

April 1958

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Recommended Citation

Stanley E. Dadisman, *The West Virginia Dead Man's Statute*, 60 W. Va. L. Rev. (1958).

Available at: <https://researchrepository.wvu.edu/wvlr/vol60/iss3/3>

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THE WEST VIRGINIA DEAD MAN'S STATUTE

STANLEY E. DADISMAN*

THE West Virginia dead man's statute provides:

"No person offered as a witness in any civil action, suit or proceeding, shall be excluded by reason of his interest in the event of the action, suit or proceeding, or because he is a party thereto, except as follows: No party to any action, suit or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, insane or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such person, or the assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf, nor as to which the testimony of such deceased person or lunatic shall be given in evidence: Provided, however, that where an action is brought for causing the death of any person by any wrongful act, neglect or default under article seven, chapter fifty-five of this code, the person sued, or the servant, agent or employee of any firm or corporation sued, shall have the right to give evidence in any case in which he or it is sued, but he may not give evidence of any conversation with the deceased."¹

This statute warrants reappraisal because of its age if for no other reason. It is a venerable statute, dating back to the early years of the state, and has sturdily survived with but minor amendments. While age alone does not ordinarily impair the quality and utility of a statute, this particular one has its roots planted deep in history and yet is invoked and applied, vigorously and decisively, in current litigation of types, to an extent and with results perhaps not contemplated by the original draftsmen. Accordingly, a brief examination of its history, current status and applications, and future usefulness may well be timely.

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¹ W. VA. CODE c. 57, art. 3, § 1 (Michie 1955).

HISTORY OF THE DEAD MAN'S STATUTE

Early common law rules disqualified many persons as witnesses, particularly parties to litigation and others interested therein. These rules were developed because of historical reasons, during the sixteenth and seventeenth centuries.² However, by the middle of the nineteenth century, changed conditions, circumstances and thinking prompted England's statutory abandonment of many of the rules. For example, Lord Denman's Act in 1843 began with the recital, "Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony."³ Eight years later, in 1851, "an act to amend the law of evidence" provided:

"II. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as herein-after excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."⁴

The exception mentioned in the act is not pertinent herein. It will be noted that England, by the two acts quoted and others, swept away generally the disqualification rules. Equally significant is the fact that England did not, at the time or later, enact dead man's statutes prohibiting survivors from testifying as to communications or transactions with persons since deceased.

The story, however, is different in the United States. About and after the middle of the nineteenth century the several states generally abandoned many of the rules disqualifying witnesses, including those who were parties to litigation and others interested therein, but proceeded to enact dead man's statutes for the ostensible

² 2 WIGMORE, EVIDENCE §§ 575-578 (3d ed. 1940).

³ 6 & 7 VICT. c. 85 (1843).

⁴ 14 & 15 VICT. c. 99 (1851).

purpose of protecting estates of decedents.⁵ The enactments were obviously compromise measures without known precedent, but they quickly and firmly took root in a great majority of the states. Judge Alpheus F. Haymond, speaking for the Supreme Court of Appeals of West Virginia in 1878, explained that "the intention of the law in the exception to the privilege to testify was intended to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affair, or expose the omission, mistakes or perhaps falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered too great, to allow the surviving party to testify in his own behalf. Any other view of this subject, I think would place in great peril the estates of the dead, and would in fact make them an easy prey for the dishonest and unscrupulous, which with due deference to the views and opinions of others, it seems to me, the Legislature never intended."⁶ Many practitioners who have had experience in handling litigation involving estates of deceased persons will affirm every word Judge Haymond so stated many years ago.

For present purposes, simply stated, the West Virginia statute denies a "party to any action, suit or proceeding" and "any person interested in the event thereof" the right or privilege to "be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased. . . ."⁷ The next sentence of the statute limits this prohibition and will permit the party or other interested person to testify concerning any transaction or communication on which the executor, administrator and other named parties have been examined in their own behalf or relating to which the testimony of the deceased person shall have been given in evidence. Little change has been made legislatively in these provisions of the law, although judicial construction and application of the language manifest change. The proviso at the end of the section was amended materially in 1937. Prior to that time the proviso was limited to physicians in the following language:

"Provided, however, that where an action is brought for causing the death of any person by a wrongful act, neglect or default under article seven, chapter fifty-five of this Code, the

⁵ 2 WIGMORE, EVIDENCE § 578.

⁶ *Owens v. Owens's Adm'r*, 14 W. Va. 88, 95 (1878).

⁷ W. VA. CODE c. 57, art. 3, § 1 (Michie 1955).

physician sued shall have the right to give evidence in any case in which he is sued; but in this event he can only give evidence as to the medicine or treatment given to the deceased, but he cannot give evidence of any conversation had with the deceased."⁸

Prior to the amendment the physician proviso had remained unchanged for forty years.

The statute has been many times applied, interpreted and construed in the long course of its history, as manifested by the numerous decisions of the Supreme Court of Appeals relating thereto. In view of the minor amendments of the law and the absence of attacks thereon, it may be concluded that the bench and bar, the members of the legislature, and citizens generally are content and satisfied with the statute in its present language and application. However, criticisms of the statute are heard from time to time, suggestions of legislative changes have been made,⁹ and the courts have found some difficulty in applying and construing the language in particular cases. For example in 1934 the Supreme Court of Appeals divided three to two on the meaning of the language, with Judge M. O. Litz observing in the majority opinion:

“. . . Whatever may be our views on the policy of the West Virginia statute as interpreted herein, we believe the change, if any, should be made by the Legislature.”¹⁰

The court, as early as 1876, in tracing the history of the statute back to New York laws from which the West Virginia draft is supposed to have been copied, suggested the desirability of clarifying amendments.¹¹

CURRENT STATUS OF THE DEAD MAN'S STATUTE

Across the country many spoken and written condemnations of these statutes are noted. The suggestions for change do not appear to bear fruit quickly. The apparent complacency, above mentioned in West Virginia, may be manifest throughout the country. Lawyers may be more concerned with substantive law and less receptive of changes in procedural matters. In any event it may be observed that no marked abandonment of the dead man's statutes is indicated in the several states.

⁸ W. VA. REV. CODE c. 57, art. 3, § 1 (1931); W. Va. Acts 1937, c. 67.

⁹ See 39 W. VA. L.Q. 174 (1933); 41 W. VA. L.Q. 256 (1935).

¹⁰ *Strode v. Dyer*, 115 W. Va. 733, 739, 177 S.E. 878, 881 (1934).

¹¹ *Metz's Adm'r v. Snodgrass*, 9 W. Va. 190, 194 (1876).

In *Minimum Standards of Judicial Administration*, edited by Chief Justice Arthur T. Vanderbilt in 1949, the results of a survey of the admissibility of the survivor's testimony in the various states are graphically presented on a map of the United States.¹² Six states, Connecticut, Louisiana, Massachusetts, Oregon, Rhode Island and South Dakota, are there shown to admit freely the testimony of the survivor. At the other extreme, five states, Iowa, Mississippi, Missouri, Pennsylvania and West Virginia, are labeled in black with the legend, "Survivor's testimony absolutely prohibited." Three states, Arizona, Montana and New Hampshire, leave admissibility in the discretion of the court. New Mexico and Virginia admit survivor's testimony but require corroboration. The status of the statute in the other states may be summarized by saying that, with the consent of or implied waiver by the personal representative, a survivor's testimony may be admitted as to transactions with the deceased. An examination of statutes and decisions show few material changes in the nine years since the edited survey.

Before looking more minutely into the status and applications of the West Virginia statute, it may be well to examine briefly provisions of the statutes of neighboring states on the borders of West Virginia.

Kentucky's 1952 revision of her dead man's statute is somewhat comprehensive and includes many provisions not immediately pertinent herein. The statute provides that no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by one who is dead when the testimony is offered, "except in actions for personal injury, death or damage to property by negligence or tortious acts, unless:

"(c) The decedent, or a representative of, or someone interested in, his estate, shall have testified against such person, with reference thereto"

A later subsection provides:

"(5) If the right of a person to testify for himself be founded upon the fact that one who is dead or of unsound mind has testified against him, the testimony of such person shall be confined to the facts or transactions to which the adverse testimony related."¹³

¹² VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 334-341 (1949).

¹³ KY. REV. STAT. § 421.210 (Baldwin 1955).

In Maryland, in actions or proceedings by or against estates of decedents, no party to the cause "shall be allowed to testify as to any transaction had with, or statement made by" the decedent "unless called to testify by the opposite party, or unless the testimony" of such decedent shall have already been given in evidence "concerning the same transaction or statement, in the same cause. . . ."14

In Ohio an adverse party may testify in proceedings involving a decedent's estate

"2. When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness . . .",

but such adverse party's testimony will be limited to the subject of the agent's testimony. Three other provisions are pertinent:

"3. If a party, or one having a direct interest, testifies to transactions or conversations with another party, the latter may testify as to the same transactions or conversations;

"4. If a party offers evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions;

". . . .

"7. If after testifying orally, a party dies, the evidence may be proved by either party on a further trial of the case, whereupon the opposite party may testify to the same matters. . . ."15

The Pennsylvania statute provides that, "where any party to a thing or contract in action is dead," the surviving or remaining party "to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased," shall be incompetent as a witness "to any matter occurring before the death of said party," with certain exceptions not here immediately pertinent.¹⁶

One section of the Virginia statute provides that "No person shall be incompetent to testify because of interest, or because of his being a party to any action, suit, or proceeding of a civil nature. . . ."17 Another section provides:

¹⁴ MD. ANN. CODE art. 35, § 3 (Michie 1957).

¹⁵ OHIO GEN. CODE ANN. § 11495 (Anderson 1938).

¹⁶ PA. STAT. ANN. tit. 28, § 322 (1930).

¹⁷ VA. CODE § 8-285 (Michie 1950).

"In an action or suit by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; and in any such action or suit, if such adverse party testifies, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence."¹⁸

It will be recalled that the above referenced survey, edited by Chief Justice Vanderbilt,¹⁹ indicated that Virginia admitted a survivor's testimony but required corroboration; that Kentucky, Maryland and Ohio admitted a survivor's testimony with the consent of or implied waiver by the personal representative of decedent; and that Pennsylvania and West Virginia were among the five states wherein a survivor's testimony was "absolutely prohibited."

Simply stated, the statutes of Kentucky, Maryland and Ohio admit a survivor's testimony concerning transactions with the decedent in cases wherein the adverse party representing decedent's estate has already introduced in evidence testimony relating to said transactions. The Virginia statute simply provides that a survivor shall be a competent witness, regardless of interest or party status, but his testimony must be corroborated and, if he testifies, the decedent's pertinent and relevant conversations and documents may be received as evidence.

Without extending a discussion of the Pennsylvania dead man's statute, it may be noted that the incompetency of a witness under provisions of the statute may be waived and his testimony may be accorded probative value.²⁰

Under the West Virginia dead man's statute, is the survivor's testimony "absolutely prohibited"?

Reference to a few cases decided by the Supreme Court of Appeals will serve to answer this question. In *Ogden v. First National Bank*²¹ the court observed that the disqualification of a witness under provisions of the statute may be waived and the testimony of the witness is competent. In *Painter v. Long* the court held:

¹⁸ *Id.* § 8-286.

¹⁹ Note 12 *supra*.

²⁰ *In re Romig's Estate*, 172 Pa. Super. 334, 93 A.2d 884 (1953).

²¹ 103 W. Va. 665, 138 S.E. 376 (1927).

"In an action by an administrator for the recovery of assets on behalf of the decedent's estate, if the widow testifies to personal transactions and communications between the defendant and the decedent, the defendant may as a witness in his own behalf speak fully of the same."²²

In *Willhide v. Biggs* the court divided three to two on one phase of the case but was unanimous in holding, with reference to provisions of the dead man's statute, that

"The competence of a witness to give material testimony may not be challenged for the first time in this court, but must be raised and passed upon in the trial court before it can be made the basis of an assignment of error here"²³

This same rule of law was applied in the more recent case of *Mann v. Peck*²⁴ wherein the court considers the testimony of a witness when no question as to his incompetency under the dead man's statute was raised in the trial court. From these and other decisions it may be convincingly deduced that a survivor's testimony under the West Virginia statute is not "absolutely prohibited." Moreover, by court construction and application, results accomplished and accomplishable under the West Virginia statute may compare favorably with results under the statutes of Kentucky, Maryland and Ohio in which jurisdictions a survivor's testimony is admitted on the basis of consent of or implied waiver by the representative of decedent's estate.

A few cases will illustrate limits defined by the court in circumscribing admissibility of testimony under the statute. In *Strode v. Dyer*²⁵ the court held that the "phrase, 'personal transaction or communication,' as used in Code 1931, 57-3-1, includes transactions involving negligent injury." A strong dissent pointed out:

"A man, alone, is carefully and lawfully driving his automobile on a highway when another automobile carrying a group of drunken rowdies collides with his. One of them is killed and his personal representative sues the lone driver. The survivors in the hoodlum car may all testify; the solitary driver may not. Where is the justice of such an absurd result? Why place a law-abiding person at such an extreme disadvantage?"

²² 69 W. Va. 765, 766, 74 S.E. 953 (1911).

²³ 118 W. Va. 160, 188 S.E. 876 (1936).

²⁴ 139 W. Va. 487, 80 S.E.2d 518 (1954).

²⁵ 115 W. Va. 733, 177 S.E. 878 (1934).

The statute does not create any such consequence; it comes from judicial construction."²⁶

The court, in *Clark v. Douglas*,²⁷ was later confronted with a factual situation somewhat comparable in principle to the illustration presented in the dissent and squarely held that the survivor's testimony as to the tort committed by decedent was not admissible.

In *In re Hauer's Estate*²⁸ it was held that a claimant, in proceedings before a commissioner of accounts for settlement of an estate, was incompetent to testify as to the contents of a written agreement with the deceased made some years prior to decedent's death and apparently lost in a flood. In *Mann v. Peck*²⁹ no objection was interposed in the trial court as to a claimant's testimony relating to the execution of two notes by decedent, but the Supreme Court of Appeals indicated that, had proper objection been made, the testimony would have been inadmissible under the statute.

*Kuhn v. Shreeve*³⁰ holds that "the spouse of an interested party will not be examined as a witness relative to a personal transaction or communication theretofore had with a person deceased, insane or lunatic at the time of his examination" and further holds that:

"A witness who is incompetent to testify by reason of being the spouse of an interested party is likewise incompetent as a witness for a coparty who is equally interested."

FUTURE OF THE DEAD MAN'S STATUTE

"The current of intelligent commentary has been running strongly against maintenance of dead man statutes." So states a 1957 text prepared by eminent scholars in the field of evidence.³¹ Professor Wigmore observed in his treatise:

"As a matter of policy, this survival of a part of the now discarded interest-qualification 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."³²

²⁶ *Id.* at 739, 177 S.E. at 882.

²⁷ 139 W. Va. 691, 81 S.E.2d 112 (1954).

²⁸ 135 W. Va. 488, 63 S.E.2d 853 (1951).

²⁹ 139 W. Va. 487, 80 S.E.2d 518 (1954).

³⁰ 89 S.E.2d 685 (W. Va. 1955).

³¹ MORGAN, MAGUIRE, WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 181 (1957).

³² 2 WIGMORE, EVIDENCE § 578.

He posed the question: "Can it be more important to save dead men's estates from false claims than to save living men's estates from loss by lack of proof?" Professor McCormick points out that,

"Most commentators agree that here again the expedient of refusing altogether to listen to the survivor is, in the words of Bentham, a 'blind and brainless' technique. In seeking to avoid injustice on one side, the statute-makers have ignored the equal possibility of injustice on the other. The temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard. A searching cross-examination will usually, in case of fraud, reveal discrepancies in the 'tangled web' of deception. . . ."³³

In 1938 the American Bar Association's Committee on Improvements in the Law of Evidence referred to the dead man's statute as "an anachronism and an obstruction to truth" and recommended the Connecticut statute as a model basis for change.³⁴ The Legal Research Committee of the Commonwealth Fund of New York, a committee composed of eminent scholars and practitioners, reported in 1927 that the dead man's statutes were obstructions to truth and recommended the Connecticut statute as a basis for legislation in other states.³⁵ In *Minimum Standards of Judicial Administration*, edited by Chief Justice Vanderbilt, it was recommended

"That the rule excluding testimony of an interested party as to transactions with deceased persons, should be abrogated by the adoption of a statute like that of Connecticut, which removes the disqualification of the party as a witness and permits the introduction of declarations of the decedent, on a finding by the trial judge that they were made in good faith and on decedent's personal knowledge."³⁶

The rules of evidence have been developed as a basis for ascertainment of truth in judicial proceedings. This was emphasized by Mr. Justice Sutherland, in *Funk v. United States*, when he wrote:

"The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of truth. And since experience is of all teachers the most dependable, and since experience

³³ MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 65 (1954).

³⁴ 36 A.B.A. REP. 581 (1938).

³⁵ MORGAN, *et al.*, THE LAW OF EVIDENCE—SOME PROPOSALS FOR ITS REFORM 35 (1927).

³⁶ At 334.

is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule."³⁷

At another point in the opinion he wrote:

“. . . Whatever was the danger that an interested witness would not speak the truth—and the danger never was as great as claimed—its effect has been minimized almost to a vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances. . . .”³⁸

Professor Wigmore would obviously concur as to the efficacy of cross-examination in view of his expressed opinion that “it is beyond any doubt the greatest legal engine ever invented for the discovery of truth.”³⁹

The objects and shortcomings of the dead man's statutes are well pointed out by Professor Morgan when he says:

“All are based upon the delusion that perjury can be prevented by making interested persons incompetent or by excluding certain classes of testimony. They persist in spite of experience which demonstrates that they defeat the honest litigant and rarely, if ever, prevent the dishonest from introducing the desired evidence: if the dishonest party is prevented from committing perjury, he is not prevented from suborning it. If the statutes protect the estates of the dead from some false claims, they damage the estates of the living to a much greater extent. And frequently their application prevents proof of a valid claim by the representative of decedent's estate.”⁴⁰

When the history of the statute is understood, when its application has been found to be impractical, when commentary and survey findings point out its weaknesses and demerits, and when curative and remedial legislation in other jurisdictions has been tried, tested and found to be satisfactory, the question may be pondered why the statute is so firmly rooted and so stubbornly retained.

Several possible positions may be suggested for West Virginia.

1. The present statute⁴¹ may be continued without amendment, in which event the courts will be called upon from time to

³⁷ 290 U.S. 371, 381 (1933).

³⁸ *Id.* at 380.

³⁹ 5 WIGMORE, EVIDENCE § 1367.

⁴⁰ MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 187-188 (1956).

⁴¹ W. VA. CODE c. 57, art. 3, § 1 (Michie 1955).

time to shape and fashion the law in the borderlands of difficult cases.

2. The statute may be amended by striking out all of the section except the first part of the first sentence so that the amended enactment would read as follows:

“No person offered as a witness in any civil action, suit or proceeding, shall be excluded by reason of his interest in the event of the action, suit or proceeding, or because he is a party thereto.”

This simple declaration would positively remove the question of common law disqualification because of interest. Some additions to the simply stated statute may be desirable. For example, to borrow from a Connecticut statute, the section might further state that the interest of such witness “may be shown for the purpose of affecting his credit.”⁴² It will be noted that the present West Virginia statute has several prongs or tangents. Not to be minimized in importance is the question of admissibility of written and oral statements of the deceased in litigation involving such decedent's estate. The Commonwealth Fund suggestion,⁴³ heretofore mentioned and endorsed by the superior legal talent of the country, may be considered and adopted as an answer to this question and others arising incident to the statute. That suggestion is in the following language:

“No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.

“In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was in good faith and on decedent's personal knowledge.”

It may be found acceptable to substitute this suggestion *in toto* for the present West Virginia statute.

3. West Virginia may find the Virginia statute acceptable in form and content. It follows generally the pattern of the New

⁴² CONN. GEN. STAT. § 7868 (1949).

⁴³ 36 A.B.A. REP. 581 (1938).

Mexico statute⁴⁴ and has commendable features. Two immediately pertinent sections thereof provide:

"No person shall be incompetent to testify because of interest, or because of his being a party to any action, suit, or proceeding of a civil nature; but he shall, if otherwise competent to testify, and subject to the rules of evidence and practice applicable to other witnesses, be competent to give evidence in his own behalf and be competent and compellable to attend and give evidence on behalf of any other party to such action, suit, or proceeding; but in any case at law, the court, for good cause shown, may require any such person to attend and testify *ore tenus* and, upon his failure to so attend and testify, may exclude his deposition."⁴⁵

"In an action or suit by or against a person, who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; and in any such action or suit, if such adverse party testifies, all entries, memoranda, and declarations of the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received in evidence."⁴⁶

The Code of Laws of the District of Columbia,⁴⁷ as amended by Congress in 1948, contains similar provisions relating to a survivor's testimony. In Virginia and the District of Columbia, the corroborative evidence required by the statutes need not be of itself sufficient to support a judgment. As Circuit Judge Edgerton expressed it,

". . . We think the statute permits a judgment based essentially on the survivor's testimony if there is other evidence from which reasonable men might conclude that his testimony is probably true. . . ."⁴⁸

4. Rule 7 of the *Uniform Rules of Evidence*,⁴⁹ drafted by the National Conference of Commissioners on Uniform State Laws, provides that, except as otherwise restricted by the Rules, "all relevant evidence is admissible." Rule 8 provides that the judge

⁴⁴ N.M. STAT. ANN. c. 20, art. 1, §§ 6-8 (1953).

⁴⁵ VA. CODE § 8-285 (Michie 1950).

⁴⁶ *Id.* § 8-286.

⁴⁷ D.C. CODE ANN. tit. 14, § 302 (1951).

⁴⁸ *Rosinski v. Whiteford*, 87 App. D.C. 313, 184 F.2d 700, 701, 21 A.L.R.2d 1009 (1950).

⁴⁹ The *Uniform Rules of Evidence*, drafted by the National Conference of Commissioners on Uniform State Laws (1953), were approved by the American Bar Association at its meeting in Boston, Massachusetts, August 28, 1953.

shall pass upon the qualifications of a witness and the admissibility of his testimony. Under Rule 17 the judge may disqualify a person to be a witness if he finds "the proposed witness is incapable of understanding the duty of a witness to tell the truth." If desired, a proposed substitute for the West Virginia dead man's statute may be drafted upon a basis of the principles and provisions of the *Uniform Rules of Evidence*.

5. In view of the construction and application of the present dead man's statute, as reflected in opinions of the Supreme Court of Appeals, it seems little would be gained by West Virginia's adoption of the language and provisions of the statutes of Kentucky, Maryland and Ohio, as heretofore mentioned.

Adoption of the proposed Rules of Civil Procedure⁵⁰ for West Virginia, including a rule comparable to Rule 43 of the *Federal Rules of Civil Procedure*, will not remove the limitations and prohibitions of the West Virginia dead man's statute.⁵¹ In *Wright v. Wilson*,⁵² involving a motor vehicle accident in Pennsylvania, Circuit Judge Goodrich was obliged to apply the Pennsylvania dead man's statute in federal court litigation. He reviewed the history of the statute and, in ruling that the proffered testimony of a survivor was inadmissible, observed that "whatever door one tries it is firmly locked against the admissibility." He reached this "result without enthusiasm" but did not consider it proper to remedy the situation by judicial legislation.

It is hoped that this brief reappraisal of the dead man's statute in West Virginia will serve in some measure to focus attention of the bench and bar, members of the legislature, and citizens generally on its provisions and application. To some, the existing statute may be found entirely satisfactory. To others, it may be weighed and found wanting. As an eminent jurist once wrote, "In the endless process of testing and retesting, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine."⁵³

⁵⁰ The proposed *Rules of Civil Procedure for West Virginia*, patterned largely on the *Federal Rules of Civil Procedure*, were approved by a vote of The West Virginia State Bar in 1957, but adoption and promulgation of the Rules are within the province of the West Virginia Supreme Court of Appeals.

⁵¹ See *Hayes v. United States*, 133 F. Supp. 450 (N.D.W. Va. 1955).

⁵² 154 F.2d 616, 619-620 (2d Cir. 1946).

⁵³ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 179 (1921).