

# DEAD MAN'S STATUTES

ROY R. RAY\*

## I. HISTORICAL

At common law in England and the United States, parties to a lawsuit and all other persons having a direct pecuniary or proprietary interest in the outcome of the action were excluded from testifying in the case.<sup>1</sup> A party could not testify in his own behalf nor could he be required to testify if called by his adversary. The rule was thus a combination of disqualification and privilege.<sup>2</sup> The theory of the disqualification was that self-interest would probably cause such persons to perjure themselves; therefore, they should be prevented from giving testimony.<sup>3</sup> Defenders of the rule of exclusion realized, of course, that perjury would not always result from self-interest and that by silencing truthful persons the rule threatened honest litigants with injustice, but they argued that the rule did more good than harm.<sup>4</sup> No justification was advanced for the privilege. Jeremy Bentham, the great English Reformer, made a determined attack upon the rule in his *Treatise on Evidence* published in 1827 and, in the words of Wigmore, "first furnished the arsenal of arguments for transforming public opinion."<sup>5</sup> The unanswerable arguments that pecuniary interest did not make it probable that parties and witnesses would commit perjury, that the rule underestimated the ability of the judge and jurors to detect perjury, and that it created intolerable injustice, were taken up by such reformers as Denman and Brougham who led the assault on the disqualification. Through their efforts and those of others, professional opinion was gradually brought to the realization that the disqualification created more injustice than it prevented. In 1843 a statute was enacted by Parliament abolishing the disqualification of interested persons.<sup>6</sup> And in 1851 another statute swept away the disqualification of parties and those on whose behalf a suit was brought or defended.<sup>7</sup> These reforms spread to the United States, and

---

\* Professor of Law, Southern Methodist University.

<sup>1</sup> 2 Wigmore, *Evidence* §§ 575, 576 (3d ed. 1940) [hereinafter cited as Wigmore].

<sup>2</sup> McCormick, *Evidence* § 65 (1954) [hereinafter cited as McCormick].

<sup>3</sup> Gilbert, *Evidence* 119 (1727). Baron Gilbert's words were: "The law removes them from testimony to prevent their sliding into perjury."

<sup>4</sup> Starkie, *Evidence* 33 (1832): "The law must prescribe general rules; and experience proves that more mischief would result from the general reception of interested witnesses than is occasioned by their exclusion."

<sup>5</sup> 2 Wigmore § 576. Bentham's attack is found in his *Rationale of Judicial Evidence*, book IX, pt. III, ch. III and pt. V, ch. I.

<sup>6</sup> Lord Denman's Act, 6 & 7 Vict., c. 85 (1843).

<sup>7</sup> Lord Brougham's Act, 13 & 14 Vict., c. 99 (1851).

the English statutes served as models for legislation here. As in England the change was brought about in two steps: the first qualifying interested nonparties and the second qualifying parties. Unfortunately most of the states which enacted similar statutes departed from the English model in a most significant respect. They retained a portion of the old disqualification as an exception to the new rule of qualification. At the time when the first statutes abolishing the interest disqualification were offered to the state legislatures in this country, the objection was made that if parties and interested persons were allowed to testify in cases involving contracts and transactions where one party had died and the other survived, this would work a hardship on the estate of the deceased.<sup>8</sup> Since the lips of one party to the transaction were sealed by death, the suggestion was that the living party's lips should be sealed by excluding his testimony.<sup>9</sup> This compromise was accepted in most of the early statutes and became the pattern of legislation in this country. Today in most jurisdictions the statutes contain a general statement to the effect that no person shall be disqualified because he is a party to a suit or proceeding or interested in the issue to be tried.<sup>10</sup> But they add a provision to the effect that in suits brought or defended by an executor or administrator, such persons shall remain incompetent to testify concerning a communication with the testator or intestate.<sup>11</sup> While this is the most common type of statute, there are many which vary substantially from this in certain respects as will be noted later. The statutes usually provide that the surviving party or interested person may testify if called by the opposite party, thus doing away with the privilege feature of the common-law rule. These statutes which retain the common-law interest disqualification of parties and interested persons with respect to testimony as to transactions with decedents are popularly known as

---

<sup>8</sup> McCormick § 65.

<sup>9</sup> *Owens v. Owens Adm'r*, 14 W. Va. 83, 95 (1878): "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."

<sup>10</sup> There is now no state in which interest is a general disqualification.

<sup>11</sup> In most statutes this protection against the testimony of the opposite party is extended to persons who by reason of insanity are assumed to be handicapped as witnesses for themselves. The present article does not deal with this phase of the disqualification for two reasons: (1) space limitations and (2) the relative infrequency with which such questions about competency of parties arise in actions by or against guardians of insane persons.

"Dead Man's Statutes" and now exist in some thirty-four states.<sup>12</sup> They vary greatly in their wording and coverage, and the attitudes of the courts differ as to their interpretation, even where similar provisions are involved. Consequently, precedents from one state may be of little value in another jurisdiction.

As a background for the subsequent discussion, it seems worthwhile to set forth the text of a few statutes to illustrate variation in phraseology and the extent of the disqualification which the legislatures sought to retain.

*Alabama:*

In civil suits and proceedings, . . . no person having a pecuniary interest in the result of the suit or proceeding shall be allowed to testify against the party to whom his interest is opposed, as to any transaction with, or statement by the deceased person whose estate is interested in the result of the suit or proceeding, or when such deceased person, at the time of such transaction or statement, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced, unless called to testify thereto by the party to whom such interest is opposed, or unless the testimony of such deceased person in relation to such transaction or statement is introduced in evidence by the party whose interest is opposed to that of the witness, or has been taken and is on file in the cause. No person who is an incompetent witness under this section shall make himself competent by transferring his interest to another. Code of Alabama (1960) Title 7, § 433.

*California:*

Persons incompetent to be witnesses—Parties or assignors of parties to a suit or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such

---

<sup>12</sup> Ala. Code tit. 7, § 433 (1960); Cal. Code Civ. Proc. § 1880 (1959); Colo. Rev. Stat. Art. 153-1-2 (1953); Del. Code Ann. tit. 10, § 4302 (1953); Fla. Stat. Ann. § 90.05 (1960); Ga. Code Ann. § 38-1603 (1954); Idaho Code Ann. § 9-202 (1947); Ill. Ann. Stat. ch. 51, § 2 (Supp. 1951); Ind. Ann. Stat. § 2-1715 (1946); Iowa Code § 622.4-622.6 (1958); Kan. Gen. Stat. Ann. § 60-2804 (1949); Ky. Rev. Stat. § 421.210(2) (1960); Me. Rev. Stat. Ann. ch. 113, § 119 (1954); Md. Ann. Code art. 35, § 3 (1957); Mich. Stat. Ann. § 27A.2160 (1961); Minn. Stat. Ann. § 595.04 (1947); Miss. Code Ann. § 1690 (1956); Mo. Ann. Stat. § 491.010 (1952); Neb. Rev. Stat. § 25-1201 (1956); N.Y. Civ. Prac. Act § 347 (1961); N.C. Gen. Stat. § 8-51 (1951); N.D. Cent. Code § 31-01-03 Thru -05 (1960); Ohio Rev. Code § 2317.03 (1955); Okla. Stat. Ann. tit. 12, § 384 (1960); Pa. Stat. Ann. tit. 28, § 322 (1958); S.C. Code § 26-402 (1952); Tenn. Code Ann. § 24-105 (1955); Tex. Rev. Civ. Stat. art. 3716 (1925); Utah Code Ann. § 78-24-2 (1953); Vt. Stat. Ann. tit. 12, §§ 1602 and 1603 (Supp. 1961); Wash. Rev. Code ch. 5.60.030 (1961); W. Va. Code Ann. § 5726 (1961); Wis. Stat. Ann. §§ 325.16 and 325.17 (1958); Wyo. Stat. Ann. § 1-140 (1957).

deceased person. California Code of Civil Procedure § 1880 (1959).

*New York:*

Personal transaction or communication between witness and decedent or lunatic. Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person, or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of a lunatic or deceased person is given in evidence, concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof.

No party or person interested in the event, who is otherwise competent to testify, shall be disqualified from testifying by the possible imposition of costs against him or the award of costs to him. A party or person interested in the event or a person from, through, or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be qualified for the purposes 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 a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate.

Nothing contained in this section, however, shall render a person incompetent to testify as to the facts of an accident or the results therefrom where the proceeding, hearing, defense or cause of action involves a claim of negligence or contributory negligence in an action wherein one or more parties is the representative of a deceased or incompetent person based upon, or by reason of, the operation or ownership of a motor vehicle being operated upon the highways of the state, or the operation or ownership of aircraft being operated in the air space over the state, or the operation or ownership of a vessel on any of the lakes, rivers, streams, canals or other waters of this state, but this provision shall not be construed as permitting testimony as to conversations with the deceased. N. Y. Civil Practice Act (1961) § 347.

*Texas:*

In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent. Texas Revised Civil Statutes, 1925, Article 3716.

*West Virginia:*

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. West Virginia Code (1961) § 5726.

## II. APPLICATION AND INTERPRETATION OF THE STATUTES

Limitations of space prevent extensive discussion of the provisions of any one statute or its interpretation by the courts of the particular state. The purpose of this portion of the paper will be to call attention to express provisions of the statutes concerning their application, to point up some of the vagaries and inconsistencies which have resulted from attempts on the part of the courts to interpret and apply the statutes of their particular states, and to demonstrate that the statutes not only fail to accomplish their purported purpose but actually are instruments of injustice. To do this, the discussion will be divided into three parts: (A) Actions in which the statutes apply, (B) Persons whose testimony is excluded, and (C) Subject matter of testimony excluded. The cases discussed or cited will be used for purposes of illustration only and no attempt will be made

to give any definitive statement of the law of a particular state. The statutes have been listed in an earlier note and the citations will not be repeated in the ensuing footnotes.

A. *Actions in Which the Statutes Apply*

Since the purported purpose of the statutes is to protect the estates of the dead from false claims, it is clear that they were never intended to apply to all kinds of actions. The extent of coverage depends upon the wording of the particular statute. While in some states such as Delaware, Minnesota, North Dakota, Tennessee and Texas, the statutes apply in any action by or against an executor or administrator in his representative capacity, many of the statutes such as those of California, Idaho, Florida, New York and Oklahoma apply only where the suit is *against* the estate, *i.e.*, where the executor or administrator is the defendant. This limitation seems strange indeed. If the estate needs protection from self-interested perjury where the suit is against the estate, why is not the same protection needed when the estate brings the suit on some claim? The opposite party's incentive to commit perjury cannot be less in the latter situation. That such limitation leads to anomalous results is well-illustrated by a California case. The administrator of an estate sued defendant for damaging intestate's car in a collision. Defendant claimed that the intestate was solely responsible for the collision and counterclaimed. The court held that defendant could testify in support of his defense since no claim against the estate was involved, but not in support of his counterclaim because it was a claim against the estate.<sup>13</sup> The result does not make sense but appears necessitated by the wording of the statute.<sup>14</sup> By the express wording of the California statute, it would seem that the legislature intended it to apply to all actions against the estate. But the California courts do not so interpret it. They hold that the statute applies only where the claim is adverse to the estate, *i.e.*, seeking relief which will diminish or impair it. Thus, where an heir or legatee brings a suit seeking to share in the estate, the claim is not adverse because it does not operate to diminish the estate, and the statute does not apply.<sup>15</sup> This appears to be a highly technical and tortured construction of the statute. If the danger of perjury is present

---

<sup>13</sup> *George v. McManus*, 27 Cal. App. 414, 150 Pac. 73 (1915).

<sup>14</sup> See Chadbourn, "History and Interpretations of the California Dead Man's Statute: A Proposal for Liberalization," 4 U.C.L.A.L. Rev. 175, 203 (1956). This scholarly and definitive article points out defects in the statute and numerous anomalies in the decisions. I am indebted to Professor Chadbourn for California illustrations given in the text.

<sup>15</sup> *Id.* at 187.

in one kind of claim against the estate, it is just as much so in another. One further anomaly: where plaintiff sued the estate claiming to be decedent's common-law wife, and asking for a monthly allowance for support pending administration, the statute was held not to prevent her from testifying since this was, in effect, an application for partial distribution of the estate and not an adverse claim.<sup>16</sup> In contrast, a suit brought by one claiming to be a creditor of the estate for services rendered the deceased during his later years is an adverse claim and the alleged creditor may not testify. How can it be said that evidence in the latter situation is any less trustworthy than that in the former?

Some statutes, like those of Georgia, Iowa, Illinois, Kansas, Ohio, Oklahoma, South Carolina, Utah, Washington, West Virginia, and Wisconsin, by express terms extend the protection to anyone who derives his title or sustains his liability to the cause of action from, through or under the decedent. Such persons may include not only executors and administrators, but heirs, next of kin, legatees, devisees and assignees. Of course, the reason behind such statutes favors the extension of the protection to successors in interest. Whatever danger of perjury exists is not lessened by the presence of one of these persons as a party instead of an executor or administrator. In Texas the statute was extended, apparently as an afterthought, to heirs, but does not include actions by or against legatees, devisees, assignees or other persons who derive title or claim through the decedent.<sup>17</sup>

Most of the statutes by express terms provide that they are applicable in any civil suit or proceeding. Thus they apply in tort actions as well as contract suits. However, the West Virginia statute expressly exempts actions for wrongful death of decedent from its terms except as to conversations with decedent.<sup>18</sup> The courts of Maryland and Texas have interpreted their statutes as inapplicable in wrongful death actions.<sup>19</sup> This is understandable since a wrongful death action is not derivative; it belongs to the survivor named in the statute rather than to the estate, although the statute sometimes

---

<sup>16</sup> Estate of McCasland, 52 Cal. 568 (1878).

<sup>17</sup> Newton v. Newton, 77 Tex. 508, 14 S.W. 157 (1890) (Where the suit is by or against a legatee or devisee and no parties named in the statute are necessary parties, the statute does not apply). In a suit against devisees or executors where the latter were not necessary parties, the statute was held not applicable, Stiles v. Hawkins, 207 S.W. 89 (Tex. Com. App. 1918).

<sup>18</sup> W. Va. Code Ann. § 5726 (1961). The Wyoming statute excepts wrongful death actions from its provisions. Wyo. Stat. Ann. § 1-140 (1957). See Annot., 45 A.L.R. 1477 (1926).

<sup>19</sup> State v. Brainin, 224 Md. 156, 167 A.2d 117 (1961); Canales v. Bank of California, 316 S.W.2d 314 (Tex. Civ. App. 1958).

provides that the action may be brought by the administrator under certain circumstances.

In 1926 the Kentucky statute was amended to exempt tort actions from its operation, presumably for the primary purpose of permitting testimony by the survivor of an automobile accident. The result is that when an action sounds in tort, the survivor's testimony is admitted; if it sounds in contract, the testimony is excluded. The courts have experienced difficulty in interpreting and applying the exception.<sup>20</sup> Inconsistencies will result when a contract action is coexistent with a tort action. Suppose, for example, that a tort has resulted in unjust enrichment of the survivor at the expense of the deceased. The personal representative has a choice of theories: quasi-contract or tort. If he chooses the former, he may exclude the survivor's testimony, but if he sues in tort the survivor may testify. This is ridiculous for there can be no difference in the trustworthiness of the testimony in the two situations.<sup>21</sup>

There is a conflict among the states as to whether the Dead Man's Statutes are applicable to probate proceedings and will contests. In some jurisdictions such proceedings are expressly exempted by the statute; in others they are expressly included. In states where the statutes contain no specific reference to such proceedings, the majority of courts hold that the person opposing the probate or contesting the will is not claiming adversely to the estate but is merely seeking a part of the estate; therefore, the statute is not applicable.<sup>22</sup> Other states, however, apply the statute to such proceedings.<sup>23</sup> Since the policy of the statute is to protect the estates of decedents, it can well be argued that the statutes should be limited to suits between the estate and strangers. However, the person opposing the probate or contesting the will has as much motive to falsify as the stranger.

### B. *Persons Whose Testimony Is Excluded*

On the question of what persons are disqualified to give testimony, there is a great variance in the express terms of the statutes and in the interpretations by the courts. Some statutes disqualify "parties" only,<sup>24</sup> others disqualify both "parties" and "persons inter-

<sup>20</sup> See *Niles v. Luttrell*, 61 F. Supp. 778, 783 (W.D. Ky. 1945).

<sup>21</sup> 38 Ky. L.J. 471, 473 (1950).

<sup>22</sup> *Henry v. Hall*, 106 Ala. 84, 17 So. 187 (1895); *Williams v. Miles*, 68 Neb. 403, 94 N.W. 705 (1903); *Griffith v. Benzinger*, 144 Md. 575, 125 Atl. 512 (1924).

<sup>23</sup> *McKibban v. Scott*, 131 Tex. 182, 114 S.W.2d 213 (1938); *In re Wind's Estate*, 27 Wash. 2d 421, 178 P.2d 731 (1947).

<sup>24</sup> Maine, Maryland, Ohio, Georgia, Missouri, Pennsylvania and Vermont disqualify the surviving party to the transaction. Delaware, North Dakota, Tennessee and



ested in the event of the action,"<sup>25</sup> and some of the statutes extend the disqualification to "assignors of" or "persons from or through whom" such parties or interested persons derive their title, interest or claim.<sup>26</sup> Who are parties within the meaning of the statutes? Normally the courts hold that the term *party* means a party of record with an interest in the outcome of the suit, and that a nominal or formal party of record with no interest is not disqualified.<sup>27</sup> However, in some states the courts follow the strict letter of the statute and exclude the testimony of record parties even though they are merely nominal parties and have no interest.<sup>28</sup> For example, in an Iowa case where the dispute was as to who were the heirs, an executor who was only a nominal party was excluded,<sup>29</sup> the court feeling bound to follow the explicit language of the statute. And in Maryland, a next friend, who was a mere nominal party, was disqualified.<sup>30</sup> These decisions appear to have lost sight of the philosophy of the statute; no self-interest is present here to tempt the witness to perjury. Although by its terms the Texas statute disqualifies only parties, the courts have long held that "party" includes persons who are pecuniarily interested in the outcome even though they are not parties of record.<sup>31</sup> Thus, where one spouse sues or is being sued for community property, the other spouse cannot testify as to a transaction with a decedent although not a party of record.<sup>32</sup> In such a situation, of course, whatever danger of perjury exists is the same as to the spouse who is not

---

Texas disqualify both parties to the suit. In California, the living party is disqualified only if he is the plaintiff with a claim against the estate.

<sup>25</sup> Alabama, Illinois, Iowa, Minnesota, Nebraska, New York, North Carolina, Pennsylvania, South Carolina and Utah.

<sup>26</sup> California, Florida, Iowa, Kansas, Kentucky, Missouri, Nevada, New York, North Carolina, Oklahoma, South Carolina, Utah and Wisconsin.

<sup>27</sup> *Wolf v. Powner*, 30 Ohio St. 472 (1876) (husband who joined wife because of her coverture was only a formal or nominal party and could testify); *Lehman v. Krahl*, 155 Tex. 270, 285 S.W.2d 179 (1955) (husband of legatee, whom a statute required to be joined as a party, was not disqualified); *Raab v. Wallerick*, 46 Wash. 2d 375, 282 P.2d 271 (1955).

<sup>28</sup> *Wing v. Andrews*, 59 Me. 505 (1871).

<sup>29</sup> *In re Conner's Estate*, 240 Iowa 479, 36 N.W.2d 833 (1949) (5-to-4 decision). Compare the contrary holding in *Pruner v. Lovejoy*, 314 S.W.2d 651 (Tex. Civ. App. 1958) (partition proceeding: the estate had been fully administered except for partition. The court held that, at this stage, the administrator was only a nominal party and could testify).

<sup>30</sup> *Allers v. Leitch*, 213 Md. 390, 131 A.2d 458 (1957).

<sup>31</sup> *Simpson v. Brotherton*, 62 Tex. 170 (1884). Oklahoma, with a similar provision, refuses to construe the word *party* to include one interested in the outcome but who is not a party of record. *Wright v. Quinn*, 201 Okla. 565, 207 P.2d 912 (1949). To like effect is *Holey v. Quick*, 149 Me. 306, 101 A.2d 187 (1953).

<sup>32</sup> *Newton v. Newton*, 77 Tex. 508, 14 S.W. 157 (1890).

a record party. But the court did not need to extend the disqualification by judicial construction to persons not included in the statute.

Since the majority of the statutes disqualify persons interested in the event of the action and other statutes are interpreted by the courts as having that effect, it becomes important to determine the kind of interest which is sufficient to disqualify. Usually only a pecuniary or proprietary interest will suffice. Thus, close family relationship by blood or marriage, such as parent, child, husband or wife, will normally not render a witness incompetent.<sup>33</sup> But there are decisions in some states to the contrary. A Florida court refused to allow a son to testify in a suit by his mother, although he was not pecuniarily interested.<sup>34</sup> A Pennsylvania case has held a spouse to be disqualified in an action where the other spouse is a party,<sup>35</sup> and the Iowa statute contains this express disqualification.<sup>36</sup> In a most extreme result, the Illinois Supreme Court disqualified the party's divorced wife.<sup>37</sup> A mere interest in seeing one party succeed is usually not sufficient to disqualify. Thus the fact that the witness is an agent of a party or an agent or officer of a corporate party will not, in most states, render him incompetent.<sup>38</sup> Statutes, however, in Michigan, North Dakota, Tennessee and Wisconsin make the corporate officer or trustee incompetent, and those of North Dakota and Michigan also disqualify an agent. A federal court interpreted "party" as used in the Delaware statute as including officers of corporate parties.<sup>39</sup> In most jurisdictions, an attorney for a party is not disqualified merely

---

<sup>33</sup> Weese v. Yokum, 62 W. Va. 550, 59 S.E. 514 (1907) (father); Nelson v. Zeigler, 196 Wis. 426, 220 N.W. 194 (1928) (parents of plaintiff in malpractice action); Barnett v. Andrew, 81 W. Va. 283, 94 S.E. 144 (1917) (daughter of plaintiff); Carlson v. Hardware Mut. Cas. Co., 255 Wis. 407, 39 N.W.2d 442 (1949) (wife of plaintiff in automobile collision suit); Rusk v. Rusk, 52 S.W.2d 1108 (Tex. Civ. App. 1932) (plaintiff's sister, brother and brother's wife); Hennenberger v. Sheahan, 278 S.W.2d 497 (Tex. Civ. App. 1954) (niece and other relatives).

<sup>34</sup> Jensen v. Lance, 88 So. 2d 762 (Fla. 1956) (relationship was the sole basis of the decision despite an announced policy of strict construction of the statute).

<sup>35</sup> *In re Wistoykey's Estate*, 1 Adams County L.J. 43 (Pa. Orphans' Ct. 1960).

<sup>36</sup> Iowa Code § 622.4 (1958).

<sup>37</sup> Hann v. Brooks, 331 Ill. App. 535, 73 N.E.2d 627 (1947). See critical comment in 46 Mich. L. Rev. 664 (1948).

<sup>38</sup> Guernsey v. Loyola Fed. Sav. & Loan Ass'n, 226 Md. 77, 172 A.2d 506 (1961); Thompson v. McAllen Federated Womens' Bldg. Corp., 273 S.W.2d 105 (Tex. Civ. App. 1954); Balla v. Sladek, 381 Pa. 85, 112 A.2d 156 (1955) (agent); Nolan v. Standard Fire Ins. Co., 243 Wis. 30, 9 N.W.2d 74 (1943) (agent); Gaulden v. Antone, 279 S.W. 560 (Tex. Civ. App. 1925) (president of corporation); L. C. Jones Trucking Co. v. Jenkins, 313 P.2d 530 (Okla. 1957).

<sup>39</sup> Lake Shore Nat'l Bank v. Ballanca Aircraft Corp., 83 F. Supp. 795 (D. Del. 1949), *aff'd per curiam*, 78 F.2d 923 (3d Cir. 1950).

because he is interested in seeing his client win and is to receive a fee.<sup>40</sup> However, the Kentucky court disqualified an attorney whose testimony might augment his fee.<sup>41</sup> The slightest pecuniary interest may sometimes be enough to render the witness incompetent. For example, an Alabama case held that ownership by the witness of one share of stock of a corporate party disqualified him, although a corporate officer could testify.<sup>42</sup> The test of interest has been stated by one court thus: Whether the witness will "gain or lose by the direct legal operation and effect of the judgment or that the record will be legal evidence against him in some other action";<sup>43</sup> and by another court in these words: "whether the witness will be bound by any judgment which may be rendered under the pleadings."<sup>44</sup> Thus in Washington and Texas, where one spouse is a party to a suit involving community property, the other spouse cannot testify.<sup>45</sup> Any person on whose behalf or for whose benefit an action is brought is an interested person and therefore incompetent.<sup>46</sup> These include heirs, legatees, and devisees, except, of course, in states where suits by such persons for a part of the estate are not considered claims against the estate.<sup>47</sup>

Since competency is tested as of the time testimony is uttered, it would seem that a person who has no pecuniary or proprietary interest at the time he is offered as a witness would be qualified. However, as has been noted, statutes in many states expressly disqualify assignors and other persons through or from whom a party or interested person derives his title, interest or claim.<sup>48</sup> In the absence of such a provision,

---

<sup>40</sup> *In re Will of Henderson*, 272 Wis. 163, 74 N.W.2d 739 (1956); *Hudson v. Fuson*, 15 S.W.2d 166 (Tex. Civ. App. 1929); *Parker v. Priestley*, 39 So. 2d 210 (Fla. 1949). The Florida court indicated that if he were on a contingent fee this might disqualify him, but to the contrary see *Davidson v. Gray*, 97 S.W.2d 488 (Tex. Civ. App. 1936); *Wright v. Quinn*, *supra* note 31.

<sup>41</sup> *Garnett v. Walton*, 242 S.W.2d 107, 110 (Ky. 1951).

<sup>42</sup> *Ludden & Bates v. Watt*, 18 Ala. App. 652, 94 So. 239 (1922). Contrary holdings are found in Oklahoma, *Mud Products Co. v. Gutowsky*, 274 P.2d 389 (Okla. 1954); and Maryland, *Guernsey v. Loyola Fed. Sav. & Loan Ass'n*, *supra* note 38. The North Dakota and Wisconsin statutes bar the agent's testimony.

<sup>43</sup> *Oliver v. Williams*, 163 Ala. 376, 50 So. 937 (1909).

<sup>44</sup> *Corbell v. Koog*, 188 S.W.2d 905 (Tex. Civ. App. 1945).

<sup>45</sup> *Boettcher v. Busse*, 45 Wash. 2d 579, 277 P.2d 368 (1954); *Newton v. Newton*, *supra* note 32.

<sup>46</sup> *Alford v. Henderson*, 237 Ala. 27, 185 So. 386 (1938) (issue as to validity of deed by testator to one of devisees; devisee incompetent); *In re Valentine's Will*, 93 Wis. 45, 67 N.W. 12 (1897) (heir who would benefit by the revocation of a will cannot testify as to revocation).

<sup>47</sup> *Henry v. Hall*, *supra* note 22. See *Chadbourn*, *supra* note 14, at 187 and 189.

<sup>48</sup> States listed in note 26 *supra*.

it is usually held that one who has disposed of his interest through a bona fide disclaimer, gift or assignment is a competent witness,<sup>49</sup> but there is authority to the contrary.<sup>50</sup> Even where recognized, however, disengagement may be extremely difficult to accomplish. In a Texas case, decedent allegedly promised to pay his nephew for medical services, payment to be out of his estate. The nephew transferred the claim for services to his wife who formed a corporation, wholly owned by her, to which she transferred the claim. In a suit by the corporation against the executor of the estate, the nephew was held incompetent to testify as to an oral agreement with decedent for the services.<sup>51</sup> The supreme court placed the burden upon the nephew to show that the transfer was bona fide and that he no longer had an interest in the claim.<sup>52</sup> This is contrary to the usual rule that the burden is upon the one challenging competency.

The requirement of a pecuniary interest seems artificial since many other factors such as close family relationship or employment may influence a witness' testimony as much as a direct pecuniary benefit from the suit.

### C. *Subject Matter of Testimony Excluded*

Where the action is one to which the statute applies, and the witness offered is one who is disqualified, the final question becomes one of whether the particular testimony is to be excluded. By their terms some statutes exclude all the testimony of the witness with certain express exceptions.<sup>53</sup> Others disqualify the witness as to all matters occurring before the death of the decedent.<sup>54</sup> Some limit the disqualification to any matter as to which the deceased might have been able to testify had he lived.<sup>55</sup> The largest number of statutes, however,

---

<sup>49</sup> *Adams Marine Service Co. Inc. v. Fishel*, 42 Wash. 2d 555, 257 P.2d 203 (1953) (principal stockholder and president of corporate party, who disposed of all his stock and resigned as president after commencement of action but before trial, was held competent); See Annot., 163 A.L.R. 1210, 1225 (1946). It is immaterial that the purpose of the transfer was to remove the disability as a witness. *Ragsdale v. Ragsdale*, 142 Tex. 476, 179 S.W.2d 291 (1944).

<sup>50</sup> *Jernigan v. Gibbs*, 26 Ala. App. 93, 89 So. 196 (1921).

<sup>51</sup> *Ditto v. Ditto Investment Co.*, 158 Tex. 104, 309 S.W.2d 219 (1958).

<sup>52</sup> See the vigorous dissenting opinion by Garwood, J., in which he takes the majority to task for failing to distinguish between "avoiding" the Dead Man's Statute and "evading" it. He urges that it was error for the trial court to presume that the assignment of the claim was all a pure fake, and he says the burden should be on the party challenging the transfer to show that it was not bona fide.

<sup>53</sup> Illinois, Maine, Missouri, Ohio and Wyoming.

<sup>54</sup> California, Idaho, Indiana, Nevada, Pennsylvania and Washington.

<sup>55</sup> Michigan and Utah.

provide that the witness (party, interested person, assignor, etc.) shall not be competent to testify as to any transaction with or statement by the decedent.<sup>56</sup>

The courts appear to have experienced great difficulty in determining what constitutes a "transaction." It seems likely that the legislatures had in mind contractual and commercial dealings.<sup>57</sup> But the courts, despite their oft-announced principle of strict construction, have given a broad interpretation to the term *transaction*, thus extending the scope of the disqualification. Among the things which have been considered transactions are: execution of deeds,<sup>58</sup> delivery of deeds and property,<sup>59</sup> contracts,<sup>60</sup> marriage,<sup>61</sup> gifts,<sup>62</sup> payment of money,<sup>63</sup> and services rendered.<sup>64</sup> Thus, in some states, a party suing the estate may not testify as to services performed or the value thereof.<sup>65</sup> The practical consequence is that a survivor who has performed such services for one whom he trusted, without securing a written agreement, is helpless if the latter dies and the estate declines to pay. Some courts do permit testimony by the survivor as to the services rendered and their value, but exclude his testimony as to non-payment by the decedent;<sup>66</sup> the theory being that as to the former, the

---

<sup>56</sup> Alabama, Delaware, Florida, Georgia, Iowa, Kansas, Kentucky, Maryland, Nebraska, New York, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Texas and Wisconsin. Some of these use the phrase "personal transaction."

<sup>57</sup> The Arkansas court held "transaction" to be synonymous with "business deal" or "negotiation" in accord with Webster's New International Dictionary. Rankin v. Morgan, 193 Ark. 751, 102 S.W.2d 552 (1937). See also Shaneybrook v. Blizzard, 209 Md. 304, 121 A.2d 218 (1956) and Harper v. Johnson, 162 Tex. 117, 345 S.W.2d 277 (1961).

<sup>58</sup> Haley v. Lee, 241 S.W. 567 (Tex. Civ. App. 1922).

<sup>59</sup> North v. North, 2 S.W.2d 481 (Tex. Civ. App. 1927).

<sup>60</sup> Haywood v. Hollingsworth, 255 Ala. 453, 51 So. 2d 674 (1951); Rork v. Klein, 206 Iowa 809, 221 N.W. 460 (1928).

<sup>61</sup> Catlett v. Chestnut, 107 Fla. 498, 146 So. 241 (1933).

<sup>62</sup> Atchley v. Rimmer, 148 Tenn. 303, 255 S.W. 366 (1923).

<sup>63</sup> Hughes v. Wachter, 61 N.D. 513, 238 N.W. 776 (1931); Altgelt v. Brister, 57 Tex. 432 (1882).

<sup>64</sup> Sklaire v. Turner's Estate, 12 App. Div. 2d 386, 212 N.Y.S.2d 389 (1961); Barnhill v. Kirk, 44 Tex. 589 (1876); Young v. Burke, 139 Colo. 305, 338 P.2d 284 (1959).

<sup>65</sup> Sklaire v. Turner's Estate, *supra* note 64 (physician suing for professional services); Young v. Burke, *supra* note 64; Gordon v. Pledger, 271 S.W.2d 344 (Tex. Civ. App. 1954). There is authority to the contrary: Kirkpatrick v. Milks, 257 Wis. 549, 44 N.W.2d 574 (1950), holding that performance of services is not a transaction since this relates to no act of decedent.

<sup>66</sup> Hunt v. Murdock, 229 Ala. 227, 156 So. 841 (1934) (services rendered); Garvin v. Hughes, 249 Ala. 126, 30 So. 2d 245 (1947) (value); Burnett v. Garrison, 261 Ala. 622, 75 So. 2d 144 (1954) (testimony as to payment by decedent barred).

witness is testifying as to his own acts. Is the witness more apt to tell the truth as to one fact than as to the other?

Automobile collisions have often been treated as transactions, with the result that the survivor's testimony was either entirely excluded or mutilated.<sup>67</sup> In many states where *A*'s car collides with one driven by *B*, who is killed in the collision, *A* may not testify as to how the accident happened or the circumstances leading up to it.<sup>68</sup> Other courts hold that the survivor can testify to his own actions and the position and movements of his own car immediately prior to the collision, but may not testify as to those of decedent or his vehicle.<sup>69</sup> Some courts have even disqualified a passenger in the survivor's car,<sup>70</sup> but others have declined to extend the gag to the passenger.<sup>71</sup> To classify an automobile collision as a "transaction" between the drivers of the cars is to completely disregard the customary and ordinary meaning of the word. It is unbelievable that the legislatures, in seeking to protect estates of decedents from false claims, could have intended to include in "transaction" such an involuntary and fortuitous contact as an automobile collision. Such decisions are not only unwarranted judicial extensions of the statute, but they create an intolerable injustice in denying the survivor the right to give his story to the triers. Fortunately the trend of recent decisions in several states is running against the disqualification.<sup>72</sup> Other unsought and violent contacts, however,

---

<sup>67</sup> *Strode v. Dyer*, 115 W. Va. 733, 177 S.E. 878 (1934); *Southern Natural Gas Co. v. Davidson*, 225 Ala. 171, 142 So. 63 (1932); *In re Mueller's Estate*, 166 Neb. 376, 89 N.W.2d 137 (1958); *Van Meter v. Goldfarb*, 317 Ill. 620, 14 N.E. 391 (1925); *Rogers v. Carmichael*, 58 Ga. App. 343, 198 S.E. 318 (1938); *Zeigler v. Moore*, 75 Nev. 91, 335 P.2d 425 (1959); *Boyd v. Williams*, 207 N.C. 30, 175 S.E. 832 (1934); *Stephens v. Short*, 41 Wyo. 324, 285 P.2d 797 (1930). The cases are collected in 80 A.L.R.2d 1296 (1961).

<sup>68</sup> *Southern Natural Gas Co. v. Davidson*, *supra* note 67; *Clark v. Storck*, 338 Ill. 564, 52 N.E.2d 229 (1943); *In re Mueller's Estate*, *supra* note 67; *Zeigler v. Moore*, *supra* note 67; *Miller v. Walsh's Adm'r*, 240 Ky. 822, 43 S.W.2d 42 (1931).

<sup>69</sup> *McCarthy v. Woolston*, 210 App. Div. 152, 205 N.Y.S. 507 (1924); *Kilmer v. Gustason*, 211 F.2d 781 (5th Cir. 1954).

<sup>70</sup> *Thomas v. Tomay*, 394 Pa. 299, 147 A.2d 321 (1959). In some states the passenger can testify as to the acts of his own driver, but not as to the acts of the driver of the other car. *Strode v. Dyer*, *supra* note 67. Some courts exclude the passenger's testimony in a suit against his own driver. *Boyd v. Williams*, *supra* note 68; *Sollinger v. Himchak*, 402 Pa. 232, 166 A.2d 531 (1961); *Busser v. Noble*, 22 Ill. App. 2d 433, 161 N.E.2d 150 (1959).

<sup>71</sup> *Gibson v. McDonald*, 265 Ala. 426, 91 So. 2d 679 (1956); *Shaneybrook v. Blizzard*, *supra* note 57; *Day v. Stickle*, 113 So. 2d 559 (Fla. App. 1959).

<sup>72</sup> *Harper v. Johnson*, *supra* note 57, overruling the earlier Civil Appeals decision in *Andreades v. McMillan*, 256 S.W.2d 477 (Tex. Civ. App. 1956); *Rankin v. Morgan*, *supra* note 57; *Christofiel v. Johnson*, 40 Tenn. App. 197, 290 S.W.2d 215 (1956); *Turbot v. Repp*, 247 Iowa 69, 72 N.W.2d 565 (1955); *Knoepple v. Suko*, 108 N.W.2d

may bring about a disqualification as in a West Virginia case where the survivor was not permitted to testify that he was shot by decedent.<sup>73</sup>

Some courts have said that "transaction" includes "every method by which one person can derive impressions or information from the conduct, condition or language of another."<sup>74</sup> On this theory, testimony as to facts learned or opinions formed from observing decedent's conduct is held to be a transaction.<sup>75</sup> Thus, in a West Virginia case, an interested witness was not allowed to give an opinion as to the genuineness of decedent's signature formed by having seen him write his signature.<sup>76</sup> But if the opinion had been formed by a bank teller who had become familiar with the signature through handling decedent's checks, he could have testified because no personal transaction with decedent was involved. The Texas courts refuse to allow a party or interested witness to give an opinion as to testator's sanity even though it is based entirely on observation.<sup>77</sup> A Kentucky decision disallowed the testimony of an interested witness as to the contents of a lost will because testatrix had shown the will to the witness and this was considered a transaction with testatrix.<sup>78</sup>

Statutes of some states, such as Iowa, West Virginia and Wisconsin, use the phrase "personal transaction." As indicated, West Virginia courts say this includes personal contact such as shooting of the survivor by the deceased, or observing decedent's conduct such as writing his signature. The Iowa court held that the witness could not testify that he loaned money to decedent, nor that decedent later admitted his indebtedness to the witness and promised to pay it,

---

456 (N.D. 1961); *Shaneybrook v. Blizzard*, *supra* note 57; *Herring v. Eiland*, 81 So. 2d 645 (Fla. 1955). Cases collected in Annot., 80 A.L.R.2d 1290 (1961). The New York statute, as amended in 1940, expressly provides that it shall not prevent any person from testifying as to the facts of an automobile accident. N.Y. Civ. Prac. Act § 347.

<sup>73</sup> *Clark v. Douglas*, 139 W. Va. 691, 81 S.E.2d 112 (1954), noted 39 Minn. L. Rev. 609 (1955).

<sup>74</sup> *Holcomb v. Holcomb*, 95 N.Y. 316, 325 (1884). This definition has been quoted by many courts. *Maciejczak v. Bartell*, 187 Wash. 113, 60 P.2d 31 (1936); *Stephens v. Short*, 41 Wyo. 324, 285 Pac. 797 (1930).

<sup>75</sup> *Holland v. Nimitz*, 111 Tex. 419, 232 S.W. 298 (Comm. App. 1921).

<sup>76</sup> *Johnson v. Bee*, 84 W. Va. 532, 100 S.E. 486 (1919).

<sup>77</sup> *Holland v. Nimitz*, *supra* note 75 (will contest: evidence by daughter and heir of testatrix that from observation of testatrix's acts, conduct and mental and physical condition, she was of the opinion that testatrix was insane at time of making will, excluded). See also *Ragsdale v. Ragsdale*, *supra* note 49, and *Freeman v. Freeman*, 71 W. Va. 303, 76 S.E. 657 (1912). An Iowa decision takes a contrary view, saying this is not a "personal transaction" within the Iowa statute. *Denning v. Butcher*, 91 Iowa 426, 59 N.W. 69 (1894).

<sup>78</sup> *Gibbs v. Terry*, 281 S.W.2d 712 (Ky. 1955).

because this was "personal."<sup>79</sup> However, if the witness overheard decedent tell *X* that he needed money to repay the money borrowed from the witness, then the witness could testify as to that conversation, because this was not a personal transaction with decedent.

By statute in California and other states, the witness may not testify as to any matter occurring before the death of decedent. In a recent California case, the court said that such testimony was to be excluded even though the event to which the testimony related did not occur in decedent's presence.<sup>80</sup> In that case a tenant sued the owner for injuries allegedly due to negligent maintenance. The owner was not present at the occurrence and died after the action was instituted. The tenant was not permitted to testify as to the accident, the court admitting, however, that the deposition of the owner, stating that he was not present could, if it had been taken, have been enough to let in the tenant's testimony. Thus the decedent, through his employee, was allowed to testify while the tenant was barred from rebutting his testimony, an obvious injustice.

Negative testimony is usually regarded as just as much within the purview of the statute as positive testimony. Thus in a majority of jurisdictions, a party or interested person is incompetent to deny that a particular transaction occurred.<sup>81</sup> He will not be permitted to testify, for example, to such things as the following: that he was not indebted to decedent,<sup>82</sup> that decedent had not paid him money owed,<sup>83</sup> that he did not sign or execute the instrument in suit,<sup>84</sup> that he did not deliver a certain instrument to decedent,<sup>85</sup> or that he did not use undue influence upon decedent.<sup>86</sup> The last situation mentioned is well illustrated by a Texas case. In a will contest, third persons who were

---

<sup>79</sup> *Secor v. Siver*, 161 N.W. 769 (Iowa 1917), *modified on rehearing*, 188 Iowa 1126, 176 N.W. 981 (1920); *Carlson v. Bankers Trust Co.*, 242 Iowa 1207, 50 N.W.2d 1 (1951).

<sup>80</sup> *Corso v. Smith*, 171 Cal. App. 2d 816, 342 P.2d 56 (1959). Compare the test in *Sears, Roebuck & Co. v. Jones*, 303 S.W.2d 432 (Tex. Civ. App. 1957), taken from earlier Texas cases (whether if the witness offered should testify falsely, the deceased, if living, could controvert it of his own personal knowledge).

<sup>81</sup> The cases are collected and arranged according to subject matter in Annot., 8 A.L.R.2d 1090 (1949). Cases holding *contra* are also listed.

<sup>82</sup> *Tucker v. Tucker*, 316 Ill. 671, 45 N.E.2d 558 (1942).

<sup>83</sup> *Weil v. Lambert*, 183 Md. 233, 37 A.2d 312 (1944); *Hughes v. Wachter*, 61 N.D. 513, 238 N.W. 776 (1931).

<sup>84</sup> *Hughes v. Etheridge*, 39 Ga. App. 730, 148 S.E. 358 (1929); *Qualls v. Monroe County Bank*, 229 Ala. 315, 156 So. 846 (1934).

<sup>85</sup> *Re Ferris' Estate*, 234 Iowa 960, 14 N.W.2d 889 (1944); *Martin v. Schaen*, 26 Wash. 2d 346, 173 P.2d 968 (1946).

<sup>86</sup> *Harris v. Harris' Estate*, 276 S.W.2d 964 (Tex. Civ. App. 1925). See also *Holland v. Nimitz*, *supra* note 75.



not interested in the estate had testified that certain persons taking under the will had used undue influence on testator. The persons so charged were barred from taking the witness stand and denying the alleged wrongdoing.<sup>87</sup> A more gross injustice would be difficult to imagine. The theory of the rule preventing testimony in denial of a transaction is that when a witness is denying a transaction, he is testifying to it as much as when he affirms it; and that he cannot be permitted to do indirectly that which he cannot do directly. It is submitted that this line of reasoning stretches that principle to the breaking point.

### III. CRITICISM OF THE STATUTES

The Dead Man's Statutes of the various states are open to all of the objections urged against the interest disqualification in general. They have been severely condemned by most modern writers in the field of evidence.<sup>88</sup> A sampling of this critical commentary follows:

<sup>87</sup> *Harris v. Harris' Estate*, *supra* note 86.

<sup>88</sup> Critical analysis of various state statutes is found in the following articles: Ladd, "Admission of Evidence Against Estates of Deceased Persons," 19 Iowa L. Rev. 521-539 (1934); Hale, "The California Dead Man's Statute," 9 So. Cal. L. Rev. 34-46 (1935); Ladd, "The Dead Man's Statute—Some Further Observations, and a Legislative Proposal," 26 Iowa L. Rev. 207-240 (1941); Harper, "The 'Dead Man' Rule," 6 Mercer L. Rev. 249-263 (1955); Ray, "The Dead Man's Statute—A Relic of the Past," 10 Sw. L.J. 390-399 (1956); Chadbourn, "History and Interpretation of the California Dead Man's Statute: A Proposal for Liberalization," 4 U.C.L.A.L. Rev. 175-221 (1956); Maguire, "Witnesses—Suppression of Testimony by Reason of Death," 6 Am. U.L. Rev. 1-21 (1957); Dadisman, "The West Virginia Dead Man's Statute," 60 W. Va. L. Rev. 239-252 (1958); Carpenter, "The Dead Man's Statute in Pennsylvania," 33 Temp. L.Q. 399-413 (1959).

Student Comments, several of which are excellent, include: "Incompetency of Interested Witnesses in Actions Against Representative of a Deceased Person," 12 Neb. L. Bull. 282-290 (1934); "Personal Transaction With Person Deceased at Time of Trial—An Analysis of Cases and a Suggestion for Statutory Change," 41 W. Va. L.Q. 256-267 (1935); "The Ohio Dead Man's Statute," 3 Ohio St. L.J. 200-210 (1937); "Evidence by Survivors: A Proposed Revision of the Illinois Statute," 31 Ill. L. Rev. 218-230 (1937); "Competency of Witness—Transaction and Communication With a Deceased," 15 Wis. L. Rev. 407-423 (1940); "The 'Dead Man's Statute' in Missouri," 23 Wash. U.L.Q. 343-384 (1938); Recent Developments Under the Dead Man's Statute, 22 Wash. L. Rev. 211-221 (1947); "Dead Man's Statutes—Competency of Spouse of a Party or Interested Person," 46 Mich. L. Rev. 664-672 (1948); "The Proposed Missouri Evidence Code—A Symposium," 14 Mo. L. Rev. 259-266 (1949); "Admissibility of Survivor's Testimony Under the Kentucky Dead Man's Statute," 38 Ky. L.J. 471-474 (1950); "The Ohio Dead Man's Statute," 4 W. Res. L. Rev. 61-73 (1949); "Testimony of Parties Against Representatives or Heirs of Person Deceased," 30 N.D.L. Rev. 138-148 (1954); "Dead Man's Statute—Tort Actions Within the Prohibition of the Statute," 39 Minn. L. Rev. 609-613 (1955); "Alabama Dead Man's Statute," 8 Ala. L. Rev. 301-310 (1956); "The Dead Man's Statute and the Uniform Rules of Evidence," 11 Miami L.Q. 103-110 (1956);

Dean Wigmore, the Master of American Evidence Law, denounced the statutes in these words:

As a matter of policy, this survival of the now discarded interest-disqualification is deplorable in every respect; for it is based upon 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.<sup>89</sup>

Almost seventy years ago, Justice Corliss of North Dakota fired a broadside at such statutes:

Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them by destroying the evidence to prove such claims than there would be fictitious claims established if all such enactments were swept away, and all persons rendered competent witnesses. To assume that in that event many false claims would be established by perjury is to place an extremely low estimate on human nature, and a very high estimate on human ingenuity and adroitness. He who possesses no evidence to prove his case save that which such a statute declares incompetent is remediless. But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can contradict the survivor, who supports his claim with his oath. In the legal armory, there is a weapon whose repeated thrusts he will find is difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods—the sword of cross-examination.<sup>90</sup>

An experienced Texas trial lawyer indicted the Texas statute on three counts:

(1) It prevents recovery of just debts from the estate of decedent debtors. If the number of honest men is greater than the number of dishonest men, the number of honest claims against decedents is likely to be greater than the number of dishonest claims. A statute which closes the mouth of honest and dishonest claimants alike does more harm than good, especially in view of the fact that the dishonest claimant, if allowed to testify, is likely to be defeated anyhow. (2) The time consumed in applying and interpreting the statute is out of all proportion to the doubtful good it does. A statute so difficult of definite limitation should be one of undoubted desirability before it is justified. The statute cannot meet this test.

---

"The Dead Man's Rules as Applied to Tort Actions in Pennsylvania," 62 Dick. L. Rev. 174 (1958); "The Survival of a Jurisprudential Anomaly—The Dead Man's Statute in Wisconsin," 43 Marq. L. Rev. 73-88 (1959); "Waiver of Ohio Dead Man's Statute," 11 W. Res. L. Rev. 630-648 (1960); "Effect of the Dead Man's Statute on the Testimony of a Party Witness," 21 Md. L. Rev. 60-68 (1960); "Construing the Oklahoma Dead Man's Statute," 14 Okla. L. Rev. 62-67 (1961).

<sup>89</sup> 2 Wigmore § 578.

<sup>90</sup> St. John v. Loffand, 5 N.D. 140, 64 N.W. 930 (1895).

(3) It has so befogged our decisions that the Courts and the Bar do not yet know the limitations of the rule.<sup>91</sup>

Professor Morgan, one of the great evidence scholars of our time and Reporter for the Model Code of Evidence, spoke of the shortcomings of the statutes in these terms:

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 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.<sup>92</sup>

Professor McCormick, author of the leading one-volume treatise on Evidence, utters this scathing criticism of the Dead Man Rule:

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 to one side, the statute-makers have ignored the equal possibility of injustice to 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 inherent in the "tangled web" of deception. In any event, the survivor's disqualification is more likely to balk the honest than the dishonest survivor. One who would not stick at perjury will hardly hesitate at suborning a third person, who would not be disqualified, to swear to the false story.<sup>93</sup>

The case against the statutes may be summarized on the following points:

(1) The statutes are based upon a fallacious philosophy, *i.e.*, that the number of dishonest men is greater than the number of honest ones; and that self-interest makes it probable that men will commit perjury. These assumptions run contrary to all human experience.

(2) The statutes create an intolerable injustice by preventing proof of honest claims and defenses. In seeking to avoid the *possibility* of injustice to one side, they work a *certain* injustice to the other. It is difficult to understand why all the concern is for the possibility of

---

<sup>91</sup> Cheek, "Testimony as to Transactions With Decedents," 5 Texas L. Rev. 149, 172 (1927).

<sup>92</sup> Morgan, Some Problems of Proof under the Anglo-American System of Litigation 187 (1956).

<sup>93</sup> McCormick § 65.

unfounded claims against the estate. Why is there no concern for loss by the survivor who finds himself unable to prove his valid claim against decedent's estate? Surely a litigant should not be deprived of his claim merely because his adversary dies. It cannot be more important to save dead men's estates from false claims than it is to save living men's estates from loss by lack of proof.

(3) The statutes are psychologically unsound. They do not disqualify many persons who are vitally interested in the outcome of the suit but who have no direct pecuniary interest such as spouses of parties, close relatives, or officials of corporate parties. On the other hand, they often disqualify certain totally disinterested persons or persons with only a slight pecuniary interest. The pecuniary interest limitation is unsound.

(4) The statutes fail to accomplish their purported purpose since they suppress only a small part of the opportunities for perjured testimony. They block the testimony of the witness only as to certain subjects, leaving him free to testify falsely as to other matters if he sees fit to do so. Furthermore, a witness who will not stick at perjury will not hesitate to suborn perjury by getting a third person to testify as to those matters as to which his own testimony is barred.

(5) The statutes impede the search for truth. The real hazard in shaping any exclusionary rule is that the jury cannot be expected to make sensible findings when it is deprived of substantial parts of available evidence bearing on the issue in dispute. The great danger thus lies in the suppression of truth.

(6) The statutes underestimate the efficacy of cross-examination in exposing falsehood, and the abilities of the judge and jury to separate the false from the true. These safeguards have proved adequate in other situations involving the testimony of parties and interested persons. Why not here?

(7) The statutes burden the parties with uncertainties and appeals. For a hundred years or more, our courts have been struggling with the interpretation of these statutes. The result is a labyrinth of decisions which have often brought confusion rather than clarity. The statutes continue to mystify able judges and lawyers in endless complexities of interpretation and application. Within the limited space available, it has been possible to touch upon only a very few of the many problems arising under such statutes. But the vagaries and inconsistencies pointed out are sufficient to demonstrate that the thousands and thousands of decided cases have built here one of the most complex and hazardous fields of the law of evidence.<sup>94</sup>

---

<sup>94</sup> A prominent Texas trial judge has recently said: "A legal beginner, as well as a

## IV. ALTERNATIVES TO DEAD MAN'S STATUTES

If, as the writer has indicated, the Dead Man Rule is unsound, what are the possible alternatives to such statutes? Since the philosophy behind the disqualification is fallacious, the first expedient which comes to mind is outright repeal of the statutes. By eliminating this remnant of the interest disqualification, the same rules of competency would apply here as in other cases. This step has been urged by many of the writers of articles and comments cited in an earlier note. It has much to recommend it—repeal would not only end the intolerable injustice now possible, but would rid the courts of the vast amount of useless litigation over the interpretation and application of the statutes. It has never been demonstrated that the protection afforded by the statutes is needed. England abolished incompetency based on interest more than a hundred years ago and has never had a Dead Man's Statute. Yet there has been no indication that dead men's estates have been plundered in that country by false claimants. In this country, Massachusetts and Rhode Island have no Dead Man's Statute. The American Law Institute's Model Code of Evidence<sup>95</sup> and the Uniform Rules of Evidence<sup>96</sup> completely reject the dead man principle. The main drawback to this solution is the difficulty of accomplishment. The statutes have become so deeply rooted in the jurisprudence of the various states that repeal is almost a virtual impossibility. This is illustrated by the Pennsylvania experience. In 1952, the Committee on Civil Law of the Pennsylvania Bar Association recommended the removal of the disqualification.<sup>97</sup> A statute was drafted by the Judicial Administration Committee and referred to the Statutory Law Committee to secure its passage.<sup>98</sup> The proposed act, repealing the Dead Man Rule, was introduced in the 1953 session of the legislature, but killed by the Senate Judiciary Committee.<sup>99</sup> It should be mentioned,

---

veteran, well knows that, at its best, the Dead Man's Statute is full of snares, traps, and pitfalls, and that we have a rule by a wilderness of uncertain cases as well as a rule by an uncertain statute." Stout, "Should the Dead Man's Statute Apply to Automobile Collisions?," 38 *Texas L. Rev.* 14, 23 (1959). He mentions that a very large Texas firm furnishes its trial advocates with a "table" without which they would be "lost."

<sup>95</sup> Model Code of Evidence rule 101 (1942). See the comment to the rule.

<sup>96</sup> Uniform Rule of Evidence 7.

<sup>97</sup> 58 *Annual Rep. of Pa. Bar Ass'n* 38-39 (1952). See Carpenter, "The Dead Man's Statute in Pennsylvania," 32 *Temp. L.Q.* 398, 412 (1959).

<sup>98</sup> McWilliams, "Judicial Administration," 24 *Pa. B.A.Q.* 179 (1953). The language of the proposed statute was: "(1) No person shall be disqualified as a witness in any action, suit or proceeding by reason of an interest in the event of the same as a party or otherwise. (2) All Acts of the Assembly inconsistent herewith are repealed."

<sup>99</sup> Erwin, "Report of Committee on Judicial Administration," 25 *Pa. B.A.Q.* 372, 373 (1954).

however, that New Jersey has recently amended its statute to eliminate the disqualification of the survivor.<sup>100</sup> But it added a restriction that the party who asserts a claim or defense against a representative of the decedent supported by oral testimony must establish it by clear and convincing evidence. This is somewhat akin to the restriction discussed below under (2).

Short of repeal of existing statutes, what other solutions are possible? The legislatures of a few states have adopted various modifications of the Dead Man Rule. These are of three types: (1) Permitting the interested survivor to testify when it appears to the trial judge that injustice would result if his testimony were excluded; (2) Admitting testimony by the survivor, but allowing no verdict or judgment to be rendered thereon unless such testimony is corroborated by other disinterested evidence; (3) Admitting testimony of the survivor and also any relevant hearsay declarations or statements of the deceased.

(1) In Montana and Arizona, the statutes contain dead man prohibitions in more or less typical terms, but then provide that the trial judge shall have discretion to admit testimony by the survivor when it appears to the judge that its exclusion would cause injustice.<sup>101</sup> New Hampshire formerly had such a statute.<sup>102</sup> On the surface it may appear that this expedient is a desirable means of alleviating the harshness of the Dead Man Rule. It has, however, serious defects. Trial judges prefer definite rules of admission and exclusion and are reluctant to exercise discretion in individual instances. Moreover, appellate courts seize the first opportunity to formulate rules for the guidance of trial courts, thus practically abrogating their discretion. In New Hampshire, for example, fixed rules became established regularly admitting survivor's testimony as to matters unknown to decedents, and regularly excluding it as to matters known to decedents.<sup>103</sup> Furthermore, the injustice had to be shown by evidence

---

<sup>100</sup> N.J. Rev. Stat. § 2A:81-2 (1961), as amended effective July 1, 1960, now reads: When one party to any civil action is a lunatic suing or defending by guardian or when one party sues or is sued in a representative capacity, any other party who asserts a claim or an affirmative defense against such lunatic or representative supported by oral testimony of a promise, statement or act of the lunatic while of sound mind or of the decedent, shall be required to establish the same by clear and convincing proof.

The amended statute was construed by *Staudter v. Elter*, 64 N.J. Super. 432, 166 A.2d 394 (1961), as eliminating the disqualification of parties as to transactions with decedents.

<sup>101</sup> Mont. Rev. Code § 93-701-3 (1947) ("when it appears to the court that, without the testimony of the witness, injustice will be done"); Ariz. Rev. Stat. Ann. § 12-2251 (1956) ("required to testify thereto by the court").

<sup>102</sup> N.H. Laws, 1926, ch. 336, § 28.

<sup>103</sup> *Cobb v. Follansbee*, 79 N.H. 205, 107 Atl. 630 (1919).

other than that of the survivor.<sup>104</sup> Thus the judge's discretion could be used only to receive evidence which came in under the ordinary Dead Man's Statutes. In 1941, New Hampshire amended its statute in an attempt to provide broader judicial discretion.<sup>105</sup> Apparently this was also unsuccessful,<sup>106</sup> and, in 1953, the practice was abandoned.<sup>107</sup> In Montana, the survivor's testimony will not be admitted until sufficient other testimony has been admitted to warrant the court, in the exercise of its discretion, to render a ruling in favor of the questionable testimony.<sup>108</sup> In Arizona, where the language of the statute reads, "required to testify thereto by the court," recent decisions indicate that full discretion has been maintained despite earlier rulings indicating a limitation like that in Montana.<sup>109</sup> It is believed that this type of modification will alleviate very few of the hardships caused by the usual Dead Man's Statute.

(2) The second type of legislation—admission of the interested survivor's testimony coupled with a provision that no verdict or judgment shall be obtained on his uncorroborated testimony—is found in New Mexico,<sup>110</sup> Oregon<sup>111</sup> and Virginia,<sup>112</sup> although the two latter states add a provision somewhat akin to that discussed in the next alternative. While this modification has been considered by some to be an improvement over the typical Dead Man's Statute, it has serious defects. The philosophy behind such statutes is similar to that underlying the average Dead Man Rule—the assumption that uncorroborated claims are of such doubtful validity that all must be rejected. In Oregon, the survivor apparently must make out a *prima facie* case

<sup>104</sup> Morgan, *The Law of Evidence—Some Proposals for Its Reform* 29 (1927).

<sup>105</sup> N.H. Laws, 1941, ch. 132.

<sup>106</sup> *Broderick v. Blaisdell*, 97 N.H. 338, 88 A.2d 174 (1952).

<sup>107</sup> N.H. Laws, 1953, ch. 182.

<sup>108</sup> *Cox v. Williamson*, 124 Mont. 512, 227 P.2d 614 (1951). Earlier cases permitted the exercise of discretion by the judge only when such testimony was necessary to make a case for the jury. *Rowe v. Eggrim*, 107 Mont. 378, 87 P.2d 189 (1938).

<sup>109</sup> *Garza v. Fernandez*, 74 Ariz. 312, 248 P.2d 869 (1952); *Goff v. Guyton*, 86 Ariz. 349, 346 P.2d 286 (1959). See 2 Ariz. L. Rev. 284 (1960). A limitation like that in Montana was indicated in earlier cases. *Goldman v. Sotelo*, 7 Ariz. 23, 60 Pac. 696 (1900).

<sup>110</sup> N.M. Stat. Ann. ch. 20, §§ 2-5 (1953) ("... unless such evidence is corroborated by some other material evidence").

<sup>111</sup> Ore. Rev. Stat. § 44.020 (1953) makes all parties competent witnesses. § 116.555 says: "... No other claim which has been rejected by the executor shall be allowed except upon some competent, satisfactory evidence other than the testimony of the claimant."

<sup>112</sup> Va. Code, tit. 8, § 286 (1950): "... No judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony."

without his own testimony.<sup>113</sup> These statutes have been termed misguided.<sup>114</sup> The few cases in which they assist the survivor are those in which he least needs it, *i.e.*, where he has other sufficient proof. The survivor who has no evidence except his own testimony is just as frustrated as under the conventional Dead Man's Statute. The New Mexico court condemned the arbitrary feature of the statute in preventing recovery by a claimant whose testimony the court believed to be true.<sup>115</sup> Where the survivor is defending a claim instead of asserting one, the rule of corroboration seems especially out of place.

An additional objection to the corroboration requirement is the difficulty in administering such a rule. How can corroboration be defined in a way so that the test can be applied in individual cases without resulting in substantial litigation? If, as is believed, the requirement is unsound, the courts should not be burdened with its administration.

(3) The third alternative is a form of statute which permits the survivor to testify without restriction but seeks to minimize the danger of injustice to decedent's estate by creating a special exception to the hearsay rule for any relevant oral declarations or written statements of the decedent. The oldest statute of this type is that of Connecticut.<sup>116</sup> This is the solution recommended in 1927 by the Committee of the Commonwealth Fund<sup>117</sup> and in 1938 by the Committee on Improvements in the Law of Evidence of the American Bar Association.<sup>118</sup> In 1939, South Dakota adopted a statute in the form recommended by the above-named groups.<sup>119</sup> A recent adherent to this approach is New Hampshire.<sup>120</sup> The rationale of this approach is that by

---

<sup>113</sup> *Goltra v. Penland*, 45 Ore. 254, 265, 77 Pac. 129, 133 (1904): ". . . there must be other material and pertinent testimony supporting or corroborating that given by him, sufficient to go to the jury and upon which it may find a verdict. . . ."

<sup>114</sup> 7 Wigmore § 2065.

<sup>115</sup> *Bujac v. Wilson*, 27 N.M. 105, 196 Pac. 327 (1921).

<sup>116</sup> Conn. Gen. Stat. Rev. § 7895 (1949): "In actions by or against the representatives of deceased persons . . . the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received in evidence. . . ."

<sup>117</sup> Morgan, *op. cit. supra* note 104, at 35.

<sup>118</sup> 63 A.B.A.R. 597 (1938).

<sup>119</sup> S.D. Code § 36.0104 (1939): "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."

<sup>120</sup> N.H. Rev. Stat. Ann. § 516.25 (1955). The Virginia and Oregon statutes also create an exception to the hearsay rule for declarations of the decedent. However, in Virginia it applies only if the adverse party testifies. Va. Code, tit. 8, § 286 (1950). In Oregon it applies only if the adverse party appears as a witness in his own behalf or



freeing the oral declarations and writings of decedent from the strictures of the hearsay rule, most of the reason for the Dead Man's Statute is removed.<sup>121</sup> As to the special exception to the hearsay rule thus created, it has as much or more to justify it than some of the other generally recognized exceptions.<sup>122</sup> While there is no opportunity to cross-examine the deceased personally, this is not present in any of the exceptions admitting hearsay evidence. This type of legislation is by far the best yet enacted. It prevents the injustice caused by the Dead Man Rule, affords adequate protection to decedent's estate, and eliminates the difficult problems of administration.

#### V. RECOMMENDED LEGISLATION

Based upon an experience of many years participation in drafting and sponsoring bills designed to improve the law of evidence in his own state (several of which have been adopted) and having devoted particular effort to proposals seeking a modification of the Dead Man's Statute of his state (which has not yet been adopted), the writer of this paper offers a statute which he believes will accomplish all the desired objectives and at the same time offers some reasonable prospect of adoption. The draft is as follows:

*In actions by or against executors or administrators, in which judgment may be rendered for or against them as such, and in all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent, the following provisions shall apply:*

*(a) Either party if otherwise qualified shall be competent to testify.*

*(b) If any party shall testify to any transaction with or statement by the decedent, any adverse party may prove the statements, oral or written, of the decedent, relevant to the matters in issue, as evidence of the facts stated.*

*(c) In passing upon the credibility of the testimony of a party as to any transactions with or statement by the decedent, his interest shall be considered, and if his testimony, though uncontradicted, is not satisfactory and convincing, the court or jury shall not be bound to find in accordance therewith, and in a case tried to a jury, the jury shall be instructed as provided in this paragraph.*

---

offers evidence of statements made by deceased against the interest of the deceased. Ore. Comp. Laws Ann. tit. 4, ch. 41, § 850 (1953). Massachusetts and Rhode Island have statutes admitting declarations of any deceased persons in any action. Mass. Gen. Laws Ann. ch. 233, § 65 (1956); R.I. Gen. Laws ch. 538, § 6 (1938).

<sup>121</sup> Quick, "A Reappraisal of Rule 63(4)," 6 Wayne L. Rev. 204, 216 (1960).

<sup>122</sup> Ladd, "The Dead Man's Statute: Some Further Observations and a Legislative Proposal," 26 Iowa L. Rev. 207, 238 (1941).

The proposed statute would make all interested parties competent to testify in suits involving transactions with deceased persons, just as they are in all other suits. This means that the main sources for exposing false testimony available in all cases would be relied on here. These are, of course, the bringing of honest witnesses when they are available to counter the false with the true, and, secondly, the test of cross-examination by which fraud and perjury can so often be exposed.

But the proposal provides additional safeguards. If one of the parties testifies to a transaction, this opens the door to the other parties, who would usually be those defending the interests of the estate, to introduce evidence of oral declarations or written statements made by the deceased in his lifetime as evidence of the facts stated—thus making him a witness for himself from the grave. If someone claimed an oral contract or payment, what the deceased said or wrote about the matter would give his version to the court. This creates, of course, a new exception to the hearsay rule, but one fully justified. It would often be an effective answer to false claims.

The other built-in safeguards are the provisions for instructions to the jury concerning the party's interest and the fact that the jury is not bound to find in accordance with his unsupported testimony.

It is believed that these provisions open the door to honest witnesses now barred, and as to the dishonest ones, provide reasonable protection. The average jury will be inclined to view with great caution the testimony of a party-witness to a transaction with one now dead when he is not supported by other witnesses.

The proposed statute omits any reference to suits involving guardians of infants and insane persons which are included within the provisions of many Dead Man's Statutes. This omission is made because of the relative infrequency with which questions arise in respect to actions by or against guardians, because of the need for simplicity, and because to omit them will permit parties in such suits to testify under the general statutory provisions making all parties competent witnesses.