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codicil to will has nothing to do with admissibility to probate but with quite different matters: incorporation by reference and the related doctrine of republication.

One further matter should be mentioned before we may sit back and hope that In re *Whittier* will be overruled: the unfortunate refusal of the court to settle the effect of Section 1414. True, it found it "not necessary" to decide, but the language in the concluding paragraph of the opinion is disturbing.[24] "Since the codicil in this case was neither *attached* to the will nor made any reference whatever to it, the *Schirmer* case is controlling, and the document was therefore not entitled to be admitted to probate." The opinion itself italicized the word "attached," the precise requirement of the statute and not a part of the *Schirmer* rule at all; does this mean that the court is committed to the attachment rule? Is reference enough, or must both reference and attachment exist to win probate for a codicil? At least half of the quandary could have been avoided had the court chosen to take a stand. Either Section 1414 is applicable and decisive or it is not, and it is a matter of real consequence to the profession to know Perhaps it was not necessary to decide the question for the purpose of disposing of In re *Whittier*; if so, it should not have been used as an additional, or at least a make-weight argument for the result. An opinion has a precedent-making function which is at least as important as its function of disposing of the case itself, and such temporizing, albeit only a careless choice of words, compounds confusion.

[24] *Op. cit.* p. 802.

RECENT DEVELOPMENTS UNDER THE DEAD MAN STATUTE

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The "Dead Man Statutes" of the several states, which exclude testimony by interested parties in certain cases, stand in the unique position of being condemned by all the modern writers on the law of evidence.[1] Yet this exception to the abrogation of the common law rule against testimony by interested parties still survives in the majority

[1] Wigmore attacks it with characteristic vigor: "As a matter of policy, this survival of a part of the now discarded interest-disqualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words." 2 WIGMORE, EVIDENCE (3d ed. 1940) 697, § 578.

of the states,[2] and furthermore, the courts are generally agreed that the statutes are to be strictly construed. However, in the application to a particular set of facts, such as whether the interested survivor may deny that a transaction took place, or whether the statute is applicable to proceedings in probate or contest of a will, the decisions are in hopeless conflict, due more or less to the phraseology of the particular statute. Since no other state has a statute closely resembling that of Washington,[3] extra-state precedents are of slight value. It remains for us to look to the recent decisions of the Washington court to determine the applicability of the statute and thus perhaps better judge whether the widespread criticism of the statute is warranted.

I.

TESTIMONY SUPPORTING INFERENCE OF NO TRANSACTION

One of the most significant developments in the last ten or fifteen years, as to REM. REV STAT. Section 1211,[4] is found in *Martin v.*

" such a statute destroys the possibility of collecting honest claims by the living. It may prevent perjury of a claimant but it does not prevent subornation of perjury by a claimant and perjury by witnesses." Comment, MODEL CODE OF EVIDENCE (1942) 92.

"So long as legislatures and courts continue to disregard realities by assuming that perjury can be eliminated by rules of evidence and that it is wiser to do injustice than risk deception by possible perjurers, so long will absurdities such as these continue to shock common sense, and no amount of judicial rationalization can give them the appearance of wisdom." Morgan, *The Law of Evidence, 1941-1945* (1946) 59 HARV. L. REV. 481 at 512.

"The phrase ['where one man's lips are closed by death, the other's must be closed by law'] has a specious equity which conceals a baneful potency for injustice. It is a sin against the light when, in the name of solicitude for the dead, the law permits one set of living folks to cut off another's claim without a fair hearing." McCormick, *Tomorrow's Law of Evidence* (1938) 24 A. B. A. J. 511.

[2] Such exclusionary statutes are in effect in all but six states. 2 WIGMORE, EVIDENCE (3d ed. 1940) § 578.

[3] Comment (1926) 1 WASH. L. REV. 21.

[4] "*Not Excluded on Ground of Interest—Exception—Transaction With Person Since Deceased.* No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility; Provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen (14) years, then a party in interest or to the record, shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him, or in his presence, by any such deceased or insane person, or by any such minor under the age of fourteen (14) years: Provided further, that this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and who have no other or further interest in the action." REM. REV. STAT. § 1211.

Shaen.[5] This case involved the question of delivery of a deed, shown to have been in the possession of the decedent prior to her death. The executor of the estate was defendant in the action. The appellant husband was not permitted to testify that he did not deliver a quitclaim deed to his wife, on the ground that the appellant, being a party in interest, would not be permitted under the provisions of the Washington statute to testify in his own behalf as to any transaction had by him with the decedent. Neither was he permitted to testify that he had not withdrawn the deed from his safe-deposit box (where he testified he placed it immediately after its execution), that he did not know that the deed had been withdrawn from the safe-deposit box; or, that he did not see the deed again until the time of the first trial.

The court relied principally on the New York case of *Boyd v. Boyd.*[6] Here the executor contended that the plaintiff had forged the deceased's signature, and plaintiff attempted to testify that he did not. The court held that such testimony was inadmissible, saying in part:[7]

"The statute may be as effectively violated by testimony of a negative character as by affirmative proof of what actually took place."

The Washington court also cited *O'Connor v. Slatter,*[8] which involved an action to recover on certain notes bearing the endorsement of the defendant's decedent. The defendant widow alleged fraud on the part of plaintiff in obtaining the notes. The plaintiff was allowed to testify that the defendant, widow of the deceased, was not present when certain notes were endorsed by the decedent, the court saying that this did not constitute testimony relating to a statement made by or transaction had with the deceased. However, it was further held that the plaintiff could not testify as to whether the notes had been changed since he received them from the deceased inasmuch as this, in the court's opinion, was an indirect way of ascertaining their condition when received from the hands of the deceased and was "a palpable attempt to evade the statute."[9]

The court might better have relied on *Denis v. Metzenbaum*[10] in support of its position. This was an action upon a promissory note against one of two makers. While the defendant conceded his separate liability on the note, his community resisted upon the ground that de-

[5] Martin v. Shaen, 126 Wash. Dec. 324, 173 P (2d) 968 (1946)
[6] Boyd v. Boyd, 164 N. Y. 234, 58 N. E. 118 (1900)
[7] *Id.* at 121.
[8] O'Connor v. Slatter, 48 Wash. 493, 93 Pac. 1078 (1908)
[9] *Id.* at 496.
[10] Denis v. Metzenbaum, 124 Wash. 86, 213 Pac. 453 (1923)

fendant Metzenbaum was an accommodation maker and thus the community received no consideration. The instrument upon which the executor relied indicated on its face a relationship of co-maker and payee between the defendant and the deceased. The defendant was not permitted to rebut this presumption by testifying that such a relationship did not in fact exist. It was pointed out that:[11]

"Manifestly, the only purpose of the proferred testimony was to show that Metzenbaum was an accommodation maker of the note. Whether he was or was not so depends upon the transaction he had with the payee of the note, and to prove this in the manner attempted would be to prove it by indirection, a manner of proof the cases cited forbid."

In *Martin v. Shaen,* the executor relied on a presumption of valid delivery, based on the fact that the grantee had the deed in her possession at the time of her death. This, of course, is a rebuttable presumption. There was no direct testimony as to delivery of the deed. Yet we find the husband precluded from rebutting the presumption raised by possession by not being allowed to testify that he never delivered the deed, or further, that he had never taken the deed from the safe-deposit box. The holding of the case goes beyond *Boyd v. Boyd* in not permitting collateral testimony which could support even an inference of no transaction with the deceased. The rule that the law will not permit an adverse party to prove by indirection through his own testimony that which he may not testify to directly is carried to its extreme.

It should be noted that in the *Martin* case the court made no reference to *Bardsley v. Truax,*[12] where on the issue concerning the delivery of a deed by the decedent, the court held it proper to permit the survivor to testify to the fact that he had had the deed in his possession since its date as affording the basis of an inference of delivery The difficulty of harmonizing this holding with those in the *O'Connor, Metzenbaum,* and *Shaen* cases is obvious, because clearly the survivor in the *Bardsley* case was allowed to do indirectly what he could not have done directly

The object or purpose of the statute is to guard against the temptation to give false testimony on the part of the surviving party and to put the parties to the suit upon terms of equality Since one party is precluded from testifying by reason of death or insanity, it is believed

[11] *Id.* at 89; cited: Spencer v Terrel, 17 Wash. 514, 50 Pac. 468 (1897), Kline v Stein, 30 Wash. 189, 70 Pac. 235 (1902)

[12] Bardsley v Truax, 64 Wash. 400, 116 Pac. 1075 (1911)

only just to deny the other party the advantage of giving his uncontradicted account of the transaction.[13] However, in many instances, the exclusion of the right to deny a transaction would seem to give an undue advantage to the decedent's estate and to place an undue burden on the survivor.[14]

Running through the many cases presenting the problem, one finds a recognition by the court that an important consideration in determining whether offered testimony concerns a transaction with the deceased is whether or not the deceased, were he alive and present, could contradict the offered testimony However, it seems clear that this test is not entirely conclusive. If it clearly appears that the deceased could not contradict the proffered testimony, it is obvious that it does not concern a transaction with the deceased.[15] On the other hand, even though it appears that the deceased could contradict, it does not necessarily follow that the offered testimony concerns a transaction with the deceased. It may or may not.[16]

The "Dead Man Statute" is applicable both to an action against the estate and to one by the estate. In the first instance, the interested party is precluded from testifying directly that a transaction with the deceased did take place or from testifying to collateral facts which lead to an inference of such transaction. In the second instance, the statute as applied precludes negative testimony, whether consisting of a direct denial that a transaction did in fact take place, or testimony which by inference would lead to the same conclusion. It appears, therefore, impossible for the interested party to introduce personal testimony which would tend to rebut a presumption in favor of the estate.

It is in this latter category, where the action is brought by the estate, that a strict application of the rule works the greatest hardship. If it is deemed inadvisable to completely abrogate the statute by legislation, the most patently unjust results could be eliminated by limiting the application of the statute to situations where claims are brought by the interested party *against* the estate.[17] Then the problem of *Martin v. Shaen* would never arise.

[13] 3 JONES ON EVIDENCE (4th ed. 1938) § 773.

[14] TOMPKINS, THE CHAMBERLAYNE TRIAL EVIDENCE (2d ed. 1936) § 308.

[15] Piles v. Bovee, 168 Wash. 538, 12 P.(2d) 914 (1932)

[16] Ah How v. Furth, 13 Wash. 550 (1896); Bardsley v. Truax, 64 Wash. 400, 116 Pac. 1075 (1911)

[17] In Mississippi, an interested witness is incompetent to testify "to establish

II.

PROBATE AND WILL CONTEST PROCEEDINGS

As to the applicability of the "Dead Man Statute" to probate and will contest proceedings, the courts of states having such statutes are again in conflict. Here, too, the decisions are predicated upon statutes materially different in one or more aspects. In some jurisdictions probate proceedings are especially withdrawn from the operation of the disqualifying statute[18] and in others, are expressly included.[19] In those jurisdictions in which there is no such statutory reference made, the weight of authority supports the contention that the probating of a will and the contest of a will are proceedings *in rem* and that heirs, devisees, legatees, and distributees are competent to testify notwithstanding the inhibition of the statute as to parties in interest.[20] It is held that the estate as an entity is not a party in interest, since the effect of such proceedings is neither to increase or diminish the estate, but only to settle the distribution of the estate.[21] The executor or administrator of the estate therefore acts only as an intermediary for those who are the real parties in interest, *i.e.*, those who claim a share in the distribution.

The minority, on the other hand, holds the estate a party to the proceedings and thus the interested survivors are incompetent to testify These jurisdictions have been recently reinforced by the addition, through a switch of allegiance, of the Washington court.[22] In re *Wind's Estate* involved a proceeding initiated by the legal representative of August Wind, a deceased person, to prove the destroyed will of Mr. Wind. The trial court found that August Wind had made a will, but that, shortly before his death, the will was destroyed at the request

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his (her) own or assigned claim against the estate of a deceased person." REV. CODE (1906) § 1917.

[18] Note: 51 L. R. A. (N. S.) 206.

[19] An interested person, or one in privity therewith " shall not be qualified for the purpose of this section, to testify in his own behalf or interest, or in behalf of the party succeeding to his title or interest, to personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of the donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate." N. Y. Civ. Pr. Act § 347, as amended to Sept. 1, 1935.

[20] *In re* Shapter's Estate, 35 Colo. 57, 85 Pac. 688, 6 L. R. A. (N. S.) 575 (1905)

[21] Henry v. Hall, 106 Ala. 84, 17 So. 187 (1895); Williams v. Miles, 68 Neb. 463, 94 N. W 705, 62 L. R. A. 383 (1903), 28 R. C. L. 511, § 98.

[22] *In re* Wind's Estate, 127 Wash. Dec. 395 (1947) (*En banc* hearing)

of the testator. Mrs. Wind was allowed to testify that about January 11, 1945 her husband handed her his will, which had been executed on the previous day, and asked her to burn it, and that she had complied with his request. Mrs. Wind was personally and financially interested in seeing to it that the will be invalidated, in that she did not take under the will but would take if the husband was found to have died intestate. It was held that the testimony of the wife should have been excluded under REM. REV STAT. Section 1211. The court said in part:[23]

"There can be no difference between securing the allowance of a claim against the estate by testifying to a transaction with the deceased and defeating the probate of a will, by testifying to transactions such as testified to in this case. In each case, the witness stands to profit, not by the merits of his contention but because his evidence cannot be denied."

The Washington court, in receding from its prior position, found it necessary to directly overrule only one case, In re *Findley's Estate,*[24] in which it was squarely held that REM. REV STAT Section 1211 was not applicable to proceedings to establish a lost will. It was there pointed out that the weight of authority was in accord,[25] and the court went on to say:[26]

"This is not an action wherein an adverse party sues or defends as executor, administrator, or legal representative of a deceased person with reference to some claim or demand which arises out of any transaction with the deceased during his lifetime and which existed at his death. It is a judicial inquiry as to whether the instrument offered is a last will and testament of the deceased and entitled to probate as such. The primary object of the inquiry is to determine whether the deceased intended that the devolution of his property should be controlled by the laws of descent or by the alleged will, and nothing pertaining to claims against the estate is in any way involved."

A literal interpretation of REM. REV STAT. Section 1211 supports the conclusions reached In re *Wind's Estate.* The statute refers to "an action or proceeding" which leaves the door open for its application to probate or will contest proceedings. Similarly, Section 1211 does not by its terms make the exclusion applicable only in the event of "claims

[23] *Id.* at 402.

[24] 199 Wash. 669, 93 P.(2d) 318 (1939) The Washington court had stated that the exclusion rule did not apply either to will contests or applications for the probate of a will in three other cases: *In re* Anderson's Estate, 114 Wash. 591, 195 Pac. 994 (1921), *In re* Zelinsky's Estate, 130 Wash. 165, 227 Pac. 507 (1924), Jones v. Peabody, 182 Wash. 148, 45 P (2d) 915, 100 A. L. R. 64 (1935) However, the court pointed out that its statement in each instance was dicta because it was not necessary to a decision in the case.

[25] ANN. CAS. (1914 A) 982; 28 R. C. L. 510-512; 5 NICHOLS, APPLIED EVIDENCE 4467, § 42.

[26] *In re* Findley's Estate, 199 Wash. 669, 93 P (2d) 318 (1939)

against the estate,"[27] which suggests that the rationale of the court in In re *Findley's Estate* was incorrect.

In reversing its former holding, the court employed clear and unambiguous language, stating that Section 1211 applies to proceedings for the probate or contest of wills in which an interested party seeks to testify to "any transaction had with, or statement made by, or in the presence of any deceased or insane person."[28] Under the holding, therefore, it would seem that an interested party will be held competent to testify in a probate proceeding only where it is determined that his testimony does not concern a "transaction" or conversation with the deceased.

The court distinguished the case In re *Anderson's Estate*[29] on the above ground, holding that testimony by an interested party as to the mental condition of the testator could not be termed a transaction with one since deceased. This is in line with the weight of authority that such testimony is mere opinion which could not be denied by the testator were he alive.[30] The Washington court, in the *Anderson* case, however, would seem to have gone even farther in also permitting the facts on which the opinion is based, including conversations had with the testator, to be admitted in evidence. In re *Wind's Estate* stands squarely for the proposition that Section 1211 will permit no testimony as to any "transaction or conversation" with the deceased, regardless of whether it be a probate proceeding or any other action in which the estate is an adverse party Therefore, although the court purported to distinguish the *Anderson* case, it would appear that the *Wind* case in effect directly overrules the *Anderson* case insofar as the admissibility of conversations with the deceased for any purpose whatsoever is concerned.

Aside from applying a strict interpretation of the statute, the decision in In re *Wind's Estate,* in identifying the purpose of, or reason behind, the statute, would seem to be both logical and correct. Certainly the temptation to commit perjury is just as great on the part of one seeking

[27] Under the Mississippi Statute providing that one cannot testify to establish against the estate of a deceased person a claim which originated during his lifetime, it has been held that a wife who, in the absence of a will, will inherit all her husband's property, is incompetent to testify as to his testamentary capacity. Whitehead v. Kirk, 104 Miss. 776, 61 So. 737 (1913)

[28] *In re* Wind's Estate, *supra* note 22 at 402.

[29] *In re* Anderson's Estate, 114 Wash. 591, 195 Pac. 994 (1921)

[30] Jewett v. Budwick, 145 Wash. 405, 260 Pac. 247 (1927), noted in (1928) 37 YALE L. J. 827.

a greater share in the distribution of an estate as on the part of one who is an alleged creditor of the estate. In either instance, the deceased is equally incapacitated to make a defense or denial.

It is undeniably true that the effect of a proceeding to probate a will, to prove a lost will, or to contest a will is neither to increase or diminish the size of the estate. But should this fact alone operate to render the statute inapplicable? It should be remembered that the right of an individual to make a will and to insure distribution of his property in accordance with his wishes is a most zealously protected statutory right.[31] To hold that the estate of the deceased is in effect not a party in interest to a proceeding in probate would seem to be wholly inconsistent with the protection of his right to determine distribution of his property after death. For example, *A* makes a will disposing of all his property to *B* and *C*. Later he attempts to revoke the will which would operate to leave all his property to *C*. After *A's* death, *B* attempts to prove the partially destroyed will and offers to testify to certain conversations with the deceased which would tend to establish that *A* did not wish to destroy the will. Surely, it cannot be said that the executor, representing the deceased's estate, is not an adverse party in relation to such testimony The true test of the competency of a witness should be determined by whether he would gain or lose by a decree setting aside a will or admitting a will to probate. Though ostensibly a contest between the heirs at law and the devisees and legatees, the action directly affects the rights of the deceased and the interests of the estate. Rights of the deceased in regard to the disposal of his properties after death should be granted as great a degree of protection as would his property interests in the event of a claim against the estate.

III.

CONCLUSION

The recent developments pertaining to REM. REV STAT. Section 1211 clearly indicate that the Washington court is presently committed to a strict interpretation of this disqualifying statute. It is equally clear that complete abrogation, assuming for the moment that such a step would be advisable, is virtually an impossibility There appears to be a definite preponderance of opinion among local practitioners that cross-

[31] *In re* McComb's Estate, 164 Wash. 339, 2 P (2d) 692 (1931); *In re* Little Joe, 165 Wash. 628, 5 P.(2d) 995 (1931)

examination standing alone is not sufficient protection,[32] that the statute is generally wholesome in effect, and that the good it accomplishes undoubtedly outweighs whatever hardships it works.[33] But the latter test is hardly a satisfactory basis for judging and condoning legislation. While granting that the statute may provide a necessary safeguard against fraud and perjury, it should nevertheless be possible to retain those essential safeguards and at the same time modify and liberalize the statute which a respectable minority of states have done.[34] The most workable of these "modifications" would seem to be that of New Hampshire where such testimony is excluded, except when it "appears to the court that injustice may be done without the testimony of the party."[35]

From a study of recent decisions in this jurisdiction, it is submitted that the court, under the statute as it now exists, has correctly applied the exclusionary rule to such situations as were presented in *Martin v. Shaen* and In re *Wind's Estate*. Nevertheless, there is much to be said

[32] The opponents of exclusionary statutes feel that more trust should be placed on cross-examination. "In the early development of our jurisprudence the testimony of all interested witnesses was excluded; but experience gradually led to the conclusion that the restriction should be relaxed and more reliance should be placed upon the efficacy of our process of investigating truth. Cross-examination, for instance, has been found to be well calculated to uncover a fraudulent scheme concocted by an interested party; and where that has failed, the scrutiny to which the testimony of a witness is subjected by the court and by the jury has proven efficacious in discovering the truth, to say nothing of the power of circumstantial evidence to discredit the mere oral statement of an interested witness." Taft, *Comments on Will Contests in New York* (1921) 30 YALE L. J. 593, 605.

[33] "We should not forget that the statute interposes no obstacle to the establishment of a claim based upon written contract, and under present day conditions, it is probably true that the vast majority of good faith contracts and business transactions are evidenced by some writing or memorandum." Falknor, *The American Law Institute's Model Code of Evidence* (1943) 18 WASH. L. REV. 228, 231.

[34] In Massachusetts, Connecticut and Rhode Island, interested survivors are now entirely competent, and declarations, whether written or oral, of the decedent are likewise admissible. In Connecticut, the trial judge has the privilege to comment on the weight and credibility of the evidence; and lawyers frequently pointed to this fact as a controlling reason for not advising additional safeguards. MORGAN AND OTHERS, THE LAW OF EVIDENCE (1927) 35.

In New Mexico, Oregon and Virginia, the interested party may testify, but his testimony uncorroborated is insufficient to support a recovery. This modification is perhaps of limited value, since if there is substantial corroborating testimony, the testimony of the survivor will not be necessary. TOMPKINS, THE CHAMBERLAYNE TRIAL EVIDENCE (2d ed. 1936) § 320.

[35] New Hampshire: N. H. PUB. LAWS (1926) c. 336, § 28; Arizona has adopted a somewhat similar statute, allowing the witness to testify "if required by the court." ARIZ. REV. STAT. (1913) Civil Code § 1678.

for an attempt, by modification of the statute, to soften the harshness of the present rule without losing the salutary results of its general application.[86]

[86] "If fault be found, and criticism justified, the rule should be modified by legislative action or court rule which applies generally, and not by judicial legislation against a party in a particular case." Wright v. Wilson, 154 F (2d) 616 (C. C. A. 3d 1946)