally interested and affected by the litigation in issue and on trial, since she has a vested interest in his realty which cannot be defeated unless she joins in the conveyance. In a suit by the wife involving realty, the husband may testify in her behalf, since his marital rights do not constitute an interest in the event.⁷⁵ His marital rights, however, are contingent, and may be defeated by the wife's conveyance prior to her death without his consent, and therefore his interest in the suit is rather remote.⁷⁶

*E. Interest As Agent—Officer Of Corporation—
Stockholder—Partner*

It is generally stated that interested agents, carriers, factors, brokers and servants were not incompetent at common law to testify in actions to which their respective principals were parties where no question of exceeding their powers was involved.⁷⁷ This rule was based upon "public convenience and necessity."⁷⁸ Where the principal called his own servant or agent to prove an injury to his property, while in the care and custody of the servant or agent, however, the agent was held incompetent at common law, because of his interest. A verdict favorable to the principal would

73. *Wylie v. Charlton* (1895) 43 Neb. 840, 62 N. W. 220.

74. In *Martin v. Abernathy* (1926) 220 Mo. App. 76, 278 S. W. 1050, 1051, the court said, "As to her interest, the only possible interest she could have had in the outcome of the trial was the interest she might have had because of the marital relationship. While that interest would possibly affect her credibility as a witness, it is not such an interest as would make her incompetent to testify." See also *Hughes v. Renshaw* (1926) 314 Mo. 95, 282 S. W. 1014; *Laska v. Kripteck* (1933) 261 N. Y. 126, 184 N. E. 722, 734.

75. *Hughes v. Renshaw* (1926) 314 Mo. 95, 282 S. W. 1014 (Deed to co-grantees. On death of grantor, wife of one co-grantee held competent, and husband of other co-grantee also held competent).

76. R. S. Mo. (1929) sec. 319.

77. 1 Greenleaf, *op. cit.*, secs. 411, 416, and 417.

78. *Ibid.*

place the servant or agent in a state of security against any action which otherwise, the principal might bring against him; and to the extent of preventing this eventuality, the agent is directly interested in fixing the liability on the other party.⁷⁹ A release by the principal of the agent's possible liability, therefore, rendered the agent competent.⁸⁰ A possible reconciliation of these two common-law rules⁸¹ lies in the fact that in those cases where the interested agent had been held competent, his interest, generally, was in the question involved rather than in the event, and therefore there existed no basis for disqualifying him, nor any true exception to the common-law disqualification for interest rule in the case of an agent actually interested in the event.⁸²

Since our statute is now construed as an enabling one, the agent interested in the event, being competent at common law, should remain competent under our statute although he is also the survivor to the contract or cause of action in issue and on trial, and generally our courts have so held.⁸³ Some courts, however, have realized the great injustice which would result in allowing an interested surviving agent unrestricted power to testify concerning the contract or cause of action, and, although admitting the statute to be an enabling one, have ruled the interested surviving agent to the contract in issue and on trial incompetent on the following basis

* * * the agent may testify if the latter's interest extends no further than his relationship to his principal: but if it appears, in addition, that there exists a present, actual, and vested interest in the matter by the agent, he *becomes a principal so far as concerns his right to testify*.⁸⁴

Where the agent of the deceased is also one of the adverse contracting parties, he occupies a double status. His position as agent has been here disregarded, and he has been disqualified as

79. Id., sec. 396.

80. Id., secs. 419 and 426.

81. This conflict is recognized by Mr. Greenleaf. Id., 888-889, sec. 396.

82. A study of the factual configurations of the common-law cases which have dealt with the competency of an agent or servant to testify seem to lead to this conclusion.

83. *Wagner v. Binder* (Mo. 1916) 187 S. W. 1128, 1152-1153, recognizes as a general principle the right of an interested surviving agent to testify. See also *Bernblum v. Travelers Ins. Co. of Hartford, Conn.* (Mo. 1937) 105 S. W. (2d) 941, 945; *Bates v. Forcht* (1886) 89 Mo. 121, 1 S. W. 120.

84. *Allen v. Jessup* (Mo. 1917) 192 S. W. 720, 723 (italics supplied). The husband acted as agent for the wife. The court admitted that the husband, since he was an agent, would have been competent to testify to his dealings with the deceased if he had not also been interested in the event.

being the surviving interested party to the contract or cause of action in issue and on trial.⁸⁵

Where a partner enters into a contract or transaction in behalf of the partnership, he is incompetent on the death of the other party thereto, since he is actually an interested principal rather than an interested agent to the contract in issue and on trial.⁸⁶

An officer of a corporation has no interest in the event in a suit by the corporation, and is, therefore, competent in such action.⁸⁷

Shareholders acting as agents for the corporation have been held competent on the theory that although they are interested in the event, being agents, they were competent at common law whether interested or not, and our statute retains this competency.⁸⁸ Some decisions have also held that the shareholders are not interested in the event on the basis that they are not the persons for whose immediate benefit the suit is brought, but are separate and distinct from the corporation asserting the claim.⁸⁹

WHO IS A "PARTY TO THE CONTRACT OR CAUSE OF ACTION IN ISSUE AND ON TRIAL"?

Our courts have generally held that the parties to the contract in issue and on trial are those who negotiate it rather than the persons in whose name and interest it is made.⁹⁰ "Literally," however, the parties liable on the contract, are the real parties thereto, rather than the negotiators,⁹¹ but to so hold would render the statute extremely undesirable.⁹² A mere "bystander," who is

85. *Scott v. Cowen* (1917) 274 Mo. 298, 195 S. W. 732 (witness was one of the makers of the note as well as agent for the deceased payee); *Lyngar v. Shafer* (Mo. App. 1907) 102 S. W. 630.

86. *Robertson Bros. v. Garrison Estate* (Mo. App. 1929) 21 S. W. (2d) 202, 203; *Green Real Estate Co. v. St. Louis Mutual House Bldg. Co.* (1906) 196 Mo. 358, 93 S. W. 1111.

87. *Old Bank of Stoutsville v. Curtiss* (Mo. App. 1924) 260 S. W. 812, 815; *Kuhn v. Germania Life Ins. Co.* (1897) 71 Mo. App. 305.

88. *Bates v. Forcht* (1886) 89 Mo. 121, 1 S. W. 120; *Kuhn v. Germania Life Ins. Co.* (1897) 71 Mo. App. 305.

89. *Old Bank of Stoutsville v. Curtiss* (Mo. App. 1924) 260 S. W. 812; *Barclay v. Globe Mutual Ins. Co.* (1858) 26 Mo. 490, 491.

90. *Bernblum v. Travelers Ins. Co. of Hartford Conn.* (Mo. 1937) 105 S. W. (2d) 941, 945; *Clark v. Thias* (1903) 173 Mo. 628, 74 S. W. 623; *Note* (1925) 10 ST. LOUIS LAW REVIEW 101.

91. This proposition was advanced by Commissioner Hyde in *Freeman v. Berberich* (1933) 332 Mo. 831, 60 S. W. (2d) 393, 400.

92. The death of the principal would disqualify the party contracting with the agent, although the agent was alive. The death of the contracting agent would not disqualify the other party to the contract, providing the principal was alive. Neither of these results seem desirable if the purposes of the statute are to be accomplished.

present when the contract is entered into, is not considered to be a party thereto.⁹³

When, therefore, the party contracting with the agent dies the latter is competent to testify concerning the contract although he is the other party thereto:⁹⁴ if such agent is not interested in the event, on the basis that he was competent at common law, and our statute does not disqualify him;⁹⁵ if interested in the event, on the same basis, providing the court concedes that an interested agent was competent at common law.⁹⁶ Under *Rood v. Banking House*⁹⁷ which held that death alone was sufficient to disqualify the survivor to the contract, the agent, upon the death of the other party to the contract, was incompetent whether he was interested in the event or not.⁹⁸ The view which construed the provisos as relating only to interested survivors, disqualified the interested agent, but not one who possessed no interest in the event.⁹⁹

Some cases indicate that the agent is not the other party to the contract in issue and on trial.¹⁰⁰ This *dicta*, it seems, should not be considered too seriously, because these same cases clearly and expressly base the agent's competency on the fact that he was competent at common law, and therefore remains competent under the statute which is an enabling one.¹⁰¹ Since the statute applies only to the *other party* to the contract in issue and on trial, if these cases had not considered the agent to be the other party to the contract, that fact alone would have rendered him competent, regardless of his competency at common law. Conclusive proof that the agent who negotiates the contract is considered to be a party thereto is the fact that the death of the agent has unanimously been held to disqualify the *interested* other party to the contract upon the basis that the agent, the

93. *Yawitz v. Laughlins' Estate* (Mo. App. 1934) 68 S. W. (2d) 830, 831 (witnesses also held not to be interested in the event, and competent to testify on that basis alone); *Hattersley Brokerage & Comm. Co. v. Hume* (1916) 193 Mo. App. 120, 182 S. W. 93, 95.

94. *Bernblum v. Travelers Ins. Co. of Hartford Conn.* (Mo. 1937) 105 S. W. (2d) 941; *Wagner v. Binder* (Mo. 1916) 187 S. W. 1128; *Clark v. Thias* (1903) 173 Mo. 628, 74 S. W. 623.

95. *Supra*, notes 24 and 25.

96. *Supra*, notes 77 and 83.

97. (1896) 132 Mo. 256, 33 S. W. 816, 817.

98. *Supra*, notes 20 and 21.

99. *Supra*, note 36.

100. *Wagner v. Binder* (Mo. 1916) 187 S. W. 1128, 1154.

101. *Id.* at 1152-1154, where the court discusses the competency of the agent at common law whether he was interested in the event or not, and concludes that since the statute is an enabling one such agents are now competent because they are not expressly disqualified by the statute.

"other party" to the contract in issue and on trial, is dead.¹⁰² Furthermore, the death of the principal does not disqualify the party contracting with the agent, since the other party to the contract, the agent, is alive.¹⁰³

The term "cause of action" has not been uniformly defined.¹⁰⁴ Some jurisdictions treat it as identical with another term, "right of action," referring to the legal right which the plaintiff seeks to enforce in the action.¹⁰⁵ "Cause of action" has also been interpreted as the "aggregate of operative facts" which give rise to the plaintiff's right to legal redress.¹⁰⁶ In *Freeman v. Berberich*¹⁰⁷ the Supreme Court of Missouri overruled *Leaveva v. Southern Ry. Co.*,¹⁰⁸ and held that the party to the cause of action in suits *ex delicto* for personal injuries is the master, rather than the servant who was acting in his behalf. The death of the servant, therefore, was held not to disqualify the surviving interested party to the accident. This decision is sustainable upon the former definition of "cause of action." The latter meaning, however, would lead to a contrary conclusion, since the master is not a party to these facts, but is merely responsible for their creation. The court, in addition, based its conclusion upon the following practical grounds

We do not, however, think there is any reason to justify its application to actions *ex delicto* for personal injuries, *except* as to the actual parties to the cause of action in issue and on trial. While it may logically be said that a deceased

102. In *Bernblum v. Travelers Ins. Co. of Hartford Conn.* (Mo. 1937) 105 S. W. (2d) 941, 945, these cases are collected; *Williams v. Edwards* (1888) 94 Mo. 447, 7 S. W. 429.

103. *Jackson v. Smith* (Mo. App. 1909) 118 S. W. 659; *Reed v. Crissey* (1895) 63 Mo. App. 184, 190.

104. Clark, *Code Pleading* (1928) sec. 19; Wheaton, *The Code "Cause of Action": Its Definition* (1936) 22 Cornell L. Rev. 1.

105. Clark, *op. cit.*, 78-79, sec. 19.

106. *Id.* at 83-87. This view is favored by Professor Clark. Professor Wheaton states that the cases do not support this definition of the cause of action. *Supra*, note 104.

107. (1933) 332 Mo. 831, 60 S. W. (2d) 393, *aff. Drew v. Wabash Ry.* (1908) 129 Mo. App. 459, 107 S. W. 478. Plaintiff collided with *B*, the agent of the defendant. Although *B* was dead, the plaintiff was permitted to testify concerning the accident. The court could have based the plaintiff's competency on the fact that a co-defendant was alive and testifying, but it chose instead to expressly overrule the *Leaveva* case and affirm the *Drew* decision.

108. (1915) 216 Mo. 151, 181 S. W. 7, followed in *Brunk v. Met. St. Ry.* (1918) 98 Mo. App. 243, 200 S. W. 443. In a Comment (1915) 11 Mo. Law Bull. 60, Commissioner Hyde, then a student at Missouri University, criticized the *Leaveva* case which had in that year overruled the *Drew* decision. Eighteen years later he wrote the opinion in the *Berberich* case which overruled the *Leaveva* case.

contracting agent was in a sense a party to the contract in issue, it cannot by any stretch of language or reasoning be logically said that a deceased wrongdoing servant was one of the original parties to the cause of action on trial. This follows also from the very nature of the different relations of principal and agent. Agency contemplates contractual liability arising from the acts of the agent * * *, whereas tort liability is properly described by the phrase *respondeat superior*. The essential distinction is that the agent is employed to establish contractual relations between his principal and third persons, while the servant is not. Rather, the servant deals with things; if he deals with persons it is not to bring about contractual relations. Moreover, it is apparent that the duties of a contracting agent to bring about contractual relations necessarily involves secrecy, and that, therefore no one, except he who conducts the negotiations, will usually be in a position to know anything about the transaction. These matters are not proclaimed from the housetops nor through the streets. To let others know they were given in progress would often defeat their purpose. In the case of an alleged verbal contract, there is nothing visible which will contradict or corroborate. On the other hand, the negligent or wrongful acts of a servant in the scope of his employment, for which a master may be responsible for personal injuries occasioned to a third party, are usually open for all the world to see.¹⁰⁹

This distinction between contract and tort situations, it seems, may often exist. The result of the *Berberich* case, however, fails to cover a great number of non-contractual situations where there are no witnesses to the transaction to testify in behalf of the master, and the survivor, on the death of the servant, sues the master and presents his own interested version of the occurrence without contradiction, explanation, or qualification.¹¹⁰ The disqualification of such a witness was the essential purpose for the enactment of the statute.¹¹¹

If the Supreme Court of Missouri is to follow the principle of the *Berberich* case as to parties to the cause of action, does it intend to hold that the death of the defendant master, who was held to be a party to the cause of action, shall disqualify the interested injured plaintiff, the other party to such cause of action, although the servant of the deceased defendant responsi-

109. *Freeman v. Berberich* (1933) 332 Mo. 831, 60 S. W. (2d) 393, 401.

110. This situation arises under the direct holding of the *Berberich* case where the plaintiff on the death of the agent is permitted to testify concerning the facts pertaining to the accident.

111. *Supra*, notes 10, 11 and 12.

ble for the accident is alive and testifying for the defendant's estate?¹¹² It is obvious that the deceased defendant has no knowledge of how the accident occurred, and that his servant would be present to explain, qualify, or contradict the testimony of the plaintiff in the event he were permitted to testify. To disqualify such a plaintiff would not only be unjust, but would be contrary to every purpose of the statute.

Practically all other jurisdictions reach a conclusion contrary to the *Berberich* case,¹¹³ on the ground that their statutes provide that the death of one party to the contract or *transaction* disqualifies the other party thereto.¹¹⁴ Such a change in our statute would seem desirable, since it is the parties to the transaction who possess the knowledge of the facts in issue and on trial, which the statute attempts to govern, rather than the persons who may be plaintiff or defendant in the suit.

The servant, upon the death of the other party to the transaction, would be competent to testify thereto, since the *Berberich* case holds that the agent is not the other party to the cause of action in issue and on trial, and he is, therefore, not within the express prohibition of the statute.¹¹⁵ Even if the servant were held to be the other party to the cause of action, he would be competent, whether interested or not, on the basis that servants and agents were competent witnesses at common law, and our statute has not expressly disqualified them.¹¹⁶

"CONTRACT OR CAUSE OF ACTION"—WHEN "IN ISSUE
AND ON TRIAL"

In *Bradley v. West*¹¹⁷ the plaintiff brought an action in ejectment, relying upon a deed from the deceased. The defendant based his claim upon adverse possession, and denied that the deceased had executed or delivered said deed to the plaintiff. The plaintiff was held competent to prove these facts, the court saying

112. The Illinois statute expressly provides that if the agent to the contract or transaction is alive, the death of the principal does not disqualify the other party to such contract or transaction. Ill. Smith-Hurd Rev. Stats. (1935) ch. 51, sec. 2.

113. *Reinhart v. Echave* (1920) 43 Nev. 323, 185 Pac. 1070; *DeNottbeck v. Chapman* (1919) 93 Vt. 378, 108 Atl. 338.

114. 1 Wigmore, *Evidence* (2nd ed. 1923) sec. 578; Covick, 1 Gen. Stat. of Kansas (1935) c. 60—2804.

115. *Freeman v. Berberich* (1933) 332 Mo. 831, 60 S. W. (2d) 393.

116. If the servant is not interested in the event, *supra*, notes 24, 25, 94 and 95. If the servant is interested in the event, *supra*, notes 28, 83 and 96. But if the view adopted in 1 Greenleaf, *op. cit.*, sec. 396, *supra*, note 79 is followed, the *interested* servant would be disqualified.

117. (1878) 68 Mo. 69.

The deed from the grantor to plaintiff was not the contract or cause of action in issue and on trial. The cause of action in issue and on trial was the alleged unlawful withholding, by the defendant, of the possession of certain lands from plaintiff, and both of the parties to the controversy are alive. By the words contract or cause of action in issue and on trial * * * intended such contract or cause of action as was to be enforced by the proceeding; that in regard to which an issue was to be formed and a trial had, where the rights of the parties to the contract or cause of action will be determined by the result.¹¹⁸

It may be said that the court reached a logical, although not a just, conclusion. It was in no way passing judgment on the deed between plaintiff and deceased so as to bind the latter's estate. That instrument, therefore, was not in issue and on trial, but was involved in what was merely a collateral issue. Furthermore, in Vermont, whose statute was followed in Missouri, the courts had reached a similar conclusion.¹¹⁹

It was obvious, however, that the spirit and purposes of the statute was in this manner defeated. The contract or transaction with the deceased was being employed as the basis of, or as a defense to the cause of action which the court was called upon to determine.¹²⁰ In *Chapman v. Dougherty*,¹²¹ therefore, the doctrine of the *Bradley* case was overruled, and the court set up a more equitable rule, to wit

* * * the disability imposed by the statute upon a witness who is one of the original parties to a contract or cause of action in issue and on trial, where the other party thereto is dead, is *coextensive with every occasion where such instrument or cause of action may be called into question*.¹²²

In this manner, the mutuality of producing testimony, and the prevention of perjury by an interested witness as to facts peculiarly within his knowledge was more effectively accomplished.

The statute, however, is designed and limited to protect the estate of the deceased party to the contract or cause of action

118. *Id.* at 72.

119. *Manufacturer's Bank v. Scofield* (1867) 39 Vt. 590, cited in *Gunn v. Thruston* (1895) 30 Mo. 339, 32 S. W. 654, 654.

120. See *Linhard v. Ditmars* (Mo. App. 1921) 229 S. W. 401; *Lieber v. Lieber* (1911) 239 Mo. 1, 143 S. W. 458; *Bishop v. Brittain Inv. Co.* (1910) 229 Mo. 699, 129 S. W. 668, 675, where the rule of *Bradley v. West* is discussed and criticized.

121. (1885) 87 Mo. 617. Action in ejectment. The plaintiff relied upon a deed of the deceased from the defendant. *Held*, the defendant was incompetent to testify to the non-delivery of the deed to the deceased.

122. *Id.* at 626 (italics supplied).

in issue and on trial, or those who are claiming under him. Therefore, the creditors or others who would benefit if the survivor were not permitted to testify, may not prevent a waiver of the survivor's incompetency by the parties possessing the right to invoke the statute.¹²³

If the contract or transaction with the deceased is not relied upon by the party to secure any advantage in the suit, it is not in issue and on trial.¹²⁴ Thus if a plaintiff's claim or defense is independent of any dealings with a decedent, the plaintiff is competent to testify to such facts.¹²⁵ Or, if the contract or cause of action between the plaintiff and the deceased is admitted,¹²⁶ or is irrelevant to the final determination of the issues in the suit,¹²⁷ then the contract or cause of action between the survivor and the deceased is not in issue and on trial, and there may be testimony as to such facts.

WITNESSES NOT PARTIES TO THE RECORD

In *Looker v. Davis*¹²⁸ it was held that to render a witness incompetent he must not only be a party to the original contract in issue and on trial, but also a party to the record in the suit. At the time that decision was rendered the proviso of the statute read

Provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the *other party* shall not be admitted to testify in his own favor * * *.¹²⁹

The "other party" not being described, it was possible to say that it meant either the other party to the proceeding, or the other party to the contract, who was also a party to the proceeding. In the *Looker* case, the latter conclusion was reached. In *Meier v. Thieman*,¹³⁰ however, "the other party" was held not

123. *Lampe v. Franklin Amer. Trust Co.* (Mo. 1936) 96 S. W. (2d) 710.

124. *Infra*, notes 125, 126, 127 and 244; *Stratton v. Cole* (1919) 203 Mo. App. 257, 216 S. W. 976; *Bajohr v. Bajohr* (Mo. App. 1916) 184 S. W. 76; *McKee v. Downing* (1909) 224 Mo. 115, 124 S. W. 7, 15; *Griffin v. Nicholas* (1909) 224 Mo. 275, 123 S. W. 1063.

125. *Spence v. Spence* (1911) 238 Mo. 71, 141 S. W. 898 (party relied on adverse possession as the basis of his title rather than upon the deed from the deceased).

126. *Collard v. Burch* (1909) 138 Mo. App. 94, 119 S. W. 1009, 1009 (contract was not here admitted, but the court briefly discusses this rule).

127. *Supra*, note 124; *Timmonds v. Wilbur* (1924) 209 Mo. App. 54, 260 S. W. 1004, 1007; *Stam v. Smith* (1904) 183 Mo. 464, 81 S. W. 1217.

128. (1870) 47 Mo. 140; accord *Klostermann v. Loos* (1874) 58 Mo. 290, 294.

129. R. S. Mo. (1879) sec. 4010 (italics supplied).

130. (1886) 90 Mo. 433.

to refer to the other party to the suit, but merely to the other original party to the contract in issue and on trial. In order to be incompetent, therefore, it was inessential that the witness also be a party to the suit.

This proviso was amended in 1887¹³¹ to read, "the other party to such contract or cause of action," thus naming and identifying "the other party," and resolving the uncertainty. The important determination now is whether the witness comes within the disqualifications imposed by the statute. If he does, the fact that he is not also a party to the record will not affect his incompetency to testify.¹³²

The second proviso of the statute, however, still reads "the other party." In view of the language in the first proviso this has been construed to mean "the other party to the contract or cause of action in issue and on trial."¹³³

PARTY DERIVING TITLE OR INTEREST FROM DECEASED

A party succeeding to the rights of the deceased in a contract or cause of action is not incompetent to testify thereto.¹³⁴ The basis for this competency is clearly stated in *Norvell v. Cooper*¹³⁵

In this case the only one of the original parties to the contract or cause of action in issue, who is dead, is defendant's intestate. The other party is the plaintiff. She is the only one 'who is, or if living would be subject to the foregoing disqualification.' If there was any party to the suit whose right of action or defense was derived from her, the proviso would render such party incompetent to testify in his own favor; but there is no such party. The children derive from deceased, and not from plaintiff, or from any one else who is, or if living, would be, 'subject to the foregoing disqualification.' Plaintiff being alive, deceased, if living, would not be disqualified, so the language of the statute would not disqualify her devisees.

The survivor to such contract or transaction with the deceased, however, is incompetent to deny, rebut, explain, or qualify the testimony given by these interested parties concerning his con-

131. Laws of 1887, p. 287.

132. *Dull v. Johnson* (Mo. App. 1937) 106 S. W. (2d) 504, 507; *Stone v. Fry* (1915) 191 Mo. App. 607, 178 S. W. 289; *McClure v. Clements* (1912) 161 Mo. App. 23, 143 S. W. 82.

133. *Atkinson v. Hardy* (1902) 128 Mo. App. 349, 107 S. W. 466, 467.

134. *Poague v. Mallory* (1921) 208 Mo. App. 395, 235 S. W. 491, 495. The contract or cause of action is between *A* and *B*. If *A* or *B* dies, the party claiming under the deceased may testify to the contract or cause of action, whereas the survivor is incompetent to testify thereto; *Cole v. Waters* (1912) 164 Mo. App. 567, 147 S. W. 552.

135. (1911) 155 Mo. App. 445, 134 S. W. 1095, 1096.

tract or transaction with the deceased, since he is expressly disqualified by the statute.¹³⁶ The advantage thus afforded to the estate of the deceased is tremendous, and is strongly contrary to the intention of the statute. This conclusion is merely indicative of the peculiar results that a rule of construction may bring about. The need for revision of the statute in this respect has been long recognized by our courts.¹³⁷

EXTENT OF DISQUALIFICATION

A. Under The First Proviso

The first proviso of the statute does not disqualify the surviving party for all purposes, but only from testifying to the contract or cause of action in issue and on trial.¹³⁸ This result is fair to both parties to the suit, since the competent evidence is not of such a nature as to be particularly subject to denial or explanation by the deceased, if living, and, therefore, there is no practical basis for excluding it.

When a contract or transaction is between a witness who is living and the survivor, but relates to the contract or cause of action with the deceased, the survivor is competent to testify concerning such contract or transaction with the living witness if the latter presents his version thereof.¹³⁹ Theoretically, the survivor does not testify concerning his transaction with the deceased, but merely testifies to what occurred between a living witness and himself. Actually, however, his incompetency to testify concerning the contract or cause of action with the deceased is thus waived to the extent that the subsequent contract or transaction with the living witness relates to the one in issue and on trial. This conclusion seems desirable, since there exists no legitimate reason for allowing a living witness, who is generally interested in the event, to testify to alleged damaging admissions by the survivor made subsequent to the contract or cause of action with the deceased, and to which the latter was not a party, without affording the survivor an opportunity of

136. *Supra*, notes 134 and 135.

137. *Ibid.*

138. *Elsea v. Smith* (1918) 273 Mo. 396, 202 S. W. 1071, 1073. It is very difficult often to determine whether or not the offered evidence relates to the contract or cause of action with the deceased. *Richenbach v. Ellerbe* (1893) 115 Mo. 588 (party held competent to testify that he sent notice to the deceased); *Bank of St. Charles v. Payne* (1892) 111 Mo. 29, 20 S. W. 41 (party competent to testify to knowledge derived from sight).

139. *Weiermueller v. Scullin* (1907) 203 Mo. 466, 101 S. W. 1088, 1090; *Eyer mann v. Piron* (1899) 151 Mo. 107, 52 S. W. 229; *Martin v. Jones* (1875) 59 Mo. 181, 187.

rebuttal or explanation as to what actually happened, or was said at such time.¹⁴⁰

When, however, witnesses who were present at the contract or transaction between the deceased and the survivor, testify thereto in behalf of the former's representatives or estate, the survivor is not thereby rendered competent to give his version of the contract or transaction with the deceased.¹⁴¹ It is submitted, that if the deceased's side is thus heard, the survivor should, in all fairness, be given an opportunity to testify *to the same extent*. This result would be possible if the court considers the introduction of such evidence as a waiver of the disqualification.

B. Under The Second Proviso

Where an executor or administrator is the other party to the suit, a much harsher rule applies. The second proviso of the statute has been construed to disqualify the survivor on the death of the other party to the contract in issue and on trial from testifying to any facts which had occurred prior to the appointment of the executor, or grant of letters of administration, regardless of the nature of the evidence offered.¹⁴² This rule is not affected by the fact that the offered evidence relates to an independent contract or transaction which took place with third parties subsequent to the death of the other party to the contract in issue and on trial, or that it did not even relate to the contract in issue and on trial.¹⁴³ This arbitrary advantage given to the estate of the deceased has been severely criticized by our courts for more than fifty years,¹⁴⁴ but nothing has been done to alleviate the situation. The following statement is typical

Speaking for myself, it is difficult to see the reason for this strict rule. What difference does it make whether the conversation was before or after the grant of letters of administration? The dead man is no party to the conversations. All the persons engaged in the conversation are living. Some of them are permitted to testify to the conversations, but the living party to the suit is excluded because the op-

140. *Ibid.*

141. *In re Fossen* (Mo. App. 1929) 13 S. W. (2d) 1076; *Brunk v. Met. St. Ry. Co.* (1918) 198 Mo. App. 243, 200 S. W. 443, 444.

142. *Weiermueller v. Scullin* (1907) 203 Mo. 466, 101 S. W. 1088; *Leeper v. Taylor* (1892) 111 Mo. 312, 19 S. W. 955. The witness may testify to facts occurring subsequent to the grant of letters of administration. *Wade v. Hardy* (1882) 75 Mo. 394.

143. *Hildreth v. Hudloe* (Mo. App. 1926) 282 S. W. 747, 748; *Poague v. Mallory* (1921) 208 Mo. App. 395, 235 S. W. 491.

144. *Supra*, notes 142 and 143.

posing party to the suit is dead. If he had been living, and was not present at the conversation, he would not be able to say anything about it. It strikes me, as to these conversations, separate and independent from any transaction with the deceased, to permit the living witnesses to give their version of the conversation, and then exclude the living party from giving his, is directly in conflict with the spirit of the statute, of placing all parties on an equal footing. The party to the suit must remain silent, and living witnesses can testify that he made certain statements, and he is not permitted even to deny their statements.¹⁴⁵

INDIRECT PROOF OF CONTRACT OR CAUSE OF ACTION PROHIBITED

A disqualified witness may not prove by indirection through his own testimony that which the statute will not permit him to testify to directly.¹⁴⁶ If the extraneous evidence creates the natural inference of the contract or cause of action, or if its sole relevancy lies in its tendency to disclose such facts, it is inadmissible.¹⁴⁷ Whether the offered evidence has this effect will depend upon the facts and circumstances of each particular case.

PROPER METHOD OF OBJECTING TO INCOMPETENCY

A failure to object properly to the incompetency of a witness constitutes a waiver of such right.¹⁴⁸ Since the witness is not totally incompetent, a general objection to the introduction of any testimony by him will not be sustained, unless the examination discloses a purpose to violate the rule as to the disqualification.¹⁴⁹ A proper objection, therefore, must be specific, and the attention of the court must be called to the *exact* reason why such witness should not be allowed to testify.¹⁵⁰ The competency of the witness, when properly objected to, is placed in issue, and the court then hears the evidence of both parties relating to such competency and makes its ruling thereon.¹⁵¹

It must be remembered that the testimony is not inadmissible, but that it is the particular witness who is disqualified from

145. *Kersey v. O'Day* (1903) 173 Mo. 560, 73 S. W. 481, 484.

146. *Dean v. Bigelow* (Mo. 1927) 292 S. W. 25; *Scott v. Scott* (Mo. App. 1924) 265 S. W. 864, 865; *Collard v. Burch* (1909) 138 Mo. App. 94, 119 S. W. 1009, 1010.

147. *Supra*, note 146; *Comment* (1908) 8 Col. L. Rev. 650, 651.

148. 1 *Greenleaf*, *op. cit.*, sec. 421; *infra*, notes 149-152.

149. *Goodrich Rubber Co. v. Bennett* (1926) 222 Mo. App. 36, 281 S. W. 75, 77; *Dempsey v. McGinnis* (Mo. App. 1923) 249 S. W. 662, 665.

150. *Kneiven v. Berliner's Estate* (Mo. App. 1932) 54 S. W. (2d) 494, 500; *Barley v. Kansas City* (1905) 189 Mo. 503, 87 S. W. 1182.

151. 1 *Greenleaf*, *op. cit.*, secs. 421, 422 and 423.

testifying thereto. An objection to the introduction of the testimony, rather than to the right of the witness to testify, is, therefore, improper, and will be overruled.¹⁵²

WAIVER OF INCOMPETENCY

A study of the complicated situations giving rise to a waiver of the incompetency of a witness to testify convinces one that the "Dead Man's Statute" has become, in this respect, the trap of the unwary, and the servant of the wise. The simplest mode of waiver is by allowing the surviving party to take the stand and to testify without objection.¹⁵³ An administrator or executor will often expressly waive the incompetency of those filing claims against the estate, and allow them to testify in their own behalf. This action is generally founded on the belief that the claimants have honest demands and will not present unjust claims.

A direct or cross-examination of the survivor concerning the contract or cause of action with the deceased is a complete waiver of his incompetency. Having had the benefit of such testimony, the party cannot afterwards object to his incompetency.¹⁵⁴ A mere perfunctory and irrelevant inquiry does not constitute a waiver.¹⁵⁵ Nor is a waiver created by a cross-examination of the survivor which is limited to the testimony introduced on direct examination over an objection.¹⁵⁶ When the incompetency of a witness is challenged from the beginning, and the cross-examination is asserted to be "under protest," but extends to matters not covered in the examination in chief, there is authority for the proposition that this excursion does¹⁵⁷ and does not¹⁵⁸ constitute a waiver. Treating such a cross-examination as a waiver places

152. *People's Bank of Queen City v. Aetna Casualty & Surety Co.* (1931) 225 Mo. App. 1113, 40 S. W. (2d) 535; *In re Menamy's Guardianship* (1925) 307 Mo. 98, 270 S. W. 662.

153. *People's Bank of Queen City v. Aetna Casualty & Surety Co.* (1931) 225 Mo. App. 1113, 40 S. W. (2d) 535; *Nordquist v. Nordquist* (1929) 321 Mo. 1244, 14 S. W. (2d) 583; *Belch v. Roberts* (1915) 191 Mo. App. 243, 177 S. W. 1062.

154. *Hattersley Brokerage & Comm. Co. v. Hume* (1916) 193 Mo. App. 120, 182 S. W. 93; *Conrey v. Pratt* (1913) 248 Mo. 576, 154 S. W. 749; *Rauch v. Metz* (Mo. 1919) 212 S. W. 353.

155. *Thomas v. Fitzgeralds' Estate* (Mo. App. 1927) 297 S. W. 425; *Weffert v. Lawson* (1926) 315 Mo. 1099, 287 S. W. 610, 613.

156. *Johnston v. Johnston* (1903) 173 Mo. 91, 73 S. W. 202, 211.

157. *Reitz v. O'Neil* (Mo. App. 1928) 2 S. W. (2d) 178; *Pierce Loan Co. v. Killian* (1910) 153 Mo. App. 106, 132 S. W. 280, 283.

158. *In Lohnes v. Baker* (1911) 156 Mo. App. 397, 137 S. W. 282, 284, the witness was incompetent and objected to, but was permitted to testify. The court said, "Objection was not lost because the cross-examination elicited all of the damaging evidence;" accord *Bowlen v. Baker* (1922) 147 Tenn. 36, 245 S. W. 416.

the objector in a dilemma. If he cross-examines the witness as to new matters, he waives his incompetency; if he fails to elicit this less favorable testimony and stands on his objection, and the witness is eventually declared competent, he has sacrificed valuable evidence.

The adverse party may waive the incompetency of a survivor by taking his deposition.¹⁵⁹ This is true whether the same is filed in court or not.¹⁶⁰ Whether the same rule applies when there is a stipulation reserving the right to invoke objections to the "competency, relevancy, and immateriality of the evidence" has been more difficult of determination.¹⁶¹ Such a stipulation has been held not to prevent a waiver for the following reasons: first, that the personal disqualification of a witness is not raised by such a general objection; and, second, that the reservation of the right to object has been limited to the incompetency of the testimony of the witness, which is clearly competent, and not to the incompetency of the witness, who is incompetent.¹⁶² A carefully drawn stipulation reserving the right to object to the incompetency of the witness, and stating the exact basis of his incompetency, would, it seems, protect the party from waiving the survivor's incompetency by the taking of his deposition.

When the testimony of the deceased has been preserved and through it he may be heard, the disqualifying rule does not obtain to the extent of such recorded testimony.¹⁶³ This is true whether such testimony is preserved in a bill of exceptions of a former trial, a letter, or a deposition.¹⁶⁴ The fact that the counsel for the deceased refuses to put this testimony in evidence does not affect the waiver.¹⁶⁵ With these cases as a guide, a diligent lawyer, it seems, could take the depositions of the opposing party in conformity with the statutory provisions relating to the perpetuation of testimony, and thus circumvent the effect of the

159. *In re McMennamy's Guardianship* (1925) 307 Mo. 98, 270 S. W. 662; *Alexander v. Sovereign Camp of Woodmen of The World* (1916) 193 Mo. App. 411, 186 S. W. 2, 3; *Rice v. Wadill* (1902) 168 Mo. 99, 67 S. W. 605.

160. *Ibid.*; *Bush v. Block* (1916) 193 Mo. App. 704, 187 S. W. 153.

161. *In re Imbodens' Estate* (1905) 111 Mo. App. 220, 86 S. W. 265; *In re Estate of Soulard* (1897) 141 Mo. 642, 43 S. W. 617.

162. *Ibid.*

163. *Knickerbocker v. Athletic Tea Co.* (Mo. App. 1926) 285 S. W. 797; *Galvin v. Knights of Father Mathew* (1913) 169 Mo. App. 496, 155 S. W. 45, 51.

164. *Ibid.*; *Ferry v. Woody* (1922) 210 Mo. App. 98, 241 S. W. 78; *Alexander v. Sovereign Camp of Woodmen of The World* (1916) 193 Mo. App. 411, 186 S. W. 2; *McCracken v. Schuster* (Mo. App. 1915) 79 S. W. 757, 759; *Stone v. Hunt* (1893) 114 Mo. 66, 21 S. W. 454, 455.

165. *Supra*, notes 163 and 164.

statute should death intervene prior to the bringing of the suit.

When the survivor testifies to facts contained in the bill of exceptions of a former trial at which the deceased was present and was heard, such survivor may present a contrary version to his testimony therein, but such evidence is subject to impeachment by showing its contradictory nature.¹⁶⁶ An earlier case had ruled out any subsequent testimony which did not accord with that presented at the former trial.^{167a}

In an action to discover assets claimed to be withheld from an estate, the Missouri statute provides

If the party so cited does not admit the allegations in the affidavit; he *shall* be examined under oath, after which, at the instance of the administrator or executor, other witnesses may be examined both for and against such party; but, before such other witnesses shall be examined, interrogatories *shall* be filed in writing, to be examined also in writing by the parties cited.^{167b}

In *In re Trautmann's Estate*¹⁶⁸ the Supreme Court held that the executor waived the incompetency of the survivor by orally examining him concerning the transaction between the survivor and the deceased, prior to the filing of the written interrogations. Although the statute states that the executor *shall* so act, the court, after considering the historical background, held that the oral preliminary examination is not mandatory, but is merely auxiliary to the main proceeding. The person who initiates the proceeding may demand it or not as he elects. A practical reason was also advanced to sustain the conclusion

If the plaintiff in such cases could require the defendant to disclose under oath all the facts and circumstances touching the transaction giving rise to the controversy, and then silence him, he would not have to be a strategist of any great skill to be able to so frame his pleadings (the interrogatories) and to so marshal the evidence as to put the defendant at a serious disadvantage.¹⁶⁹

The filing of the interrogatories, however, has consistently been held not to act as a waiver of the incompetency of the person answering them.¹⁷⁰ These interrogatories are considered as

166. *Stone v. Hunt* (1893) 114 Mo. 66, 21 S. W. 454.

167a. *Coughlin v. Haeussler, Ex'r of Dillon* (1872) 50 Mo. 126.

167b. R. S. Mo. (1929) sec. 64.

168. (1923) 300 Mo. 314, 254 S. W. 286; accord *Morley v. Prendiville* (1927) 316 Mo. 1094, 295 S. W. 563.

169. *Id.* at 289.

170. *Carmody v. Carmody* (1916) 266 Mo. 566, 181 S. W. 1148; *Tygard v. Falor* (1901) 113 Mo. 234, 63 S. W. 672.

the pleadings in the case, and as constituting a *mandatory* procedural step by the plaintiff. It is only too obvious that the plaintiff is thus afforded the advantage of forcing the survivor to relate prejudicial portions of the contract or transaction with the deceased without giving such survivor an opportunity to explain or present the rest of the facts. The *dicta* and analogies advanced by the court in the *Trautmann* case strongly indicate that a contrary conclusion should be reached in this situation.

The waiver of the incompetency of one co-defendant by the plaintiff constitutes a waiver of the right to object to the other co-defendant's incompetency.¹⁷¹ Also, a waiver by one co-defendant of the plaintiff's incompetency is binding upon the other co-defendant, unless the latter refuses to take part in the former's waiver, is not benefited by such evidence, and has no power to control his co-defendant's action.¹⁷²

A waiver by any of the above specified modes in the Probate or Justice of the Peace Court continues as a waiver on appeal to the Circuit Court in a trial *de novo*.¹⁷³ If, however, the representative of the deceased had not participated in any way in the proceeding which resulted in the allowance of the demand in the Probate Court, although the survivor was there allowed to testify, the latter will be incompetent, upon proper objection, in the Circuit Court.¹⁷⁴

In order to render a party competent where there has been a waiver, it devolves upon his counsel specifically and clearly to point out this waiver to the court. Otherwise an objection to the witness's testifying will be sustained.¹⁷⁵

CO-PLAINTIFFS—CO-DEFENDANTS

In a suit against co-defendants by the representative of the deceased, upon a joint contract or obligation, neither defendant is competent to testify concerning the contract or transaction in his own or in his co-defendant's favor.¹⁷⁶ The "other party" to the contract or cause of action, in other words, consists of all parties jointly interested in the contract or cause of action with the deceased.¹⁷⁷ Co-plaintiffs possessing a joint or mutual inter-

171. *Fowler v. Sone* (Mo. App. 1920) 226 S. W. 995.

172. *Hollman v. Lange* (Mo. 1898) 44 S. W. 752.

173. *In re McMennamy's Guardianship* (1925) 307 Mo. 98, 270 S. W. 662.

174. *Lang v. Wishart* (1925) 217 Mo. App. 119, 273 S. W. 768.

175. *Norton v. Lynds* (Mo. App. 1930) 24 S. W. (2d) 183; *Tomlinson v. Ellison* (1891) 104 Mo. 105, 16 S. W. 201, 203.

176. *Short v. Thomas* (1914) 178 Mo. App. 400, 163 S. W. 252; *Rice v. McFarland* (1890) 41 Mo. App. 489; *Hisaw v. Sigler* (1878) 68 Mo. 449.

177. *Ibid.*

est in the claim cannot testify in their own on their co-plaintiff's behalf concerning the contract or transaction with the deceased.¹⁷⁸

If the contract sued upon, however, was made on the one side by two persons, one of whom had since died, that fact alone does not disqualify the survivor from testifying in the case. If the remaining adverse party is cognizant of the facts which the survivor desires to testify to, the reason for the statutory inhibition does not exist, and such survivor is allowed to so testify.¹⁷⁹ But if it appears that the contract or transaction upon which the suit is founded was effected solely through the deceased adverse party, the survivor is disqualified as a witness, although a remaining adverse party to the contract in issue and on trial is alive.¹⁸⁰ These results seem to be very practical, since the precautions desired by the statute are thus obtained.

It is doubtful, however, if the statute as it reads justifies these conclusions. The first proviso is as follows

* * * if *one* of the original parties to a contract or cause of action in issue and on trial is dead, * * * the other party to such contract or cause of action shall not be admitted to testify in his own favor.

The death of *one* of the original parties to the contract, as we saw, does not necessarily disqualify the survivor.¹⁸¹ On the other hand, the second proviso reads

Where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue *was originally made with a person who is living and competent.*

In this type of case, it would seem that the survivor should be permitted to testify concerning the contract whether the remaining adverse party is cognizant of the facts or not, since the lack of such knowledge does not destroy the fact that the remaining adverse party is a living party to the contract and competent. Logic, however, is not the paramount feature of the "Dead Man's Statute."

There is no cause of action in issue and on trial between a defendant and his co-defendant when they are both sued by plaintiff as joint tort-feasors, and a defendant may, therefore, testify against his co-defendant, although the latter is deceased.¹⁸²

178. *Rice v. Shipley* (1900) 159 Mo. 39, 60 S. W. 740.

179. *Birdsall v. Coon* (1911) 157 Mo. App. 439, 139 S. W. 243; *Vandergrif v. Swinney* (1900) 158 Mo. 527, 59 S. W. 71; *Fulkerson v. Thornton* (1878) 68 Mo. 468, 469.

180. *Ibid.*; *Butts v. Phelps* (1883) 79 Mo. 302.

181. *Supra*, note 179.

182. *Freeman v. Berberich* (1933) 332 Mo. 831, 60 S. W. (2d) 393, 396.

PROCEEDINGS INVOLVING THE "DEAD MAN'S STATUTE"

A. Introduction

The analytical aspects of the "Dead Man's Statute," which have been heretofore discussed, are to be found in all types of proceedings. The proper approach to a sound understanding of the statute, therefore, would be to analyze the essential nature of these various rules, rather than to rely too heavily upon cases which are alike as regards the relief demanded, but utterly dissimilar in the basic problem involved. There is, however, a definite advantage in a functional approach and in understanding some of the results our courts have reached in certain like proceedings which have arisen under the statute.

B. In General

Some of the earlier decisions held that the statute is inapplicable to non-contractual causes of action.¹⁸³ This conclusion has since been definitely overruled, except under the second proviso which is expressly limited to actions in contract.¹⁸⁴ If the other requirements are satisfied, the first proviso of the statute applies whether the cause of action is *ex delicto*, or *ex contractu*.

When one party to the contract or cause of action in issue and on trial is dead, the survivor may not be permitted to testify that the deceased assigned a policy of insurance to him;¹⁸⁵ that a partnership¹⁸⁶ or agency¹⁸⁷ existed between them; that a mortgage given to the deceased was to be a second deed of trust;¹⁸⁸ that he gave certain instructions to the deceased;¹⁸⁹ that he possessed a power of attorney from the deceased;¹⁹⁰ that he performed part of the contract in issue and on trial;¹⁹¹ that he ac-

183. *Graham v. Wilson* (Mo. App. 1913) 153 S. W. 83, 85 and cases cited.

184. *Freeman v. Berberich* (1933) 332 Mo. 831, 60 S. W. (2d) 393, 396-397.

185. *Borchers v. Barckers* (1911) 58 Mo. App. 267, 138 S. W. 555, 556; *Saetelle v. Life Ins. Co.* (1899) 81 Mo. App. 509.

186. *Scott v. Scott* (Mo. App. 1924) 265 S. W. 864.

187. *Linhard v. Ditmars* (Mo. App. 1921) 229 S. W. 401.

188. *Bank of Williamstown v. Hiller* (Mo. App. 1924) 266 S. W. 1031.

189. *Collins v. Star Paper Mill Co.* (1910) 143 Mo. App. 333, 127 S. W. 641; cf. *Wilson v. Frankel* (Mo. App. 1933) 61 S. W. (2d) 363, in which the status of the plaintiff while on the premises was in issue, and the plaintiff was permitted to testify that the deceased had given her permission to use said premises, thus establishing her status thereon as a licensee rather than as a trespasser.

190. *Miller v. Corpman* (1923) 301 Mo. 589, 257 S. W. 428.

191. *Emmel v. Hayes* (1890) 102 Mo. 186, 14 S. W. 209; *Sitton v. Shipp* (1877) 65 Mo. 297.

counted to the deceased for certain money being sued for;¹⁹² or, that he received a gift *inter vivos* or *causa mortis* from the deceased.¹⁹³

C. Parties To Bills And Notes

In proceedings involving bills and notes, the maker, on the death of the payee, is not permitted to testify to the nature or failure of the consideration,¹⁹⁴ to a release,¹⁹⁵ or to his payment¹⁹⁶ of the note. The death of the maker bars the payee in a suit for services to deny that the check marked "in full" for such services, was not so intended by the parties.¹⁹⁷ In a suit by an indorsee of the deceased payee against the maker, a witness, although not a party to the suit, may not testify that the note is his property by virtue of a contract with the deceased payee.¹⁹⁸ Nor is a maker competent to testify that the deceased indorsee admitted purchasing the note after maturity, in order to destroy the indorsee's status as a holder in due course.¹⁹⁹ Where the statute of limitations is pleaded to an action by the payee on the note, the latter, on the death of the maker, is incompetent to testify that the maker made certain payments on the note, in order to defeat this defense.²⁰⁰

The results reached in the foregoing proceedings are not difficult to understand since they involve little more than a direct application of the letter of the statute.

D. Contract For The Benefit Of A Third Party

In situations where a contract has been entered into for the benefit of a third party, some perplexing problems arise in applying the statute. A contract with a parent for the adoption of her minor child has been construed by our courts to be a contract for the benefit of the child.²⁰¹ The negotiator of the contract, who is not liable thereon, is competent to testify on the

192. *Barnett v. Kemp* (1914) 258 Mo. 139, 167 S. W. 546.

193. *Suiter v. Frazer* (Mo. App. 1920) 226 S. W. 622; *Scott v. Riley* (1892) 49 Mo. App. 251.

194. *Dull v. Johnson* (Mo. App. 1937) 106 S. W. (2d) 504; *Hathaway v. McBride* (Mo. App. 1917) 198 S. W. 1143.

195. *Ibid.*; *Davis v. Robb* (Mo. App. 1928) 10 S. W. (2d) 680; *Powell v. Bosard* (1899) 79 Mo. App. 627.

196. *Dull v. Johnson* (Mo. App. 1937) 106 S. W. (2d) 504; *supra*, notes 194 and 195.

197. *Dean v. Bigelow* (Mo. 1927) 292 S. W. 25.

198. *Cleaveland v. Coulson* (1903) 99 Mo. App. 468, 73 S. W. 1105.

199. *Jones v. Burden* (1893) 56 Mo. App. 199.

200. *Goddard v. Williamson's Adm'r* (1880) 72 Mo. 131.

201. *Taylor v. Coberly* (1931) 327 Mo. 940, 38 S. W. (2d) 1055; *Signaigo v. Signaigo* (Mo. 1918) 205 S. W. 23.

death of the other party to the contract in an action brought by the beneficiary, because such a witness, although interested in the suit from the standpoint of the personal motives he had when he contracted in behalf of the beneficiary, or which he now has in desiring the beneficiary to succeed in the present suit, is not interested in the event according to the common-law criterion of interest; and, therefore, since he was competent at common law, he remains competent under the statute, which is now construed to be an enabling one.²⁰² Earlier cases, holding this to be a disabling enactment, disqualified such a witness, solely upon the basis that the other party to the contract in issue and on trial was dead.²⁰³ When such a negotiator brings the suit on behalf of the beneficiary, as "trustee of an express trust," there exists the possibility that he will be liable for costs. This interest is of a disqualifying nature, and since he is both interested in the event, and the survivor to the contract in issue and in trial, he is incompetent to testify thereto.²⁰⁴

The beneficiary is clearly interested in the event, but he is not a party to the contract because he is not the negotiator thereof. He is, however, incompetent to testify to the contract on the death of the negotiator liable thereon, on the basis that he is the other party to the *cause of action in issue and on trial*.²⁰⁵

But we regard the plaintiffs, if not in reality parties to the contract, are certainly parties to the "cause of action." The contract, as we have stated it, was of such a nature as to give them the cause of action, and they became parties to it when they accepted its provisions.²⁰⁶

This result is in harmony with the definition of "cause of action" as followed in the *Berberich* case, namely, the "right of action" or the legal right which the plaintiff seeks to enforce against the defendant.²⁰⁷

When the negotiator who is liable upon the contract desires to testify thereto, the following factors should be considered. He

202. *Ibid.*; *O'Neil v. Stratton* (C. C. A. 8, 1933) 64 F. (2d) 911, 912; *Atkinson v. Hardy* (1908) 128 Mo. App. 349, 107 S. W. 466, 467.

203. *Edmonds v. Scharff* (1919) 279 Mo. 78, 213 S. W. 823; *McMorrow v. Dowell* (1905) 116 Mo. App. 289, 90 S. W. 728; *Asbury v. Hicklin* (1904) 181 Mo. 658, 81 S. W. 390.

204. *Crocker v. New York Trust Co.* (1927) 245 N. Y. 17; see notes 61-66, *supra*, dealing with liability for costs as constituting an interest in the event.

205. *Brown v. Patterson* (1909) 224 Mo. 639, 124 S. W. 1, 3; *Atkinson v. Hardy* (1908) 128 Mo. App. 349, 107 S. W. 466.

206. *Atkinson v. Hardy* (1908) 128 Mo. App. 349, 107 S. W. 466, 467.

207. *Supra*, notes 105, 107 and 109.

is, of course, interested in the event. He occupies, however, a dual status. As regards the beneficiary, he is the other party to the cause of action; as regards the negotiator not liable on the contract, he is the other party to the contract. On the death of both the beneficiary and the negotiator not liable on the contract, there is no doubt of his incompetency. If the negotiator not liable on the contract is dead, but the beneficiary is alive, on the basis that the other party to the cause of action, the beneficiary, is alive, the negotiator who is liable should be competent to testify in his own behalf. Our courts have held, however, that since the other party to the contract, the negotiator who is not liable, is dead, the negotiator who is liable thereon is incompetent, since he is both interested in the event, and is the surviving party to the *contract* in issue and on trial.²⁰⁸ Suppose, however, the beneficiary (a party to the cause of action) is dead and the negotiator not liable (a party to the contract) is alive, and the negotiator liable (a party to the cause of action and also a party to the contract) desires to testify concerning the contract in issue and on trial?²⁰⁹

The competency of the witnesses where an agent negotiated the contract has been previously dealt with.²¹⁰ These rules should not be difficult to apply to a contract negotiated by an agent for the benefit of a third person.

E. Settlor—Trustee—Beneficiary Relationship

In a deed to a grantee as "trustee," the grantor, on the death of the grantee, is incompetent to explain the terms of the trust.²¹¹ In a suit by the beneficiary for an accounting of the trust assets, the trustee may not testify to the rights and duties conferred

208. *Fisher v. Fisher* (1920) 203 Mo. App. 45, 217 S. W. 845, 850. Suit by the beneficiary against the trustee for an accounting. The court held that for the purpose of determining the competency of the parties under the statute, the trustee and the settlor are the parties to the contract for the benefit of the beneficiary, and that the death of the settlor disqualified the trustee from testifying to his duties under the trust. If the court had followed the reasoning of *Atkinson v. Hardy*, supra, note 206, the trustee would have been competent on the basis that the beneficiary, the other party to the *cause of action* in issue and on trial was alive.

209. If *Fisher v. Fisher*, supra, note 208 is followed, the negotiator liable would be competent, since the other party to the *contract* is alive, and the fact that the other party to the *cause of action* is dead would be disregarded. If, however, *Atkinson v. Hardy*, supra, note 206 is controlling, the negotiator liable would be incompetent, since the death of one party to the *cause of action* in that case disqualified the other party thereto, and the fact that the parties to the *contract* are alive was immaterial.

210. Supra, notes 94-103.

211. *Sanford v. Van Pelt* (1926) 314 Mo. 175, 282 S. W. 1022.

upon him by the deceased settlor. The trust agreement is considered as "a contract for the benefit of the beneficiary," and since the settlor, one party to the contract, is dead, the trustee, the other party, is incompetent to testify thereto.²¹² Where the settlor devised land in trust to be used for the support of A, remainder to the plaintiff, the trustee may, on the death of A, testify to the disposition of the trust funds in his hands. This evidence does not concern the contract or cause of action in issue and on trial, since the "plaintiff is not claiming under or through A, but as purchaser from the settlor."²¹³

F. Death By Wrongful Act

In an action to recover damages for the death by wrongful act of a party,²¹⁴ the "Dead Man's Statute" again presents some very troublesome problems. The principal difficulty is in determining who are the parties to the cause of action which is in issue and on trial. The Supreme Court of Missouri had held with the majority of courts that the cause of action created by the Wrongful Death Statute was not a new one. It is merely the transmission to the parties designated by the statute of the cause of action which the deceased would have had if he had survived his injuries.²¹⁵ Under this interpretation, the parties to the cause of action in issue and on trial were first, the deceased, and second, the party against whom the action was brought.²¹⁶ In *Entwhistle v. Feighner*,²¹⁷ however, the Supreme Court of Missouri had held that the cause of action afforded by the Wrongful Death Statute was a different cause of action from the one the deceased would have had if alive, since all actions at common law based upon tort died with the death of either party.²¹⁸ The statutory party suing for such death by wrongful act and not the deceased, therefore, was held to be the other party to the cause of action in issue and on trial.²¹⁹ In *State ex rel. Thomas v. Daus*²²⁰ the Supreme Court *in banc* definitely settled this controversy and affirmed the doctrine of the *Entwhistle* case.

212. *Fisher v. Fisher* (1920) 203 Mo. App. 45, 217 S. W. 845; *supra*, note 208.

213. *Collins v. Crawford* (1908) 214 Mo. 167, 112 S. W. 538, 544.

214. R. S. Mo. (1929) secs. 3262-3263.

215. *Tiffany, Death By Wrongful Act* (1904) sec. 192; *State ex rel. v. St. Louis Brewing Ass'n v. Reynolds* (Mo. 1920) 226 S. W. 579, 580; *Hartis v. Electric Ry. Co.* (1913) 162 N. C. 236, 78 S. E. 164; *White v. Maxcy* (1877) 64 Mo. 552, 558; *Proctor v. Ry.* (1876) 64 Mo. 112, 120.

216. *Ibid.*

217. (1875) 60 Mo. 214.

218. *Behen v. Transit Co.* (1904) 186 Mo. 430, 85 S. W. 346, 350.

219. *Supra*, note 217.

220. (1926) 314 Mo. 13, 283 S. W. 51.

The very purpose of the Damage Act of 1855 was to give a cause of action where none existed at common law. It did not revive a cause of action theretofore belonging to the deceased, but it gave a new cause of action to named parties bearing a relationship to the deceased.²²¹

The following results would seem to arise from this decision: (1) the party liable for such death is not incompetent if the party having the right to bring this action is alive, since both parties to the cause of action in issue and on trial are in existence.²²² This result seems inequitable and contrary to the purposes of the statute, because in the vast majority of these instances the party bringing the action was neither present at nor has any knowledge of the accident, while the defendant, who is interested in the event, and is often the active tort-feasor, is allowed to present his unqualified version of the manner in which the accident occurred; (2) the death of the defendant, who is a party to the cause of action, should disqualify the party suing under the statute, since the latter is now considered to be the other party thereto; and (3) the death of the party having the right to bring the action should disqualify the party liable thereon.

If a servant is responsible for the wrongful act leading to the death, the same results regarding the competency of the parties to the suit to testify would follow, since the party liable for such acts, and not the servant, under the rule of the *Berberich* case, has been held to be the other party to the cause of action in issue and on trial.²²³ The competency of the servant to testify in tort situations has been previously discussed.²²⁴

G. Delivery Of Instruments

The survivor is incompetent to testify to a delivery of an instrument by the deceased to him.²²⁵ Without proof of such delivery, the instrument is inadmissible in evidence.²²⁶ In *Weiland v. Weyland*²²⁷ the executor of the deceased sued the defendant upon a promissory note. The defendant desired to introduce a written release proved to have been signed by the deceased, but

221. *Id.* at 56.

222. This was the direct holding in *State ex rel. Thomas v. Daus* (1926) 314 Mo. 13, 283 S. W. 51.

223. *Freeman v. Berberich* (1933) 332 Mo. 831, 60 S. W. (2d) 393.

224. *Supra*, notes 115 and 116.

225. *Koger v. Black* (Mo. 1920) 220 S. W. 904; *Wren v. Sturgeon* (Mo. 1916) 184 S. W. 1036; *Fink v. Hey* (1890) 42 Mo. App. 295.

226. *Ibid.*; *Weiland v. Weyland* (1876) 64 Mo. 168.

227. (1876) 64 Mo. 168.

was not permitted to do so since he had no independent proof of its delivery to him. This result seems unjust, as well as contrary to common experience. The possibility that this completed instrument had not been delivered to the defendant or that the latter had procured it by wrongful means from the deceased is, to say the least, remote. The fact that business-men deal privately in such matters makes the lack of proof (through third parties) of delivery, actually, a very common event. This result, however, is inevitable under the literal mandate of the "Dead Man's Statute."

H. Proof Of The Signature Of The Deceased

Our courts have not been consistent in determining whether the survivor may testify to the genuineness of the signature of the deceased. The earlier decisions refused to permit the survivor to testify,²²⁸ while the later cases, although not expressly mentioning these prior decisions, have reached a contrary conclusion.²²⁹ The proper approach to this problem, followed in most jurisdictions it seems, is to first determine the source of the survivor's knowledge as to the deceased's handwriting. If the witness derived such knowledge solely from his observation of the actual signing his testimony should be inadmissible, since it relates to the transaction with the deceased, which the latter, if living, could contradict or deny. On the other hand, if the witness testifies to the genuineness of the signature as an expert, or from his own knowledge as gained through a course of dealing with the deceased, such evidence cannot be interpreted as relating to a transaction with the deceased. It is clearly nothing more than the opinion of the witness, which the deceased, even if alive, would not be able to deny.²³⁰

I. Parties To A Deed—Resulting Or Constructive Trusts

Upon the death of either the grantor or the grantee, the one surviving, or those claiming under him, cannot testify to any contract or transaction with the deceased which has reference to the deed itself, and which tends to destroy, explain, qualify, modify, or attack the title therein conveyed.²³¹ The following situations, are typical: the grantor, after the death of the grantee,

228. *Davis v. Wood* (1901) 161 Mo. 17, 61 S. W. 695; *Kaho v. King* (1885) 19 Mo. App. 44.

229. *Goodrich Rubber Co. v. Bennett* (Mo. App. 1926) 281 S. W. 75, 77; *Conley v. Johnson* (1920) 204 Mo. App. 185, 222 S. W. 897.

230. Comment (1920) 20 Col. L. Rev. 229, 230; Comment (1908) 8 Col. L. Rev. 650.

231. *Davis v. Wood* (1901) 161 Mo. 17, 61 S. W. 695, 697; *Danciger v. Stone* (1919) 278 Mo. 19, 210 S. W. 865, 866; *infra*, notes 232-237.

cannot testify that the deed was not made to the grantee personally, but merely as trustee for the grantee's wife;²³² the grantee cannot show that the consideration in the deed from deceased grantor is other than that therein expressed;²³³ the grantee is incompetent to testify to a compliance with the conditions of the deed.²³⁴ If, however, these conditions were "mere inducements or circumstances leading up to the deed," the grantee may testify thereto, since he is in no way testifying concerning the deed itself.²³⁵ Apart from these illustrations, it is held that the grantor may not testify to a verbal release of the deed which he executed and delivered to the deceased grantee;²³⁶ and, the grantee cannot testify to oral admissions of his title by the deceased grantor.²³⁷

Where one of the parties alleges a title or claim which is independent of the deed, he is not incompetent, because the validity or terms of the deed are not being denied or attacked, and the deed, therefore, is not in issue and on trial.²³⁸ Thus, where the plaintiff had delivered a note to a deceased agent for collection, and the agent directed the trustee to sell, the agent taking title in himself and conveying to the defendant, the plaintiff may testify to such fraudulent manipulations by the deceased agent, since such testimony is introduced to show the plaintiff's claim to the property, rather than to attack the deed from the agent to the defendant.²³⁹ Where the plaintiff relies upon adverse possession, he is permitted to testify to the facts necessary to sustain his title, although the grantor of the deed upon which the defendant relies is dead.²⁴⁰ In *Stam v. Smith*²⁴¹ the judgment creditors of the deceased grantor brought suit to set aside an alleged fraudulent conveyance to the defendant grantee. The grantee was permitted to testify concerning the conveyance to him.

The suit is not upon the contract evidenced by the deed * * *. Plaintiff's rights lie wholly dehors that contract—and outside the mutual stipulations of the parties to that deed, and

232. *Smith v. Smith* (1907) 201 Mo. 533, 100 S. W. 579.

233. *Edmonds v. Scharff* (1919) 279 Mo. 78, 213 S. W. 823; *Chapman v. Dougherty* (1885) 87 Mo. 617.

234. *Cook v. Higgins* (1921) 290 Mo. 402, 235 S. W. 807.

235. *Griffin v. Nicholas* (1909) 224 Mo. 275, 123 S. W. 1063.

236. *Hughes v. Israel* (1881) 73 Mo. 538.

237. *Sanford v. Van Pelt* (1926) 314 Mo. 175, 282 S. W. 1022; *Gray v. Shelton* (Mo. 1926) 282 S. W. 53.

238. *Golden v. Tyler* (1904) 180 Mo. 196, 79 S. W. 143; *infra*, notes 239-241 and 244.

239. *Dougherty v. Strong* (1926) 313 Mo. 35, 281 S. W. 445, 448.

240. *Spence v. Spence* (1911) 238 Mo. 71, 141 S. W. 898.

241. (1904) 183 Mo. 464, 81 S. W. 1217.

depends on showing it was made to defeat creditors * * *. In this controversy, on the one side are the creditors, and on the other the grantee in the deed.²⁴²

A difficult problem exists in determining the competency of the parties to a suit where the plaintiff seeks to establish a resulting or constructive trust. In the resulting trust situation, the death of the grantee has generally been held to disqualify the plaintiff or his representatives, since the plaintiff relies upon a contract or agreement with the deceased, which the latter, if he were living, could explain or contradict.²⁴³ In the constructive trust cases, where the deceased had acted "wrongfully," and without the consent of or under an agreement with the plaintiff, the latter has generally been held competent to testify that his money furnished the consideration for the purchase price, because such testimony relates to an extraneous or independent claim, and not upon any contract or transaction with the deceased.²⁴⁴ The earlier rulings which held that the plaintiff was competent in constructive trust cases on the theory that the statute applied only to actions founded on contract, and these are actions in tort,²⁴⁵ are no longer tenable in view of the fact that the statute is now construed to be applicable regardless of the nature of the action, except under the second proviso which is expressly limited to contract actions.^{246a} The later cases are properly sustainable on the extraneous or independent claim theory above stated. In both the resulting and constructive trust situations where the survivor is the one who acted wrongfully, the heirs or representatives of the deceased are competent to testify to the contract or transaction between the deceased and the survivor on the basis already indicated.^{246b}

J. Will Contests

In will contest cases such a wide latitude is permitted in admitting testimony of conversations, mental capacity, fraud, undue influence, directions to scribes, and other circumstances concerning the testator's activities that the "Dead Man's Statute" is seldom applicable. In fact the right to contest the validity of

242. *Id.* at 1219.

243. *Orr v. St. Louis Union Trust Co.* (1922) 291 Mo. 383, 236 S. W. 642; *Goodale v. Evans* (1914) 263 Mo. 219, 172 S. W. 370.

244. *Roberts v. Roberts* (Mo. 1927) 291 S. W. 485, 487; *Pressy v. Slezah* (Mo. 1925) 278 S. W. 382; *Miller v. Slupsky* (1900) 158 Mo. 643, 59 S. W. 99.

245. *Graham v. Wilson* (Mo. App. 1913) 153 S. W. 83, 84, and cases cited.

246a. *Freeman v. Berberich* (1933) 332 Mo. 831, 60 S. W. (2d) 393.

246b. *Supra*, notes 134-137.

the will is generally limited to persons whose interests are substantially affected by the will.²⁴⁷ The statutory provisions regarding the incompetency of a subscribing witness who is disqualified by interest and waiver thereof is well known.²⁴⁸ A detailed analysis of these situations would require a separate treatment.

K. Doctrine Of Fraud Ex Necessitate Rei

At common law parties to the record or interested in the event were competent as witnesses, under a clear exception to the general rule, where it had been already proved that the party against whom the evidence was offered "had been guilty of some fraud or other tortious and unwarrantable act," or "where on general grounds of public policy, it was deemed essential to the purposes of justice."²⁴⁹ Since our statute is now construed to be an enabling one, such witnesses, being competent at common law, should remain competent under the statute.²⁵⁰ This doctrine of "fraud *ex necessitate rei*," has, however, been seldom urged,²⁵¹ and exactly how far and to what types of factual situations our court will apply it is difficult to ascertain. A study of the common-law history and cases involving this principle will furnish the best answer to this problem.

L. Miscellaneous

The same rules which have been declared when one party is dead are applicable when the other party to the contract or cause of action in issue and on trial is insane.²⁵² Other jurisdictions have extended their statutes to include "idiots, habitual drunkards, and distorted persons."²⁵³ Still others have restricted the disqualification to death alone.²⁵⁴ The liberality or restrictiveness of the protection afforded is primarily a question of legislative policy which should depend upon whether the need exists for the disqualification, and whether the party's position is an in-

247. Woerner, *Law of Decedents' Estates* (2nd ed. 1924) secs. 200-202; *Gamache v. Gamache*, Adm'r (1873) 52 Mo. 287, 290; Note (1933) 6 Miss. L. Rev. 409, 413.

248. R. S. Mo. (1929) sec. 558.

249. 1 Greenleaf, *Evidence* (14th ed. 1883) secs. 348-350.

250. *Bernblum v. Travelers Ins. Co. of Hartford Conn.* (Mo. 1937) 105 S. W. (2d) 941.

251. In *Warfield v. Hume* (1902) 91 Mo. App. 541, 546, this doctrine was urged, but the court rejected it on the basis that the facts did not warrant its application; see *Henry v. Sneed* (1899) 99 Mo. 407 where the doctrine was applied to permit the wife to testify concerning confidential communications to her husband.

252. *Martinsburg Bank v. Fennewald* (Mo. App. 1928) 2 S. W. (2d) 207; *McClure v. Clements* (1912) 161 Mo. App. 23, 143 S. W. 82.

253. Ill. Smith-Hurd Rev. Stat. (1935) ch. 51, sec. 2.

254. Kan. Gen. Stat. (1935) ch. 60-2804.

voluntary one, so that he is equitably entitled to this safeguard.

One rule which is very important but not often invoked is the right the representatives or those claiming under the deceased have to force the survivor to testify against himself concerning the contract or cause of action in issue and on trial. This privilege, where the survivor is honest and upright, is a very material and valuable advantage.²⁵⁵

CRITICISM OF THE UNDER-LYING POLICY OF THE STATUTE

Few statutes have ever been as severely criticized by so many prominent text writers as the "Dead Man's Statutes."²⁵⁶ The New York Commission in their report interposed this objection to such statutes²⁵⁷

Who that has any respect for the society in which he lives, can doubt, that, upon this principle, the witness should be admitted? The contrary rule implies, that, in the majority of instances, men are so corrupted by their interest, that they will perjure themselves for it, and that besides being corrupt, they will be so adroit, as to deceive court and juries. This is contrary to all experience. In the great majority of instances the witnesses are honest, however much interested, and in most cases of dishonesty the falsehood of the testimony is detected and deceives none.

Professor Wigmore advances the objection that the exclusion of such evidence precludes honest claims of the living, and that there is no more justification "to save dead men's estate from false claims than to save living men's estate from the loss by lack of proof."²⁵⁸

Another criticism of these statutes is that they do not disqualify certain witnesses who are vitally interested in the outcome of the suit, but who do not possess an "interest in the event," whereas they do disqualify certain totally disinterested witnesses.²⁵⁹ The above-considered situations only too well uphold the validity of this charge.

In *Freeman v. Berberich*, this criticism of our "Dead Man's Statute" was reiterated²⁶⁰

However, it is to be feared that absolute equality or opportunity to produce testimony is a shibboleth impossible of at-

255. *Jackson v. Smith* (1910) 139 Mo. App. 69, 123 S. W. 1026, 1027.

256. *The Law Of Evidence: Some Proposals For Its Change*, published under the auspices of the Commonwealth Fund in 1927.

257. *Id.* at 25; 1 Wigmore, *Evidence* (2nd ed. 1923) 1000, sec. 576.

258. 1 Wigmore, *op. cit.*, 1005, sec. 578.

259. *Supra*, notes 61, 74 and 83.

260. (1933) 332 Mo. 831, 60 S. W. (2d) 393, 400.

tainment. It is like the theoretical condition of evenly balanced testimony sometimes referred to in instructions. Will not courts more often reach the truth by properly weighing the evidence which can be produced?

Another objection is that the statute "encumbers the profession with a profuse mass of quibbles over the interpretation of words," and that the time consumed in applying and interpreting the statute is out of all proportion to the doubtful good it does.²⁶¹ When one considers the mass of litigation on this subject, the numerous instances of non-conformity to the purposes of the statute, the intricate distinctions which have been drawn, the certainty that the future will bring additional technical problems which will tend to further complicate an already complicated situation, he strongly hesitates in denying that the statute should be abolished, or at least materially modified.

LEGISLATIVE MODIFICATIONS OF "DEAD MAN'S STATUTES"

Ten jurisdictions do not have the typical "Dead Man's Statute" but other provisions have been enacted to solve this problem.²⁶² Four states have abandoned the rule altogether, but allow the admission of the decedent's hearsay declarations as an antidote to the survivor's testimony.²⁶³ A questionnaire held in one of these states revealed that the great majority of the lawyers and judges were of the opinion that this enactment is very desirable, and aids greatly in the ascertainment of truth and justice.²⁶⁴

The Virginia and New Mexico enactments admit the testimony of the survivor, but refuse to allow a verdict in his favor unless his testimony is corroborated.²⁶⁵ A similar requirement of substantiation has been read into the Louisiana statute, which provides that interest does not make a witness incompetent, but may "diminish the extent of his credibility."²⁶⁶

The New Hampshire and Montana provisions allow the trial court discretion to admit the survivor's testimony "when it appears that * * * injustice will be done without it."²⁶⁷ The unique

261. *Supra*, note 256; 1 Wigmore, *op. cit.*, 1006-1007, sec. 578.

262. *Supra*, note 256, l. c. 28; 1 Wigmore, *op. cit.*, 1007, sec. 578; Note (1933) 6 Miss. L. Rev. 409.

263. Conn. Gen. Stat. (1930) sec. 5608; Mass. Gen. Laws (1932) c. 233, sec. 66; Ore. Code Ann. (1930) sec. 9-403; R. I. Gen. Laws (1923) sec. 5039.

264. Note (1933) 6 Miss. L. Rev. 409, 411.

265. Va. Code Ann. (1930) sec. 6209; N. Mex. Stat. Ann. (1929) sec. 45-601.

266. La. Civil Code (1932) sec. 2282.

267. N. H. Pub. Laws (1926) ch. 336, secs. 27 and 28; Mont. Rev. Code (1921) sec. 10535.

Arizona Statute, which provides that the survivor is incompetent, "unless * * * required to testify by the court," results in a like conclusion.²⁶⁸

CONCLUSION

It is clear that the solution to this problem is not easy. Three general possibilities suggest themselves: the statute can be completely abolished and some other form of restriction upon the admissibility of this type of testimony substituted, possibly one similar to those existing in the ten jurisdictions which have so acted; or, the statutory situation can be allowed to remain as it is, without any effort to change or modify the statute, leaving the goal of improvement to be attained by judicial construction; or, it is possible to make a careful survey of the particular defects which have developed in the application of the statute, and to revise the statute with a purpose to eliminate them.

The last remedy would appear to be the most desirable, because, although many of the criticisms against the statute have a measure of validity, yet in general the purposes which this enactment attempts to effectuate remain worthy of accomplishment. The decisions which fail to reach the aims intended by the statute, or which have been so troublesome to the bench and bar, merely illustrate the need for revision and clarification of the statute, and are not a justification for its complete repeal. The writer believes that a competent committee, after a careful study of this problem, could revise this statute so that it would be comparatively easy to understand and apply, thereby moulding it into a truly helpful instrumentality of justice.

M. J. GARDEN.

268. Ariz. Code (1928) sec. 4414.