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W. Dent Gitchel

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SHOULD TENNESSEE BURY THE DEAD MAN STATUTE AS ARKANSAS HAS?

W. DENT GITCHEL*

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* B. A., Hendrix College, 1963; J.D., University of Arkansas, Fayetteville, 1969. Professor of Law, University of Arkansas, at Little Rock.

I. INTRODUCTION

Dead men tell no tales; they neither lie nor speak with verity. They cannot bare the lie or controvert; no word escapes their lifeless lips. Whatever thoughts their deathless souls exude are comprehended only in unearthly realms. What, then, shall we do when they are sued? For a century, most jurisdictions answered, "[D]eath having silenced the one, the law silences the other."¹

In a controversy with the estate of a dead person it seems patently unfair, on superficial consideration, to allow either party to testify to what the deceased did or said when the deceased cannot be called as a witness to explain or refute the testimony.² Because of this concern most states enacted so-called "dead man" statutes.³ These laws provide that in lawsuits in which the dead person's estate is a party, the parties are incompetent to testify in their own behalf about statements of or transactions with the dead person.⁴

In order to understand the dead man statutes, a brief review of their history is helpful. Common law considered parties to lawsuits incompetent to testify.⁵ Their testimony was considered so inherently biased as to be totally unreliable. Such a rule is hard to comprehend today when we consider each party's right to tell his side of the story to be a basic tenet of the adversary trial;

1. *Newman v. Tipton*, 191 Tenn. 461, 465, 234 S.W.2d 994, 996 (1950).

2. See *Hood v. Welch*, 256 Ark. 362, 507 S.W.2d 503 (1974); *Newman v. Tipton*, 191 Tenn. 461, 234 S.W.2d 994 (1950); *Baker v. Baker*, 24 Tenn. App. 220, 142 S.W.2d 737 (1940). The inability of the dead man to tell his side of the story was the reason for adopting the dead man statutes. Early Tennessee decisions clearly hold that if the dead man gave a deposition before his death, the opposing party may testify to the dead man's statements and transactions. *E.g.*, *Bingham v. Lavender*, 70 Tenn. 48, 49-50 (1878); *McDonald v. Allen*, 67 Tenn. 446, 448 (1874). Although a party witness's deposition given before his opponent's death is admissible, his testimony on the same subjects could not be given after the opponent's death. *Bernard v. Reaves*, 27 Tenn. App. 121, 178 S.W.2d 224 (1944).

3. See C. McCORMICK, EVIDENCE § 65 (3d ed. 1984); Comment, *The Tennessee Dead Man's Statute*, 49 TENN. L. REV. 343, 346 (1982).

4. As the Arkansas Supreme Court said: "[A] party may not, over objection of the administrator, undertake to interpret or express what was in the mind of one whose estate he sues, by giving details of dealings, negotiations or transactions or by quoting statements made in relation to such matters." *Rankin v. Morgan*, 193 Ark. 751, 754, 102 S.W.2d 552, 553 (1937). Dead Man statutes have been held also to prohibit written evidence of a dead man's transactions with and statements to a party witness. *E.g.*, *Montague v. Thomason*, 91 Tenn. 168, 172, 18 S.W. 264, 265 (1892). Nevertheless, writings executed by the decedent have been routinely admitted into evidence. See *Cline v. Miller*, 239 Ark. 104, 387 S.W.2d 609 (1965); *Green v. Green*, 231 Ark. 218, 329 S.W.2d 411 (1959); *Royston v. McCulley*, 59 S.W. 725 (Tenn. Ch. App. 1900).

5. See, *e.g.*, *Ballard v. Noaks*, 2 Ark. 45 (1839); C. McCORMICK, EVIDENCE § 65 (3d ed. 1984); Comment, *supra* note 3.

however, exclusion of the parties' testimony prevailed until the mid-nineteenth century,⁶ and was not abolished in every state until 1904.⁷

Tennessee abolished party incompetency in 1870,⁸ and included a dead man statute in that law.⁹ Arkansas included this evidentiary reform in its constitution of 1868,¹⁰ and incorporated it in the present 1874 Constitution.¹¹ The Arkansas dead man statute was specifically repealed when a version of the revised Uniform Rules of Evidence was adopted in 1976.¹² Under the modern evidence code, unencumbered with the dead man statute, parties to suits involving decedents' estates may offer evidence of what the decedent said or did if the evidence is otherwise admissible.¹³

The proposed Tennessee Rules of Evidence state that "[e]very person is competent to be a witness except as otherwise provided

6. See C. McCORMICK, EVIDENCE § 65 (3d ed. 1984); Comment, *supra* note 3, at 345-46.

7. 2 J. WIGMORE, EVIDENCE § 488, at 647 n.1 (Chadbourn rev. 1979); Comment, *supra* note 3, at 346.

8. Act of Feb. 24, 1870, ch. 78, 1869-70 Tenn. Pub. Acts 95.

9. *Id.* The codification of the law appears as Tennessee Code Annotated section 24-1-203 and provides:

In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. Provided, if a corporation be a party, this disqualification shall extend to its officers of every grade and its directors.

TENN. CODE ANN. § 24-1-203 (1980).

10. ARK. CONST. of 1868, art. VII, § 22.

11. Arkansas Constitution schedule, section 2 provided:

In civil actions, no witness shall be excluded because he is a party to the suit, or interested in the issue to be tried. Provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party. Provided, further, that this section may be amended or repealed by the General Assembly.

ARK. CONST. of 1874, sched., § 2 (repealed 1976).

Although both the Arkansas and Tennessee statutes apply to guardians as well as personal representatives of decedents' estates, that application is beyond the scope of this article. The competency of criminal defendants to testify in their own behalf was established in Arkansas by Act LXXXII, 1885 Ark. Acts 126 (codified at ARK. STAT. ANN. § 43-2016 (repealed 1977)). See *Foster v. State*, 45 Ark. 328 (1885).

12. UNIF. R. EVID. Act 1143, § 2, 1975 Ark. Acts 2799 (codified at ARK. STAT. ANN. § 28-1001 (repealed 1979)).

13. Arkansas Rule of Evidence 601 simply provides that "[e]very person is competent to be a witness except as otherwise provided in these rules." See *Davis v. Hare*, 262 Ark. 818, 561 S.W.2d 321 (1978).

in these rules or by statute."¹⁴ However, the rules as presently drafted do not contemplate the repeal of the dead man statute.¹⁵ It is the premise of this article that Arkansas's experience of thirteen years without the statute has been entirely favorable and Tennessee would be well-advised to use the advent of its new evidence code as an opportunity to entomb this inefficacious rule of evidence.

II. JUDICIAL CONSTRUCTION OF THE STATUTE

In reviewing the appellate decisions that consider application of the dead man statute both in Arkansas and Tennessee, one is struck by the artificiality of the issue. Because the dead man laws are statutory, the courts have been forced to apply them; and because they set up a barrier at the threshold of evidentiary analysis, the courts deciding these cases have not been free to consider the logical reasons that should govern admissibility.¹⁶

The courts' distaste for these statutes is evident from the strict construction almost always given them.¹⁷ The cases tend to turn on construction of a single clause or phrase in the statute. The decisions are often inconsistent, and behind the printed word, one can see judges valiantly striving to reach just results *despite* the statute. Rarely can one discern a situation where the dead man statute *prevented* an injustice. Following is a discussion of the

14. TENN. R. EVID. 601 (proposed 1987).

15. See TENN. R. EVID. 601 (proposed 1987) advisory committee comment.

16. These considerations are *relevancy*, *competency* and *reliability*. *Relevancy* is covered by Arkansas Rules of Evidence 401-10. *Competency* to testify is determined by the witness's familiarity with the subject of the testimony rather than by a legislatively imposed obstacle in the path of reason; ordinary lay witnesses must have personal knowledge, ARK. R. EVID. 602, and may even offer helpful opinions if the opinions are rationally based on personal perception. ARK. R. EVID. 701. Witnesses qualified as experts may state opinions based on facts furnished to them. ARK. R. EVID. 703.

17. See Rankin v. Morgan, 193 Ark. 751, 102 S.W.2d 552 (1937); Grange Warehouse Ass'n v. Owen, 86 Tenn. 355, 7 S.W. 457 (1888); Rielly v. English, 77 Tenn. 16 (1882); Haynes v. Cumberland Builders, Inc., 546 S.W.2d 228 (Tenn. Ct. App. 1976); Christofiel v. Johnson, 40 Tenn. App. 197, 290 S.W.2d 215 (1956); Bernard v. Reaves, 27 Tenn. App. 121, 178 S.W.2d 224 (1944); Kurn v. Weaver, 25 Tenn. App. 556, 161 S.W.2d 1005 (1940); Baker v. Baker, 24 Tenn. App. 220, 142 S.W.2d 737 (1940); Savage v. Savage, 4 Tenn. App. 277 (1927). Despite the strict construction given the statutes, they have been held to apply to all civil actions, Free v. Maxwell, 138 Ark. 489, 212 S.W. 325 (1919), both to suits at law and in equity, Bush v. Prescott & N.W. Ry., 83 Ark. 210, 103 S.W. 176 (1907) and to those in tort as well as in contract, Chumbler v. McClure, 505 F.2d 489 (6th Cir. 1974).

rules construing the dead man statute developed by judicial decisions in Arkansas and Tennessee.

A. The Personal Representative¹⁸ Must Be a Party

The courts limited the application of the dead man statute to suits in which the executor or administrator is a party¹⁹ and is litigating for the estate in that capacity,²⁰ rather than suing²¹ or being sued²² personally. Title contests between heirs or devisees and purchasers²³ or the widow and heirs,²⁴ partition suits,²⁵ claims by beneficiaries to collect insurance proceeds,²⁶ boundary disputes between the widow and a neighbor,²⁷ and ejectment suits against the widow²⁸ have been held to be outside the terms of the statute because the personal representative is not a party.

The personal representative must be a necessary,²⁹ rather than

18. The Arkansas statute was held to apply to special as well as to regular administrators. *Brown v. Creekmore*, 141 Ark. 512, 217 S.W. 774 (1920).

19. *Winston v. Roe*, 246 F. Supp. 246 (E.D. Tenn. 1965); *Matlock v. McCracken*, 251 Ark. 972, 479 S.W.2d 508 (1972); *Umberger v. Westmoreland*, 218 Ark. 632, 238 S.W.2d 495 (1951); *Baker v. Eibler*, 216 Ark. 213, 224 S.W.2d 820 (1949); *Ladd v. Bones*, 213 Ark. 1030, 214 S.W.2d 353 (1948); *Veach v. Merchant*, 183 Ark. 77, 35 S.W.2d 344 (1931); *Cothron v. Cothron*, 21 Tenn. App. 388, 110 S.W.2d 1054 (1937). The Tennessee statute was strictly construed early on as not encompassing heirs within the terms "executors" and "administrators." See *Hughlett v. Conner*, 59 Tenn. (1 Heisk.) 83 (1873). See also *Haynes v. Cumberland Builders, Inc.* 546 S.W.2d 228 (Tenn. Ct. App. 1976).

20. *Watts v. Rayman*, 62 Tenn. App. 333, 462 S.W.2d 520 (1970).

21. *Turner v. Huggins*, 130 Tenn. 181, 169 S.W. 754 (1914); *Connor v. Hickey*, 48 S.W. 289 (Tenn. Ch. App. 1898).

22. *Barrineau v. Brown*, 240 Ark. 599, 401 S.W.2d 30 (1966); *Johnson v. Hall*, 68 Tenn. 351 (1878); *Alexander v. Kelso*, 60 Tenn. 5 (1872); *Hooper v. Neubert*, 53 Tenn. App. 233, 381 S.W.2d 569 (1963).

23. *Sewell v. Umsted*, 169 Ark. 1102, 278 S.W. 36 (1925); *Bird v. Jones*, 37 Ark. 195 (1881); *Bozeman v. Browning*, 31 Ark. 364 (1876). See also *supra* note 19.

24. *Justice v. Henley*, 27 Tenn. App. 405, 181 S.W.2d 632 (1944); *Lawrence v. LaCade*, 46 Ark. 378 (1885). See also *supra* note 19.

25. *Edgmon v. Edgmon*, 193 Ark. 1076, 104 S.W.2d 452 (1937).

26. *Webster v. Telle*, 176 Ark. 1149, 6 S.W.2d 28 (1928).

27. *Britt v. Berry*, 133 Ark. 589, 202 S.W. 830 (1918).

28. *Williams v. Prioleau*, 123 Ark. 156, 184 S.W. 847 (1916).

29. *Hodges v. Hodges*, 244 Ark. 94, 424 S.W.2d 174 (1968); *Jensen v. Housley*, 207 Ark. 742, 182 S.W.2d 758 (1944). Courts may receive the evidence for one purpose and exclude it for others, as in *Missouri Pac. R.R. v. Keeton*, 209 Ark. 605, 191 S.W.2d 954 (1946), where a widow/administratrix's testimony as to her husband's dying declarations was held admissible on the issue of damages for loss of contributions because they would be recoverable by her personally, but inadmissible on the issue of conscious pain and suffering because these damages, if recovered, would belong to the estate. And, where five cases were consolidated for trial, but the administrator was a party to only three of them, the decedent's statements at the scene of the accident were admitted in the other two cases. *McKamey v. Andrews*, 40 Tenn. App. 112, 289 S.W.2d 704 (1955).

nominal,³⁰ party for the statute to apply.³¹ Therefore, in a wrongful death suit required to be brought in the name of the personal representative, but where any recovery would go to the widow, the widow/executrix/plaintiff was held competent to testify to the decedent's contributions to her support.³² The statute has been held not to apply to a suit to set aside a conveyance made by the decedent during his lifetime, even though the administrator of his estate is a party.³³ If the estate is a co-defendant, the plaintiff's testimony concerning transactions of the deceased may be admissible against the other defendant, though not admissible against the estate.³⁴

B. Both Parties Must Have Something at Stake

Because the Tennessee statute is limited to cases where "judgments may be rendered for or against" the personal representative, the lawsuit must subject assets of the estate to increase or decrease for the statute to be applicable.³⁵ Likewise, the opposing party must either potentially be entitled to a judgment against the estate³⁶ or must potentially be liable.³⁷ Will contests,³⁸ widows' actions to take

30. Guyot v. Fletcher, 219 Ark. 561, 243 S.W.2d 639 (1951); St. Louis Union Trust Co. v. Hammans, 204 Ark. 298, 161 S.W.2d 950 (1942); Brown v. Brown, 134 Ark. 380, 203 S.W. 1009 (1918); Gibson v. Parkey, 142 Tenn. 99, 217 S.W. 647 (1919); Hale v. Kearly, 67 Tenn. 49 (1874); Hill v. Fly, 52 S.W. 731 (Tenn. Ch. App. 1899).

31. But where the administrator was an *improper* party plaintiff and the defendant did not raise the issue of misjoinder, the statute precluded the defendant's testimony. Blackburn v. Thompson, 127 Ark. 438, 193 S.W. 74 (1917).

32. Chicago, R.I. & P. Ry. v. Jenkins, 183 Ark. 1071, 40 S.W.2d 439 (1931); St. Louis & S.F. R.R. v. Conarty, 106 Ark. 421, 155 S.W. 93 (1913), *rev'd on other grounds*, 238 U.S. 243 (1915). See also Hale v. Kearly, 67 Tenn. 49 (1874). But the decedent's statements were held inadmissible as to elements for which the *estate* sought recovery. Robb v. Woosley, 175 Ark. 43, 295 S.W. 13 (1927). Whether the estate would get the money in the event of a recovery is the controlling issue. See Houston v. Carson, 219 Ark. 665, 244 S.W.2d 151 (1951) (executrix/heir not allowed to testify in a foreclosure suit brought by the estate).

33. Montgomery v. Clark, 46 S.W. 466 (Tenn. Ch. App. 1898).

34. Bush v. Prescott & N.W. Ry., 83 Ark. 210, 103 S.W. 176 (1907); Carman v. Huff, 32 Tenn. App. 687, 227 S.W.2d 780 (1949). See also Haynes v. Cumberland Builders, Inc., 546 S.W.2d 228 (Tenn. Ct. App. 1976).

35. Baker v. Baker, 24 Tenn. App. 220, 142 S.W.2d 737 (1940). However, in Arkansas, the statute was held to apply where the estate could only be liable for costs. Blackburn v. Thompson, 127 Ark. 438, 193 S.W. 74 (1917); Bush v. Prescott & N.W. Ry., 83 Ark. 210, 103 S.W. 176 (1907).

36. Leffew v. Mayes, 685 S.W.2d 288 (Tenn. Ct. App. 1984).

37. Bernard v. Reaves, 27 Tenn. App. 121, 178 S.W.2d 224 (1944); Kurn v. Weaver, 25 Tenn. App. 556, 161 S.W.2d 1005 (1940).

38. Taylor v. McClintock, 87 Ark. 243, 112 S.W. 405 (1908); Franklin v. Franklin,

against the will,³⁹ actions to establish parol trusts,⁴⁰ suits by mortgagors to have deeds declared mortgages,⁴¹ and actions by named beneficiaries to collect on insurance policies⁴² are considered to be outside the terms of the statute because they affect only the manner of distribution of the property in the estate and present no prospect of gain or risk of loss to the estate.⁴³ But a widow may not testify regarding her services to her late husband in her action for allotment of dower because under the terms of the dead man statute judgment could be rendered for or against the estate.⁴⁴ The statute has been applied most frequently to prevent claimants' testimony supporting claims against estates.⁴⁵

C. The Witness Must Be a Party

The dead man statute forbids testimony of the parties only;⁴⁶ it does not apply to other witnesses.⁴⁷ In construing the statute as narrowly as possible in order to allow as much relevant testimony as possible, the courts of both Arkansas and Tennessee decided that the witness must not only be a party—he must be an *interested*

38. Taylor v. McClintock, 87 Ark. 243, 112 S.W. 405 (1908); Franklin v. Franklin, 90 Tenn. 44, 16 S.W. 557 (1891); Davis v. Davis, 74 Tenn. 543 (1880); Orr v. Cox, 71 Tenn. 617 (1879); Baker v. Baker, 24 Tenn. App. 220, 142 S.W.2d 737 (1940); Patterson v. Mitchell, 9 Tenn. App. 662 (1929).

39. Baker v. Baker, 24 Tenn. App. 220, 142 S.W.2d 737 (1940).

40. Savage v. Savage, 4 Tenn. App. 277 (1927).

41. Sellers v. Sellers, 53 S.W. 316 (Tenn. Ch. App. 1899).

42. Newark Ins. Co. v. Seyfert, 54 Tenn. App. 459, 392 S.W.2d 336 (1964).

43. Baker v. Baker, 24 Tenn. App. 220, 142 S.W.2d 737 (1940).

44. Carter v. Younger, 123 Ark. 266, 185 S.W. 435 (1916) (Other witnesses were, however, allowed to testify.).

45. See Covington v. Covington, 216 Ark. 549, 226 S.W.2d 557 (1950); Harris v. Whitworth, 213 Ark. 480, 211 S.W.2d 101 (1948); Rogers v. Stewart, 206 Ark. 1118, 178 S.W.2d 849 (1944); Johnson v. Murphy, 204 Ark. 980, 166 S.W.2d 9 (1942); Wilson v. Dodson, 203 Ark. 644, 158 S.W.2d 46 (1942); Campbell v. Hammond, 203 Ark. 130, 156 S.W.2d 75 (1941); Bradford v. Reid, 202 Ark. 108, 149 S.W.2d 51 (1941); Peoples Nat'l Bank v. Cohn, 194 Ark. 1098, 110 S.W.2d 42 (1937); Josephs v. Briant, 108 Ark. 171, 157 S.W. 136 (1913); Miller v. Jones, 32 Ark. 337 (1877); Watts v. Rayman, 62 Tenn. App. 333, 462 S.W.2d 520 (1970); Nance v. Callender, 51 S.W. 1025 (Tenn. Ch. App. 1898); Still v. Burkett, 39 S.W. 347 (Tenn. Ch. App. 1896).

46. See Patrick v. Arkansas Nat'l Bank, 172 Ark. 1103, 292 S.W. 143 (1927); Crocker v. Crocker, 11 Tenn. App. 354 (1930).

47. Matlock v. McCracken, 251 Ark. 972, 479 S.W.2d 508 (1972); Meers v. Potter, 208 Ark. 965, 188 S.W.2d 500 (1945); Smart v. Owen, 208 Ark. 662, 187 S.W.2d 312 (1945); Rielly v. English, 77 Tenn. 16 (1882); Fuqua v. Dinwiddie, 74 Tenn. 645 (1881); Carman v. Huff, 32 Tenn. App. 687, 227 S.W.2d 780 (1949); Nashville Trust Co. v. Williams, 15 Tenn. App. 445 (1932); Brown v. Fuqua, 9 Tenn. App. 22 (1928).

party.⁴⁸ Consequently, in a claim against an Arkansas estate, a certified public accountant, and the dead man's widow, and his bookkeeper who was a co-executor were allowed to testify about the transaction.⁴⁹

Where the original plaintiff's receiver was substituted as the plaintiff in a suit against an estate, the Arkansas court held that the original plaintiff could testify.⁵⁰ The Tennessee Supreme Court took a different view, refusing to let an original payee testify in a suit on a note brought by an assignee against an administrator.⁵¹ However, in a case in which a husband executed a note to the testator and the testator told him to pay it to the wife, both husband and wife were allowed to testify to the testator's statements in the executor's suit against them to collect the note.⁵²

Generally, a defendant in a suit by a personal representative may not testify in his own behalf as to statements of or transactions with the deceased.⁵³ Other parties, however, who are neither pursuing nor being pursued by the personal representative may testify.⁵⁴

For example, in a suit by a Tennessee executrix against one judgment debtor to revive a judgment obtained by the dead man, the statute was held not to prevent another debtor on the same judgment from testifying against the estate; although he was a party to the original suit, he was not named as a party in the executrix's *scire facias* action.⁵⁵ Furthermore, mere interest in the result is not sufficient to disqualify a witness; the witness must be a party of record.⁵⁶

48. *Walden v. Blassingame*, 130 Ark. 448, 197 S.W. 1170 (1917).

49. *Gober v. Baker*, 239 Ark. 692, 393 S.W.2d 620 (1965). See also *In re Estate of Upchurch*, 62 Tenn. App. 634, 466 S.W.2d 886 (1970) (claimant's wife/bookkeeper allowed to testify about transaction between decedent and claimant).

50. *Stanley v. Wilkerson*, 63 Ark. 556, 39 S.W. 1043 (1897).

51. *Roy v. Sanford*, 140 Tenn. 382, 204 S.W. 1159 (1918). Cf. *Aymett v. Butler*, 76 Tenn. 453 (1881) (estate owed money to judgment debtor; judgment creditor garnished estate; judgment debtor assigned debt owed by estate to judgment creditor; judgment debtor not allowed to testify, but opinion indicates it may be because judgment debtor was made a party). *Contra Collier v. Trice*, 79 Ark. 414, 96 S.W. 174 (1906).

52. *Gibson v. Parkey*, 142 Tenn. 99, 217 S.W. 647 (1919).

53. *Harrison v. Davidson*, 201 Ark. 1185, 149 S.W.2d 49 (1941); *Nolen v. Harden*, 43 Ark. 307 (1884).

54. *Greer v. Stilwell*, 184 Ark. 1102, 44 S.W.2d 1082 (1932); *Sanders v. McClintock*, 175 Ark. 633, 300 S.W. 408 (1927); *Rainwater v. Harris*, 51 Ark. 401, 11 S.W. 583 (1889); *Atchley v. Rimmer*, 148 Tenn. 303, 255 S.W. 366 (1923); *Mason v. Spurlock*, 63 Tenn. 554 (1874); *Hall v. Hall*, 39 S.W. 535 (Tenn. Ch. App. 1896).

55. *Kelton v. Jacobs*, 64 Tenn. 574 (1875).

56. *Bush v. Evans*, 218 Ark. 470, 236 S.W.2d 1013 (1951); *Meers v. Potter*, 208 Ark.

Where claims against a decedent's estate are so connected that they must all succeed or fail together, co-plaintiffs may not testify in each other's behalf;⁵⁷ but if the claims, though brought in one proceeding, are actually separate, each claimant may testify to the dead man's conversations or transactions with the others.⁵⁸

Often the question has arisen whether agents of parties are forbidden to testify by the dead man statute, and, if so, how far the disqualification extends. Before repeal of the statute in Arkansas, it was well settled that employees, agents, and servants of parties could testify.⁵⁹

This was also the rule in Tennessee until 1947.⁶⁰ Corporate officers and shareholders, as agents, were considered competent to testify.⁶¹ For example, in *Poole v. First National Bank*⁶² the Tennessee Court of Appeals, following precedent, held that the dead man statute did not apply to a bank cashier and former assistant cashier in a suit by the bank against an estate to collect a note, even though the cashier was a shareholder in the bank.

The *Poole* decision, of course, in finding that corporate shareholders and directors were not "parties," construed the statute as applied to corporations almost to the point of annihilation. The court, obviously realizing that the dead man statute creates more injustice than it prevents, and that it cannot withstand the illuminating beam of reasoned inquiry, and faced with a situation where application of an irrational law would mandate an unfair

965, 188 S.W.2d 500 (1945); *Smart v. Owen*, 208 Ark. 662, 187 S.W.2d 312 (1945); *McRae v. Holcomb*, 46 Ark. 306 (1885); *McBrien v. Martin*, 87 Tenn. 13, 9 S.W. 201 (1888); *Fuqua v. Dinwiddie*, 74 Tenn. 645 (1881); *Carman v. Huff*, 32 Tenn. App. 687, 227 S.W.2d 780 (1949).

57. *Godfrey v. Templeton*, 86 Tenn. 161, 6 S.W. 47 (1887) (joint claim of surviving partners against deceased partner's estate); *Durham v. Webb*, 46 Tenn. App. 429, 330 S.W.2d 355 (1959) (employees of deceased); *Nashville Trust Co. v. Williams*, 15 Tenn. App. 445 (1932).

58. *Mabry v. Corley*, 236 Ark. 306, 365 S.W.2d 711 (1963); *Bush v. Evans*, 218 Ark. 470, 236 S.W.2d 1013 (1951).

59. *M.F.A. Mut. Ins. Co. v. Dixon*, 243 F. Supp. 806 (W.D. Ark. 1965). It should be noted that in federal civil trials state law determines competency of witnesses to testify about elements substantively governed by state law. FED. R. EVID. 601. See also *People's Sav. Bank v. McInturff*, 147 Ark. 296, 227 S.W. 400 (1921).

60. *Montague v. Thomason*, 91 Tenn. 168, 18 S.W. 264 (1892); *McBrien v. Martin*, 87 Tenn. 13, 9 S.W. 201 (1888).

61. *Nashville Trust Co. v. First Nat'l Bank*, 123 Tenn. 617, 134 S.W. 311 (1910); *Grange Warehouse Ass'n v. Owen*, 86 Tenn. 355, 7 S.W. 457 (1888).

62. 29 Tenn. App. 327, 196 S.W.2d 563 (1946).

decision, interpreted the law narrowly so as to avoid a prejudicial result.

Dogma, however, does not die easily, and in 1947 the Tennessee legislature added the last sentence to the dead man statute, providing that "if a corporation be a party, this disqualification shall extend to its officers of every grade and its directors."⁶³ In Arkansas, the dead man statute was construed in a manner consistent with the *Poole* decision.⁶⁴

D. The Witness's Interest Must Not Be Adverse To The Party Calling Him

The exclusionary effect of the dead man statute applies to a party witness testifying in his own behalf;⁶⁵ if the opponent calls a party as an adverse witness, the dead man statute does not apply.⁶⁶ Also, the testimony must be adverse to the opposing party⁶⁷ before the statute renders him incompetent. Actual opposition of interest is required in order to exclude the testimony.⁶⁸ If a party called as a witness by the nominal opponent has no real adverse interest to the nominal opponent, he may testify.⁶⁹

E. The Evidence Must Concern a Transaction or Statement Of the Decedent⁷⁰

Parties are not rendered wholly incompetent to testify by the dead man statute; they are only made incompetent to testify

63. 1947 Tenn. Pub. Acts ch. 22, § 2 (codified at TENN. CODE ANN. § 24-1-203 (1980)).

64. *Cross v. Pharr*, 215 Ark. 463, 221 S.W.2d 24 (1949); *Smith v. North La. Sanitarium*, 181 Ark. 986, 26 S.W.2d 97 (1930); *Mosley v. Mohawk Lumber Co.*, 122 Ark. 227, 183 S.W. 187 (1916).

65. *Freeman v. Citizens' Nat'l Bank*, 167 Tenn. 399, 70 S.W.2d 25 (1934); *Patton v. Hardison*, 20 Tenn. App. 585, 101 S.W.2d 698 (1936).

66. *Hill v. McLean*, 78 Tenn. 107 (1882).

67. *Morton v. Yell*, 239 Ark. 195, 388 S.W.2d 88 (1965); *Brittian v. McKim*, 204 Ark. 647, 164 S.W.2d 435 (1942); *Hill v. McLean*, 78 Tenn. 107 (1882); *Trabue, Davis & Co. v. Turner*, 57 Tenn. 447 (1873); *Carman v. Huff*, 32 Tenn. App. 687, 227 S.W.2d 780 (1949).

68. *See Roy v. Sanford*, 140 Tenn. 382, 204 S.W. 1159 (1918); *Durham v. Webb*, 46 Tenn. App. 429, 330 S.W.2d 355 (1959).

69. *Trabue, Davis & Co. v. Turner*, 57 Tenn. 447 (1873). *But see Ledford v. Lee*, 29 Tenn. App. 660, 200 S.W.2d 393 (1946), where the actual hostility of a defendant called as an adverse witness is questionable.

70. *Hood v. Welch*, 256 Ark. 362, 507 S.W.2d 503 (1974); *Free v. Maxwell*, 138 Ark. 489, 212 S.W. 325 (1919); *Strayhorn v. McCall*, 78 Ark. 209, 95 S.W. 455 (1906) *Leffew v. Mayes*, 685 S.W.2d 288 (Tenn. Ct. App. 1984). *See also Note, Evidence - Wills - What Constitutes Transaction With Decedent Within Meaning of Dead Man's Statute*, 1 MEM. ST. U.L. REV. 229 (1970) (discussing Texas law).

concerning the dead person's⁷¹ statements and transactions.⁷² Much litigation has turned on whether the conduct in question constituted a "transaction" with the deceased.⁷³ Generally, Tennessee holds that transactions consist of things done in the decedent's presence to which he could testify if alive.⁷⁴

Arkansas defines the word "transaction" more narrowly. Quoting the dictionary, the Arkansas Supreme Court stated: "The word is defined: 'A business deal; an act involving buying and selling; as, the transactions on the exchange.' Its synonym is negotiation."⁷⁵ Under this somewhat narrow definition, the court, in another case, allowed evidence of what went on in shareholders meetings attended by the decedent in a suit by his executrix against officers of the corporation, because the transactions were not the decedent's individual acts.⁷⁶ Also, testimony of expenditures made on behalf of a deceased has been held not to concern either statements of or transactions with the deceased,⁷⁷ and testimony describing the witness's relationship with the deceased was allowed.⁷⁸ Likewise, the court allowed a surviving partner to testify as to her personal contributions to the partnership in a proceeding to wind up its affairs after the death of the other partner.⁷⁹

Vehicle collisions are not considered transactions within the terms of the Arkansas statute.⁸⁰ However, Tennessee takes a different view, holding that in a suit by a guest against a deceased

71. TENN. CODE ANN. § 24-1-203 (1980). The statute only excludes statements of the "testator, intestate or ward." Therefore, statements that had been made by a deceased, former administrator were admitted. *Wassell v. Armstrong*, 35 Ark. 247 (1880).

72. *Houston v. Carson*, 219 Ark. 665, 244 S.W.2d 151 (1951); *Jones v. Waddell*, 59 Tenn. 338 (1873).

73. See, e.g., *Pierce's Estate v. Pierce*, 236 Ark. 412, 366 S.W.2d 276 (1963).

74. *Chumbler v. McClure*, 505 F.2d 489 (6th Cir. 1974); *Waggoner v. Dorris*, 17 Tenn. App. 420, 68 S.W.2d 142 (1933). See Note, *Witnesses- Dead Man's Statute in Tort Actions*, 21 TENN. L. REV. 788 (1951).

However, observed defects in the decedent's property do not fall within the definition of "transaction." *Newman v. Tipton*, 191 Tenn. 461, 234 S.W.2d 994 (1950). See also Recent Case, *Evidence - Dead Man Statute - Observation of Physical Conditions Not a "Transaction" Within Meaning of Statute*, 4 VAND. L. REV. 913 (1951).

75. *Rankin v. Morgan*, 193 Ark. 751, 753, 102 S.W.2d 552, 553 (1937).

76. *Spivey v. Pugh*, 140 Ark. 296, 305, 215 S.W. 739, 742 (1919).

77. *Craig v. Hickman*, 247 Ark. 628, 447 S.W.2d 120 (1969); *Lasker-Morris Bank & Trust Co. v. Gans*, 132 Ark. 402, 200 S.W. 1029 (1918).

78. *Lasker-Morris Bank*, 132 Ark. at 410-11, 200 S.W. at 1029, 1031 (1918).

79. *Orem v. Moore*, 224 Ark. 146, 149, 272 S.W.2d 60, 62 (1954).

80. *Eisele v. Beaudoin*, 240 Ark. 227, 398 S.W.2d 676 (1966); *Rankin v. Morgan*, 193 Ark. 751, 102 S.W.2d 552 (1937).

host-driver's estate, everything the guest and host said or did during the trip is excluded.⁸¹ Nevertheless, a Tennessee plaintiff may testify to independently observed facts.⁸²

Claimants seeking payment from an estate for personal services performed for the decedent have been precluded from testifying.⁸³ The rendering of medical care has been held to be a transaction with the deceased,⁸⁴ and statements of the deceased offered to prove that medical services were rendered have been held inadmissible.⁸⁵ Similarly, in a medical malpractice suit against a deceased doctor's estate, testimony concerning the plaintiff's state of mind, offered on the issue of informed consent, was held inadmissible.⁸⁶ Delivery of a box containing money was held to be a transaction with the deceased in a suit for conversion.⁸⁷ The facts and statements concerning delivery of an alleged gift were also within the prohibition of the statute.⁸⁸ A widow was not allowed to testify in support of her contention that the decedent's property was really owned as an estate by the entirety.⁸⁹

Many cases have involved alleged contracts with a decedent. The making of a parol contract constitutes a transaction to which the dead man statute applies,⁹⁰ as does the decedent's alleged

81. *Winston v. Roe*, 246 F. Supp. 246 (E.D. Tenn. 1965).

82. *Christofiel v. Johnson*, 40 Tenn. App. 197, 290 S.W.2d 215 (1956).

83. *Appolonio v. Baxter*, 217 F.2d 267 (6th Cir. 1954); *Campbell v. Hammond*, 203 Ark. 130, 156 S.W.2d 75 (1941); *Duty v. Keith*, 191 Ark. 575, 87 S.W.2d 15 (1935); *Graves v. Bowles*, 190 Ark. 579, 79 S.W.2d 995 (1935); *Williams v. Walden*, 82 Ark. 136, 100 S.W. 898 (1907).

84. *Panich v. McLendon*, 241 Ark. 576, 409 S.W.2d 497 (1966); *Cash v. Kirkham*, 67 Ark. 318, 55 S.W. 18 (1900).

85. *Oliver v. Thomason*, 13 Tenn. App. 307 (1931).

86. *Chumbler v. McClure*, 505 F.2d 489 (6th Cir. 1974).

87. *Nunnally v. Becker*, 52 Ark. 550, 13 S.W. 79 (1889).

88. *Zimmerman v. Hemann*, 142 Ark. 308, 218 S.W. 835 (1920); *Wilson v. Edwards*, 79 Ark. 69, 94 S.W. 927 (1906); *Wilson v. Wilson*, 151 Tenn. 486, 267 S.W. 364 (1924) (but other witnesses' testimony was admitted); *Gibson v. Buis*, 142 Tenn. 133, 218 S.W. 220 (1919); *First Nat'l Bank v. Howard*, 42 Tenn. App. 347, 302 S.W.2d 516 (1957); *Mason v. Willhite*, 61 S.W. 298 (Tenn. Ch. App. 1900); *Royston v. McCulley*, 59 S.W. 725 (Tenn. Ch. App. 1900).

89. *Smith v. Dean*, 226 Ark. 438, 439, 290 S.W.2d 439, 440 (1956).

90. *McCargo v. Steele*, 160 F. Supp. 7 (W.D. Ark.), *aff'd*, 260 F.2d 753 (8th Cir. 1958) (agreement to make will); *Barksdale v. Carr*, 235 Ark. 578, 361 S.W.2d 550 (1962) (agreement not to revoke will); *Carpenter v. Franklin*, 228 Ark. 512, 308 S.W.2d 829 (1958) (agreement to sell real property); *Merrell v. Smith*, 228 Ark. 167, 306 S.W.2d 700 (1957) (agreement to reconvey real property); *Brickey v. Sullivan*, 208 Ark. 590, 187 S.W.2d 1 (1945) (agreement to repurchase stock); *Eslick v. Friedman*, 191 Tenn. 647, 235 S.W.2d 808 (1951) (agreement to make will); *Anderson v. Howard*, 18 Tenn. App. 169, 74 S.W.2d 387 (1934) (agreement to reconvey real property).

execution of a note.⁹¹ The statute disqualifies a defendant's testimony concerning the decedent's statements promising credits on a note,⁹² as well as a payee's testimony regarding an oral agreement with a deceased payor to waive default alternatives.⁹³ But statements tending to prove an alleged contract between the decedent and his wife to execute mutual wills were admitted.⁹⁴ In Arkansas, a decedent's books of account were admissible to prove a claim against his estate,⁹⁵ but Tennessee holds otherwise.⁹⁶

Sometimes evidence inadmissible to prove a transaction with the deceased has been admitted as proof of another issue, such as authentication of a claim⁹⁷ or proof of a routine business custom of the deceased.⁹⁸ A party's testimony about receipt of letters in the decedent's handwriting or signed by him, their postmarks, and the fact that envelopes contained the decedent's letterhead are held not to concern a transaction with the decedent.⁹⁹

III. WAIVER OF THE DISQUALIFICATION

Each party to a lawsuit has the right to contradict evidence introduced by the opposing party, and otherwise inadmissible evidence may be admitted for the purpose of rebuttal. Therefore, if the plaintiff offers evidence of admissions allegedly made by the defendant in conversations with a decedent, the defendant may rebut that evidence by testifying about those conversations.¹⁰⁰ By calling witnesses to contradict the testimony of the plaintiff's non-party witnesses, a defendant does not waive the plaintiff's disqualification.¹⁰¹ However, if the defendant injects the issue into the case, the plaintiff may be allowed to testify in rebuttal.¹⁰²

91. *Gist v. Gans*, 30 Ark. 285 (1875).

92. *Kirby v. Wooten*, 132 Ark. 441, 445, 201 S.W. 115, 116 (1918).

93. *Nabors v. Gearhiser*, 525 S.W.2d 145, 147-48 (Tenn. 1975).

94. *Petty v. Nichols' Estate*, 569 S.W.2d 840 (Tenn. Ct. App. 1977).

95. *Gober v. Baker*, 239 Ark. 692, 393 S.W.2d 620 (1965); *Pierce's Estate v. Pierce*, 236 Ark. 412, 366 S.W.2d 276 (1963).

96. *Rielly v. English*, 77 Tenn. 16 (1882).

97. *Chipman v. Perdue*, 135 Ark. 559, 205 S.W. 892 (1918).

98. *Hall v. Harper*, 6 Tenn. Civ. App. 462 (1915).

99. *Josephs v. Briant*, 115 Ark. 538, 172 S.W. 1002 (1914). *Accord Minnis v. Abrams*, 105 Tenn. 662, 58 S.W. 645 (1900).

100. *Gibson v. Buis*, 142 Tenn. 133, 218 S.W. 220 (1919).

101. *Harris v. Whitworth*, 213 Ark. 480, 211 S.W.2d 101 (1948).

102. *Wilson v. Wilson*, 151 Tenn. 486, 267 S.W. 364 (1924).

The opponent of the incompetent testimony must object to its admission.¹⁰³ The Arkansas Supreme Court held, however, that when the inadmissible testimony was allowed on direct examination over objection, cross-examination on the subject waived the objection.¹⁰⁴ Tennessee holds otherwise: If a proper objection is made when the testimony is elicited on direct examination, cross-examination on that subject does not waive the objection.¹⁰⁵ However, if a party "opens the door" during cross-examination by going into matters the witness is incompetent to testify about, the disqualification is waived.¹⁰⁶

The Arkansas Supreme Court held that eliciting incompetent testimony on deposition or by interrogatories¹⁰⁷ waived the disqualification of the witness.¹⁰⁸ Tennessee law was in accord¹⁰⁹ until 1984, when it adopted the opposite view.¹¹⁰

IV. A RECENT TENNESSEE DEAD MAN CASE

*In re Estate of Pritchard v. McDonald, Kuhn, Smith, Miller & Tait*¹¹¹ illustrates the useless and meaningless arguments which the dead man statute necessitates. The law firm filed a claim against the estate of Ms. Pritchard for legal services performed for her during her lifetime. There had been no written contract and establishment of the claim depended solely upon the oral testimony of the lawyer who had done the work. That lawyer was a salaried associate who had subsequently left the firm. When he was called to testify, the probate judge sustained the administratrix's objection on the ground that the dead man statute rendered him incompetent as an agent of a party. Since his testimony was the only evidence

103. *Brickey v. Sullivan*, 208 Ark. 590, 187 S.W.2d 1 (1945); *Lisko v. Hicks*, 195 Ark. 705, 114 S.W.2d 9 (1938); *McElroy v. Barkley*, 58 S.W. 406 (Tenn. Ch. App. 1899).

104. *Starbird v. Cheatham*, 243 Ark. 181, 419 S.W.2d 114 (1967).

105. *Nabors v. Gearhiser*, 525 S.W.2d 145 (Tenn. 1975); *Bowlen v. Baker*, 147 Tenn. 36, 245 S.W. 416 (1922); *Leffew v. Mayes*, 685 S.W.2d 288 (Tenn. Ct. App. 1984); *Durham v. Webb*, 46 Tenn. App. 429, 330 S.W.2d 355 (1959).

106. *Harris v. Harris*, 225 Ark. 958, 286 S.W.2d 849 (1956); *In re Estate of Russell*, 52 Tenn. App. 320, 373 S.W.2d 226 (1961); *Cotton v. Estate of Roberts*, 47 Tenn. App. 277, 337 S.W.2d 776 (1960); *Carman v. Huff*, 32 Tenn. App. 687, 227 S.W.2d 780 (1949).

107. *Mercantile Bank v. Phillips*, 260 Ark. 129, 538 S.W.2d 277 (1976).

108. *Hood v. Welch*, 256 Ark. 362, 507 S.W.2d 503 (1974); *Smith v. Clark*, 219 Ark. 751, 244 S.W.2d 776 (1952). *Contra McCargo v. Steele*, 160 F. Supp. 7 (W.D. Ark. 1952), *aff'd*, 260 F.2d 753 (8th Cir. 1958).

109. *See Thomas v. Irvin*, 90 Tenn. 512, 16 S.W. 1045 (1891).

110. *Ingram v. Phillips*, 684 S.W.2d 954 (Tenn. Ct. App. 1984).

111. 735 S.W.2d 446 (Tenn. Ct. App. 1986).

to establish the claim, it failed. The Tennessee Court of Appeals reversed and remanded, holding that the former associate was not a party and was therefore competent to testify.

The probate court was clearly wrong in excluding the testimony.¹¹² The appellate court, relying on *Montague v. Thomason*,¹¹³ simply held that the associate, as a non-party with no personal interest in the case, was competent to testify. The court found it significant that the 1947 amendment extending the statute's disqualification to corporate officers and directors¹¹⁴ did not extend to other kinds of agents.

The striking thing about the *Pritchard* decision, like so many of its predecessors, is the total irrelevancy of the argument about the lawyer's competency to the reliability of his testimony. The argument was necessary only because the dead man statute exists. This kind of issue, necessitated by an ill-conceived law, is legal mumbo jumbo at its worst—devoid of any relation to logic or the search for a just result. If the law firm had been a professional corporation and the witness an officer, would his testimony have been any less reliable? Had he been a present partner would his testimony have been so unreliable as to justify making him an incompetent witness? Or should the admissibility of testimony relating to transactions and statements of decedents be admitted or refused on the same bases of relevance and reliability as other evidence? The author submits that there is no valid reason for arbitrarily disqualifying witnesses from testifying to statements of and transactions with decedents, and that such evidence should be admitted or excluded on the merit of the evidence, not the identity of the witness.

V. HOW ADMISSIBILITY IS DETERMINED UNDER THE UNIFORM RULES OF EVIDENCE

The entire law of evidence deals with four broad concepts: competency, relevance, reliability, and privilege. The first three concepts are concerned with the merits of the evidence itself. Privileges, however, are based upon broader societal interests, usually the encouragement of free verbal intercourse in certain professional

112. See *supra* text accompanying notes 47-64. See also *supra* text accompanying note 111.

113. 91 Tenn. 168, 18 S.W. 264 (1892).

114. 1947 Tenn. Pub. Acts ch. 88 § 2 (codified at TENN. CODE ANN. § 24-1-203 (1980)).

relationships. The existence of a privilege excludes evidence despite the fact that it is both highly probative and without prejudice in the context of the particular lawsuit.¹¹⁵ Since any existing privilege would act to exclude evidence regardless of the existence of the dead man statute, privileges will not be discussed further here.¹¹⁶

The concept of reliability is further subdivided into three broad considerations: hearsay, authenticity, and the "best evidence" rule. Therefore, without a dead man statute, evidence of what a deceased person said or transacted, like all evidence, must clear five hurdles before being admitted: competency, relevance, and the three sub-categories of reliability. Each of these necessary hurdles will be discussed separately.

A. Competency of witnesses

Repeal of the dead man statute removes the artificial barrier to receiving the testimony of party witnesses in lawsuits with decedents' estates. As with other witnesses, establishing a party's competency requires the simple predicate that the party has personal knowledge of the matters to which he testifies, and this predicate

115. See C. McCORMICK, EVIDENCE § 72 (3d ed. 1984).

116. It should be noted, however, that there is less uniformity among various "uniform" codes of evidence on the subject of privilege than any other. The only Federal Rule of Evidence dealing with privileges, Rule 501, recognizes all constitutionally required privileges, as well as those created by federal statute, Supreme Court rule or "*the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.*" FED. R. EVID. 501 (emphasis added). Uniform Rule of Evidence 501, as adopted in Arkansas and proposed in Tennessee, only recognizes privileges created by constitution, statute or supreme court rule. Therefore, under the revised Uniform Rule there can be no judicially created, common-law privileges. Arkansas lists a number of privileges in the following rules of evidence: lawyer-client, ARK. R. EVID. 502; physician and psychotherapist-patient, ARK. R. EVID. 503; husband-wife, ARK. R. EVID. 504; religious, ARK. R. EVID. 505; political vote, ARK. R. EVID. 506; trade secrets, ARK. R. EVID. 507; governmental, ARK. R. EVID. 508; and identity of informer, ARK. R. EVID. 509. The proposed Tennessee rules do not contain specific privileges, but append to Rule 501 a list of existing privileges created by statute or rule: accident report, TENN. CODE ANN. § 55-12-128 (1980); accountant-client, TENN. CODE ANN. § 62-1-116 (1986); attorney-client, TENN. CODE ANN. § 23-3-105 (1980); attorney-investigator, TENN. CODE ANN. § 24-1-209 (1980); clergy-penitent, TENN. CODE ANN. § 24-1-206 (1980); deaf person-interpreter, TENN. CODE ANN. § 24-1-103(f) (1980); disciplinary board-complainant, TENN. S. CT. R. 9, § 27.1; grand jury-witness, TENN. R. CRIM. P. 6(k)(2); legislature-witness, TENN. CODE ANN. § 24-7-113 (1980); medical review committee-informant, TENN. CODE ANN. § 63-6-219(c) (Supp. 1988); news reporter, TENN. CODE ANN. § 24-1-208 (Supp. 1988); psychiatrist-patient, TENN. CODE ANN. § 24-1-207 (Supp. 1988); psychologist-patient, TENN. CODE ANN. § 63-11-213 (1986); social worker-client, TENN. CODE ANN. § 63-23-107 (1986); spousal, TENN. CODE ANN. §§ 24-1-201 (1980) & 71-6-106 (1987).

may be established by his own testimony.¹¹⁷ Under the Uniform Rules of Evidence, once this preliminary foundation of personal knowledge is laid, the court is free to consider the touchstones that should control admissibility of evidence—its relevance and reliability. No longer is the otherwise admissible testimony of some parties arbitrarily barred.

Perhaps the most salutary effect of Arkansas's repeal of the dead man statute when it adopted the revised Uniform Rules of Evidence¹¹⁸ has been the virtual absence of appeals in which this formerly oft-litigated issue is raised.¹¹⁹ Further, a review of the annotations and digests reveals few cases involving decedents' estates which would formerly have been subject to the dead man statute. The obvious conclusion is that testimony formerly excluded by the statute was otherwise admissible, and when the artificial barrier was removed, no legitimate objections to the evidence remained.

B. Relevance

With the issue of witness competency out of the way, the court should next direct its consideration to the relevance of the evidence. Because the transactions and statements of the deceased are usually the operative facts in issue in these cases, relevance is often apparent. Few lawyers will offer evidence that does not have at least some arguable relevance to a fact in issue. Nevertheless, as with all evidence, the court must exclude irrelevant evidence¹²⁰ after proper objection.¹²¹ The concept of relevance deals with the subject matter

117. ARK. R. EVID. 602.

118. See *supra* note 11.

119. In *Davis v. Hare*, 262 Ark. 818, 561 S.W.2d 321 (1978), the competency of a claimant's testimony against an estate was challenged. The court disposed of the argument perfunctorily, simply stating that the former constitutional provision had been repealed. *Id.* at 819-20, 561 S.W.2d at 324. In *Ashmore v. Ford*, 267 Ark. 854, 591 S.W.2d 666 (Ct. App. 1979), a suit arising out of a motorcycle/automobile collision, the trial court refused to order discovery of the deceased tortfeasor's statement, holding it to be inadmissible under the dead man statute. On appeal, the defense argued that the statute should apply since the transactions occurred before its repeal. The appellate court reversed, holding that the rule of evidence existing at the time of trial (the revised Uniform Rules) applied. *Id.* at 856-57, 591 S.W.2d at 668. The court assumed that the dead man statute would have applied had it not been repealed (a questionable assumption). See *Eisele v. Beaudoin*, 240 Ark. 227, 398 S.W.2d 676 (1966); *Rankin v. Morgan*, 193 Ark. 751, 102 S.W.2d 552 (1937).

120. UNIF. R. EVID. 402.

121. It is necessary to make a timely objection in order to preserve the issue on appeal. UNIF. R. EVID. 103(a)(1).

of evidence. We must ask, "What probative value does this information have in this case?" Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."¹²² If relevant, evidence is admissible¹²³ unless the court finds it to be unduly prejudicial, confusing, misleading, cumulative, or wasteful of time.¹²⁴

C. Reliability

Once it is determined that an item of evidence is relevant and that none of Rule 403's countervailing considerations substantially outweighs its probative value, the court must consider whether it is sufficiently reliable to be admitted. The court's determination of reliability may involve any or all of three evidentiary concepts: hearsay, authentication and the "best evidence" rule.

1. Hearsay

The most obvious objection to allowing witnesses to tell what the deceased person said is that such statements are hearsay. Some decedents' statements, however, may not be hearsay and others, though hearsay, may nevertheless be admissible. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."¹²⁵ If a statement is hearsay, the hearsay rule forbids its admission unless some applicable exception to the rule allows it.¹²⁶ When a hearsay objection is raised,¹²⁷ the court must first decide whether the out-of-court statement is hearsay. If the statement is determined to be hearsay, the court must then determine whether an exception to the hearsay rule nevertheless will allow it to be admitted.

122. ARK. R. EVID. 401.

123. ARK. R. EVID. 402.

124. ARK. R. EVID. 403.

125. ARK. R. EVID. 801(c). This definition is incorporated in the proposed Tennessee rules. See generally C. McCORMICK, EVIDENCE § 246 (3d ed. 1984).

126. UNIF. R. EVID. 802.

127. Hearsay testimony is considered competent and is entitled to consideration in the absence of an objection. *Wilson v. Kemp*, 7 Ark. App. 44, 644 S.W.2d 306 (1982).

a. Statements that are not hearsay

Only out-of-court statements that were assertions of the declarant are hearsay.¹²⁸ This prerequisite to application of the hearsay rule is sometimes overlooked and nonassertive statements are found to be hearsay. In fact the author has found no Arkansas case raising the issue since adoption of the revised Uniform Rules of Evidence. One cannot make an accidental assertion; it must be intended.¹²⁹ Therefore, questions, commands and exclamations not intended as assertions by the declarant are not hearsay.

If the declarant (the decedent in these cases) intended to assert something by his statement, the court must next determine whether the proponent of the statement in the trial would have the factfinder believe the same thing the declarant would have had his listener believe. If so, the statement is "offered for truth of the matters asserted." If offered for some purpose other than to have the fact finder believe the matters asserted by the declarant, the statement is not hearsay.

If the fact that the declarant made the statement is an element or "operative fact" of the lawsuit, the statement is not considered hearsay.¹³⁰ These "operative facts" are sometimes referred to as verbal acts. Whether a fact to be proved is an operative fact (element) is determined by the pleadings.

b. Hearsay statements falling within an exception

If a statement is hearsay, the proponent must search for some exception under which it might be admitted. Any of several exceptions to the hearsay rule may provide the avenue to admissibility. Some of the exceptions most commonly applicable in suits involving decedents' estates are discussed here.

(1) State of mind

The exception most frequently applicable to statements of a deceased person is that admitting statements of a declarant's state

128. UNIF. R. EVID. 801(a)(1) & (2). It should be noted that nonverbal conduct, such as pointing or nodding in assent, may be an assertion if so intended. See TENN. R. EVID. 801 (proposed 1987) advisory committee comment. See also C. McCORMICK, EVIDENCE § 246 (3d ed. 1984).

129. FED. R. EVID. 801(a) advisory committee note. UNIF. R. EVID. 801 is exactly the same as FED. R. EVID. 801. Therefore, the reasoning in the advisory committee's note to the federal rule is equally applicable to the uniform rule.

130. See C. McCORMICK, EVIDENCE § 249 (3d ed. 1984).

of mind.¹³¹ Most "dead man" cases will involve evidence of the dead person's state of mind, since they usually concern alleged parol contracts with the deceased. Both Arkansas and proposed Tennessee Rule 803(3) include within the exception:

A statement of the declarant's then existing state of mind, motion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.¹³²

Except in cases involving the declarant's will,¹³³ the exception is limited to forward-looking statements; backward-looking statements expressing memory or belief are not excepted from the exclusionary rule.¹³⁴ This limitation is based on relevance, the backward-looking statements not being considered relevant to present state of mind.¹³⁵

(2) Admission of a party opponent

A universally recognized, common law exception to the hearsay rule is the one admitting statements made by opposing parties,¹³⁶ no matter how unreliable they may be. The revised Uniform Rules of Evidence continue to allow introduction of party opponent admissions but classify them as non-hearsay, rather than as exceptions to the hearsay rule.¹³⁷ The proposed Tennessee Rules of Evidence

131. ARK. R. EVID. 803(3) and TENN. R. EVID. 803(3) (proposed 1987).

132. TENN. R. EVID. 803(3) (proposed 1987).

133. Will contest cases are outside the terms of the dead man statute. *See supra* note 37. The proposed rule, allowing backward-looking statements in wills cases, changes Tennessee law as expressed in *Hickey v. Beeler*, 180 Tenn. 31, 171 S.W.2d 277 (1943). TENN. R. EVID. 803(3) (proposed 1987) advisory committee comment. An example of the rule's application in a will contest case is *Greenwood v. Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979).

134. *See State v. Abernathy*, 265 Ark. 218, 577 S.W.2d 591 (1979); *See generally* C. McCORMICK, EVIDENCE §§ 294-96 (3d ed. 1984).

135. *Millwee v. Wilburn*, 6 Ark. App. 280, 640 S.W.2d 813 (1982) (in a suit by an executor to set aside a deed and bill of sale executed six months before death, a tape recording of the decedent made the morning before her death was inadmissible).

136. *See* G. LILLY, EVIDENCE § 7.1 (2d ed. 1987).

137. ARK. R. EVID. 801(d)(2). The theoretical argument whether admissions should be classified as hearsay or non-hearsay has filled many a page of scholarly writing. *See* G. LILLY, EVIDENCE § 7.1 (2d ed. 1987); C. McCORMICK, EVIDENCE § 262 (3d ed. 1984) E. MORGAN, BASIC PROBLEMS OF EVIDENCE 265 (1962); J. WIGMORE, EVIDENCE § 1048 (Chadbourn rev. 1972); Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85

continue the common law tradition of classifying statements of parties opponent as excepted hearsay.¹³⁸ The Tennessee and common law classification of admissions as excepted hearsay is a more sensible approach, simply because it is less complicated and easier to apply in practice.

Admissions may be vicarious as well as personal, as where they are adopted¹³⁹ or authorized¹⁴⁰ by the party opponent, or made by his agent¹⁴¹ or co-conspirator.¹⁴² One kind of vicarious admission traditionally recognized is the statement of a person in privity of estate with a party.¹⁴³ The revised Uniform Rules of Evidence, as adopted in Arkansas, do not include these statements in the definition of admissions. Tennessee, however, proposes to retain this recognized kind of admission,¹⁴⁴ so that in the absence of a dead man statute, vicarious admissions of deceased predecessors in title would escape the prohibition of the hearsay rule.

(3) Present sense impression and excited utterance

Two closely related exceptions are those for present sense impressions and for excited utterances. Although similar, they are distinct. The exception for present sense impressions admits statements "describing or explaining an event or condition made while the declarant was perceiving. . . [it] or immediately thereafter."¹⁴⁵ The excited utterance exception admits statements "relating to a startling event or condition made while the declarant was under

U. PA. L. REV. 484, 564 (1937). Both the Federal and revised Uniform Rules of Evidence incorporate the non-hearsay rationale because the admissibility of party admissions is "a product of the adversary system," C. McCORMICK EVIDENCE § 262 (3d ed. 1984), rather than being based on some underlying indicia of reliability as are other hearsay exceptions. FED. R. EVID. 801(d)(2) advisory committee note, 56 F.R.D. 183, 296 (1973). Some scholars have expressed the opinion that this classification is a mistake. See R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 385 n.61 (2d ed. 1982). In practice, it probably makes no difference. See J. FRIEDENTHAL & M. SINGER, THE LAW OF EVIDENCE 92 (1985).

138. TENN. R. EVID. 803(1.2) (proposed 1987).

139. ARK. R. EVID. 801(d)(ii); TENN. R. EVID. 803(1.2)(b) (proposed 1987). See Thomas v. State, 10 Ark. App. 294, 663 S.W.2d 745 (1984).

140. ARK. R. EVID. 801(d)(2)(iii); TENN. R. EVID. 803(1.2)(c) (proposed 1987).

141. ARK. R. EVID. 801(d)(2)(iv); TENN. R. EVID. 803(1.2)(d) (proposed 1987). See Houston Gen. Ins. Co. v. Arkansas La. Gas Co., 267 Ark. 544, 592 S.W.2d 445 (1980).

142. ARK. R. EVID. 801(d)(2)(v); TENN. R. EVID. 803(1.2)(e) (proposed 1987). See Foxworth v. State, 263 Ark. 549, 566 S.W.2d 151 (1978).

143. See, e.g., Barnes v. Young, 238 Ark. 484, 382 S.W.2d 580 (1964); Austin v. Austin, 237 Ark. 127, 372 S.W.2d 231 (1963); C. McCORMICK, EVIDENCE § 268 (3d ed. 1984).

144. TENN. R. EVID. 803(1.2)(f) (proposed 1987).

145. ARK. R. EVID. 803(1).

the stress of excitement caused by the event or condition."¹⁴⁶

Although both derive their justification from the reliability believed to result from spontaneity, the present sense impression exception requires that the statement be made during¹⁴⁷ or immediately after¹⁴⁸ the event, whereas the excited utterance may be made at any time while the excited condition of the declarant continues. Therefore, the time elapsed between the event and the declaration may be greater under the excited utterance exception.¹⁴⁹ The statement of present sense impression is considered reliable because the speaker did not have time to fabricate, whereas the excited utterance is considered reliable because the agitated mental state of the declarant is believed to minimize the possibility of fabrication. The subject matter of the excited utterance may be broader: it must only be "related to" the event, whereas the statement of present sense impression must "describe or explain" the event.¹⁵⁰

Tennessee's proposed Rules of Evidence contain a hearsay exception for excited utterances,¹⁵¹ but delete the exception for present sense impressions. No explanation for the deletion appears. Rule 803(1), where the exception is located in the revised Uniform Rules of Evidence, is "reserved," and the comment only states tersely that "[t]he proposed rules contain no present sense impression exception."¹⁵²

(4) Other hearsay exceptions that may apply

Other hearsay exceptions may apply to statements or documents memorializing a dead person's transactions in a proper case. Most exceptions are the same in Tennessee and Arkansas; a few, recognized in Arkansas, are rejected by the proposed Tennessee Rules of Evidence, and some, recognized in both states, are slightly different.

Statements of a decedent contained in medical records may be crucial to proving that the decedent sought medical care in a claim to secure payment for that care. The proposed Tennessee Rules

146. ARK. R. EVID. 803(2); TENN. R. EVID. 803(2) (proposed 1987).

147. See *Jackson v. State*, 267 Ark. 891, 591 S.W.2d 685 (Ct. App. 1979).

148. See *Tucker v. State*, 264 Ark. 890, 575 S.W.2d 684 (1979).

149. See FED. R. EVID. 803(1) & (2) advisory committee note, 56 F.R.D. 183, 304 (1973).

150. See *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987).

151. TENN. R. EVID. 803(2) (proposed 1987).

152. TENN. R. EVID. 803(1) (proposed 1987) advisory committee comment.

contain an exception for statements made for the purpose of medical diagnosis *and* treatment.¹⁵³ Under the Uniform and Arkansas Rules, any such statements made for the purpose of diagnosis *or* treatment are admissible.¹⁵⁴ The practical effect of Tennessee's language change is to limit this exception to statements made to treating physicians. This is simply a continuation of existing Tennessee law.¹⁵⁵

A dead man's business records may be crucial to proving a claim against his estate; and if the only person who could lay the foundation for introduction of those records was the party opponent (rendered incompetent to testify to these matters by the dead man statute), the records could not be introduced. In the absence of a dead man statute, the party opponent can clear the hearsay hurdle if he can lay a foundation under the business records exception.¹⁵⁶

Both states recognize an exception for family records, such as notations in the family bible or inscriptions on pictures and tombstones.¹⁵⁷ Statements in unrecorded documents affecting an interest in property are also excepted from the hearsay rule in Arkansas,¹⁵⁸ and authenticated statements in any document at least twenty years old are excepted.¹⁵⁹ Tennessee takes a somewhat narrower view. Statements in unrecorded documents affecting an interest in

153. TENN. R. EVID. 803(4) (proposed 1987).

154. ARK. R. EVID. 803(4). See *Wallin v. Insurance Co. of N. America*, 268 Ark. 847, 596 S.W.2d 716 (Ct. App. 1980).

155. See *Gulf Refining Co. v. Frazier*, 15 Tenn. App. 662, 688-95 (1932).

156. ARK. R. EVID. 803(6); TENN. R. EVID. 803(6) (proposed 1987). Although the rules dominate this exception, one for "records of regularly conducted activity," a more accurate name than "business records" since the exception includes records of organizations other than businesses, the traditional name endures in common parlance and, accordingly, is used herein. To lay the foundation, the lawyer must call the custodian of the record or any other witness with personal knowledge of the foundational elements and establish the following through the answers of the witness: (1) the record was made at or near the time the information was received; (2) the record was made by or the information was transmitted by a person with knowledge of that information (in Tennessee, but not in Arkansas, it is also necessary to establish that the person who made the record or transmitted the information had a "business duty" to do so); (3) the record was kept in the course of a regularly conducted business activity; and (4) it was the regular practice to make the record. *Id.* See *Cates v. State*, 267 Ark. 726, 589 S.W.2d 598 (1979).

157. ARK. R. EVID. 803(3); TENN. R. EVID. 803(13) (proposed 1987).

158. ARK. R. EVID. 803(15). Of course, the statement in the document must be authenticated as having been made by the decedent.

159. ARK. R. EVID. 803(16). This is the well recognized "ancient documents" exception. Before adoption of the Rules in Arkansas, thirty years existence was required for the exception to apply. *Arbuckle v. Matthews*, 73 Ark. 27, 83 S.W. 326 (1904).

property would not be excepted under proposed Tennessee Rules,¹⁶⁰ unless the document is at least thirty years old. Other "ancient documents" not affecting an interest in property would not be excepted.¹⁶¹

2. Authenticity

Any documentary evidence of the statements or transactions of a dead person must be authenticated and he must be identified as the speaker of any oral statements attributed to him. This preliminary factual determination of whether a document or oral statement is sufficiently likely to be authentic that the jury should be made aware of it is one to be made by the court.¹⁶² Arkansas and Tennessee Rule 901(b) both list a number of examples of the kind of evidence that should be sufficient to persuade the court to allow introduction of the evidence. The rule emphasizes that the examples are "by way of illustration only, and not by way of limitation. . . ."¹⁶³ The court may base its decision on the testimony of any witness with knowledge that a document is what it is purported to be,¹⁶⁴ or on distinctive characteristics of the document.¹⁶⁵

In cases where the handwriting or signature of the decedent is in dispute, the court may base its decision on lay opinion if the witness's familiarity with the decedent's handwriting or signature was acquired other than for purposes of the instant litigation.¹⁶⁶ The court may rely upon a comparison of the disputed writing with an authenticated exemplar by a handwriting expert¹⁶⁷ or make the comparison itself.¹⁶⁸ An oral statement communicated or recorded electronically, as by telephone or tape recorder, may be authenticated as that of the dead person by the lay opinion of any witness who can identify the voice, regardless of how or when the witness became familiar with the voice.¹⁶⁹ Where the statement was made

160. See TENN. R. EVID. 803(15) (proposed 1987) advisory committee comment ("Statements of fact in a warranty deed, trust deed, or security agreement are not trustworthy enough to justify admissibility as truth.").

161. TENN. R. EVID. 803(16) (proposed 1987).

162. ARK. R. EVID. 901(a); TENN. R. EVID. 901(a) (proposed 1987).

163. ARK. R. EVID. 901(b); TENN. R. EVID. 901(b) (proposed 1987).

164. ARK. R. EVID. 901(b)(1); TENN. R. EVID. 901(b)(1) (proposed 1987). See *United Bilt Homes, Inc. v. Elder*, 272 Ark. 496, 615 S.W.2d 367 (1981).

165. ARK. R. EVID. 901(b)(4); TENN. R. EVID. 901(b)(4) (proposed 1987).

166. ARK. R. EVID. 901(b)(2); TENN. R. EVID. 901(b)(2) (proposed 1987).

167. ARK. R. EVID. (901(b)(3); TENN. R. EVID. 901(b)(3) (proposed 1987).

168. *Id.*

169. ARK. R. EVID. 901(b)(5); TENN. R. EVID. 901(b)(5) (proposed 1987).

over the telephone and the person who heard the statement cannot identify the voice as that of the decedent, the speaker may be identified as the decedent by other circumstantial evidence, such as testimony that the witness dialed the number listed beside the decedent's name in the telephone directory, where circumstances (usually self-identification) indicate that the speaker was the decedent.¹⁷⁰ Evidence that the call was made to a business and the subject matter of the conversation was the type normally conducted by that business over the telephone may be sufficient.¹⁷¹

3. The "Best Evidence" Rule

The "best evidence" rule, more accurately denominated the "original document" rule, generally requires that the proponent of a writing, recording, or photograph¹⁷² produce the original if offering it into evidence to prove its contents.¹⁷³ The terms are defined broadly: writings and recordings include "letters, words, numbers, sounds, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording,¹⁷⁴ or other form of data compilation";¹⁷⁵ the term "photographs" encompasses "still photographs, x-ray films, video tapes, and motion pictures."¹⁷⁶

The term "original" is also defined broadly:

An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print. If data are stored in a computer or similar device, any printout or other output readable by sight and shown to reflect the data accurately is an "original."¹⁷⁷

170. ARK. R. EVID. 901(b)(6); TENN. R. EVID. 901(b)(6) (proposed 1987). However, self-identification alone by an unfamiliar voice during an incoming telephone call was insufficient. *Roleson v. State*, 272 Ark. 346, 614 S.W.2d 656 (1981).

171. ARK. R. EVID. 901(b)(6); TENN. R. EVID. 901(b)(6) (proposed 1987).

172. *Johnson v. State*, 289 Ark. 589, 715 S.W.2d 441 (1986); *Redman v. State*, 265 Ark. 774, 580 S.W.2d 945 (1979).

173. ARK. R. EVID. 1002; TENN. R. EVID. 1002 (proposed 1987). See *Canady v. Canady*, 285 Ark. 378, 687 S.W.2d 833 (1985).

174. See *Sumlin v. State*, 266 Ark. 709, 587 S.W.2d 571 (1979).

175. ARK. R. EVID. 1001(1); TENN. R. EVID. 1001(1) (proposed 1987).

176. ARK. R. EVID. 1001(2); TENN. R. EVID. 1001(2) (proposed 1987).

177. ARK. R. EVID. 1001(3); TENN. R. EVID. 1001(3) (proposed 1987).

The breadth of the definition of "original" satisfies the rule in many cases. In most other cases the rule is satisfied by the provision that duplicates are admissible to the same extent as originals unless there is some genuine question as to the authenticity of the original.¹⁷⁸ Since "duplicates" include carbon copies, photocopies, electronic re-recordings and other copies made by "equivalent techniques which accurately reproduce the original,"¹⁷⁹ almost all documents satisfy the rule.

If no original is available or if its authenticity has been placed in issue, other evidence of contents, including oral testimony,¹⁸⁰ is admissible if any one of four propositions can be proved: (1) that the original is lost or destroyed through no bad faith of the proponent;¹⁸¹ (2) that the original cannot be obtained through judicial process;¹⁸² (3) that the opponent had possession of the original and did not produce it at trial although he had notice that its contents would be in issue (the notice may be inferred from the pleadings); or (4) that the document is collateral to any controlling issue.¹⁸³ Finally, the rule does not apply to secondary evidence of contents offered through the oral testimony, deposition, or written out-of-court admission of the opposing party.¹⁸⁴

VI. CONCLUSION

In the absence of a dead man statute courts will determine the admissibility of the proof of the deceased's words and dealings on the basis of their relevance and reliability, as the admissibility of all unprivileged evidence should be determined. A dead man statute was from the first an ill-conceived and poorly reasoned exception to the general qualification of all persons to be witnesses, for whatever weight the trier of fact chooses to give to their testimony. Its application has never prevented injustice and, to the contrary, has often caused aberrational results because crucial evidence, otherwise admissible, has been excluded. Because of its deleterious effect on the process of seeking truth in trial, it has been so riddled with

178. ARK. R. EVID. 1003; TENN. R. EVID. 1003 (proposed 1987).

179. ARK. R. EVID. 1001(4); TENN. R. EVID. 1001(4) (proposed 1987).

180. See *Smith v. State*, 286 Ark. 247, 691 S.W.2d 154 (1985).

181. See *Renton v. State*, 274 Ark. 87, 622 S.W.2d 171 (1981).

182. See *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir.), *cert. denied*, 464 U.S. 934 (1983).

183. ARK. R. EVID. 1004; TENN. R. EVID. 1004 (proposed 1987).

184. ARK. R. EVID. 1007; TENN. R. EVID. 1007 (proposed 1987).

limitations and exceptions as to become nothing more than intellectual fodder for lawyers and judges, necessarily chewed and swallowed, though usually not comfortably digested, preliminary to considering the issues that should control the admissibility of evidence. Its death and burial have been unlamented in Arkansas. Tennessee would be well-advised to lay the useless creature to its everlasting rest, like the dead men it supposedly protects.

