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Evidence -- Automobile Accidents and the "Dead Man's Statute"

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the judicial hierarchy, being the decision of a municipal court. Thus, in the remaining 33 cities whose health codes empower entrance without a warrant to inspect for violations,[47] it seems well settled that as long as the actions of the inspector are "reasonable" within themselves, they will be allowed. Any future denial of such a right to inspection under the state police power would have to be based upon the unreasonable actions of the inspecting officer while operating under the provisions of the various ordinances.

The problem of keeping large cities and their inhabitants free from disease and epidemic is indeed a serious task facing all municipal governments. Under the authority of the decision in the instant case, that task has been considerably eased and the way facilitated for the institution of practical inspection machinery to aid health officials.[48] The Court went to great lengths in this opinion to keep its holding as narrow as possible and yet still effectively support its conclusion with the law. The sometimes entangled and perhaps seemingly superfluous decision rendered by the majority may well be criticized by some for its lack of clarity, yet it cannot be denied that the Court has accomplished its goal effectively. With a minimum loss of personal rights, those being the rights to *absolute* inviolability of a man's "castle," the Court has precariously tightroped the fine lines of search and seizure and due process, and still reaches a reasonable result. Cities need the unencumbered right to make inspections for the purpose of discovering substandard health conditions, and this case has rightly granted it to them.

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EVIDENCE — AUTOMOBILE ACCIDENTS AND THE "DEAD MAN'S STATUTE"

Plaintiff sought recovery for personal injuries suffered in an automobile collision in which he was the sole survivor. The trial court construed the "Dead Man's Statute" to prohibit the plaintiff from testifying as to the facts of the accident and directed a verdict for the defendant-executor. *Held*, reversed: an automobile accident is not a "transaction" within the

47. The health codes of 57 cities were studied by the Urban Renewal Administration and out of these, 36 empowered officers to inspect without a warrant. See 3 URBAN RENEWAL BULL. (1956).

48. It has been argued that rather than allow these warrantless searches, a special type of warrant should be provided for. However as recognized by Mr. Justice Frankfurter, to set up "a loose basis for granting a search warrant for the situation before us is to enter by way of the back door to a recognition of the fact that by reason of its intrinsic elements . . . such a search . . . does not offend the protection of the Fourteenth Amendment." Frank v. State of Maryland, 359 U.S. 360,373 (1959).

meaning of the "Dead Man's Statute." *Day v. Stickle*, 113 So.2d 559 (Fla. App. 1959).

The common law rule that parties to an action were incompetent to testify was based on the premise that no interested person would testify truthfully; thus all testimony by the parties was excluded.[1] In every jurisdiction in the United States this disqualification has been removed by statute; however, in most states an exception has been made in the case of an action against a decedent. Generally these "Dead Man's Statutes" exclude from admissability the testimony of a surviving party in an action against the decedent's estate.[2] These statutes are not uniform in language in that some prohibit testimony by a party relating to a "transaction or occurence" with a decedent, while others prohibit such testimony only if the transaction is a "personal" one. A few statutes prohibit the plaintiff from testifying in a matter constituting a "claim or demand" upon the estate.[3] Notwithstanding minor variations in statutory language, the American decisions are in conflict as to whether an automobile accident is a "transaction" within the meaning of the "Dead Man's Statute."

Most jurisdictions regard an automobile accident as a "transaction,"[4] defining the term as "every variety of affairs which can form the subject of negotiations, interviews or actions between two persons. . . ."[5] By this definition no distinction is drawn between actions of contract and tort.[6] A liberal construction of the statute is favored[7] in order to carry out its intended purpose, *i.e.* maintaining equality in the presentation of evidence.[8]

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1. 1 GILBERT, EVIDENCE 220 (Lofft's ed. 1795).

2. 2 WIGMORE, EVIDENCE § 578 at 695 n. 1 (3d ed. 1940): "the jurisdictions not recognizing this disqualification are half-a-dozen only"; 58 AM. JUR. *Witnesses* § 216 (1948); See Wahl, *Rex Beach, Dr. Brown and the Dead Man's Statute*, 15 FLA. L.J. 236.

3. *Compare* CAL. CODE CIV. PROCEDURE § 1880(3) (1953) *with* NEB. REV. STAT. § 25-1201 (1956) *and* WIS. STAT. § 325.16 (1957).

4. Wright v. Wilson, 154 F. 2d 616 (3rd Cir. 1946) (applying Pa. law); Miller v. DuBois, 153 Cal. App. 23, 314 P.2d 27 (1957); Schampon v. Speis, 258 Ill. App. 23, 1 N.E.2d 499 (1936); Miller v. Walsh's Adm'x., 207 Ky. 779, 43 S.W.2d 42 (1931); Cross v. Frost, 227 Miss. 455, 86 So. 2d 296 (1956); *In re* Mueller's Estate, 166 Neb. 376, 89 N.W.2d 137 (1958); Tallman v. First Nat'l Bank of Nevada, 66 Nev. 248, 208 P.2d 306 (1949); Boyd v. Williams, 207 N.C. 30, 175 S.E. 833 (1934); Panhandle & Santa Fe Ry. v. Ellinson, — Tex. —, 326 S.W.2d 38 (1959); Strode v. Dyer, 115 W. Va. 733, 177 S.E. 878 (1934); Stephans v. Short, 41 Wyo. 324, 285 Pac. 797 (1930).

5. *In re* Mueller's Estate, 166 Neb. 376, 383, 89 N.W.2d 137,142 (1958); Stephans v. Short, 41 Wyo. 324, 332, 285 Pac. 797, 798 (1930). Compare Strode v. Dyer, 115 W. Va. 733, 177 S.E. 878, 879 (1934): "[Transaction meant is] an action participated in by witness and decedent, or something done in decedent's presence, to which, if alive, he could testify of his own personal knowledge." The dissenting judge stated however, "I think that those courts which have included within the term 'transaction' all sorts of chance happenings have gone beyond the plain signification of the word and have given a strained meaning to the statute, with the result that what was designed to prevent certain evils has been made to foster others." Strode v. Dyer, *supra* at 740, 177 S.E. at 881.

6. Hallowach v. Priest, 113 Me. 510, 95 Atl. 146 (1915).

7. Strode v. Dyer, 115 W. Va. 733, 177 S.E. 878 (1934); State *ex rel.* Bryant v. Morris, 69 N.C. 444, 448 (1873): "While the objection to the evidence is not within the letter, it is within the spirit of the statute."

8. Cross v. Frost, 227 Miss. 455, 86 So.2d 296 (1956).

The decedent's estate is protected from fraudulent claims by excluding *all* of the survivor's testimony; "death having silenced the one, the law silences the other."[9] The Georgia courts alone permit the surviving witness to testify to his own actions but exclude testimony relating to acts of the decedent.[10] This distinction has been strongly condemned by other jurisdictions.[11]

A more liberal position is taken by a minority of states which give a restricted interpretation to the statutes and hold that all testimony is admissable unless clearly excluded by the statute;[12] when doubt exists such testimony is to be admitted.[13] It is apparent from the decisions that these jurisdictions view the hearing of all the evidence of greater importance than the protection of decedents' estates from fraudulent claims, and leave to the jury the determination of the facts after all evidence is presented.

Prior to the instant case the Florida courts had not determined whether an automobile accident was a "transaction" within the prohibition of the Florida statute.[14] In *Kilmer v. Gustafson*, in which the Florida statute was applied, a surviving driver was allowed to testify as to his actions but not as to those of the decedent defendant.[15] This case was later followed by the Florida Supreme Court in permitting a defendant driver to testify as to his actions in a suit for personal injuries brought by the representative of a mentally incompetent passenger.[16] In the instant case the court discussed all the arguments advanced both for and against

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9. Newman v. Tipton, 191 Tenn. 461, 465, 234 S.W.2d 984, 996 (1950); Tallman v. First Nat'l Bank of Nevada, 66 Nev. 248, 208 P.2d 306 (1949).

10. U.S.A.C. Transp. Inc. v. Corley, 202 F.2d 8 (5th Cir. 1953); Rogers v. Carmichael, 53 Ga. App. 343, 198 S.E. 318 (1938).

11. *In re* Mueller's Estate, 166 Neb. 376, 386, 89 N.W.2d 137, 144 (1958): "We can see no logical reason for such a holding, for if the factual situation brings it within the statute, then the statute necessarily excludes all of the testimony relating thereto."

12. Gibson v. McDonald, 265 Ala. 426, 91 So.2d 679 (1957); Rankin v. Morgan, 193 Ark. 751, 102 S.W.2d 552 (1937); Turbot v. Repp, 247 Iowa 69, 72 N.W.2d 565 (1955); Shaneybrook v. Blizard, 209 Md. 304, 121 A.2d 218 (1956); Christofel v. Johnson, 40 Tenn. App. 197, 290 S.W.2d 215 (1956); Krantz v. Krantz, 211 Wis. 249, 248 N.W. 155 (1933). An automobile accident is a fortuitous and involuntary event, Shaneybrook v. Blizard, *supra*. Testimony relating the facts of the accident is considered the history of the event, the unilateral observations of the survivor and thus admissible, Christofel v. Johnson, *supra*. While these courts do not define "transaction" they state that it involves mutuality and concert of action, Krantz v. Krantz, *supra*.

13. Newman v. Tipton, 191 Tenn. 461 465, 234 S.W.2d 994, 996 (1950): "This statute cannot be extended by the courts in cases not within its terms . . . [I]t must be strictly construed as against the exclusion of the testimony and in favor of its admission."

14. FLA. STAT. § 90.05 (1957) provides: "no party . . . nor any person interested . . . shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time of such examination deceased. . . ."

15. 211 F.2d 781, 783 (5th Cir. 1954): "The trial court had carefully excluded all testimony by the plaintiff pertaining to the decedent's car and its movements, even to the extent of forbidding plaintiff to testify that there was in fact a collision." In reaching this holding the court relied heavily upon and adopted the Georgia view as expressed in U.S.A.C. Transp. Inc., v. Corley, 202 F.2d 8 (5th Cir. 1953).

16. Herring v. Eiland, 81 So.2d 645, 646 (Fla. 1954).

the admittance of the surviving witnesses' testimony. In adopting the more modern and liberal minority rule which allows such testimony into evidence the court said:

> Here we have a guest in an automobile, who is completely inactive as to the controls of the automobile in which he is riding, who in no way mutually participates in the ensuing collision, and who is merely the unfortunate victim of the actions of others which actions he observes as independent facts and not as part of a transaction between the decedent driver and himself.[17]

The holding in the instant case removes this state from the limbo of its prior intermediate position[18] and expressly adopts the more liberal minority view.

It is submitted that the result in the instant case is both proper and desirable. The exclusion of a survivor's testimony has been uniformly condemned by a great majority of the modern writers on the law of evidence[19] as a rule "unfounded in reason . . . which leads to more false decisions than it prevents and encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words."[20] The rule has been strongly condemned by the very courts which enforce it, such courts holding themselves bound to do so until the legislature repeals the statute.[21] If a court can construe a statute so as to exclude evidence, surely it is within the judicial power to construe the same statute to admit such evidence.

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ADMIRALTY — FEDERAL QUESTION JURISDICTION

A Spanish seaman injured aboard a ship on which he was a crew member, brought an action for personal injuries on the law side of a United States District Court against four separate corporate defendants. The claims against the vessel's Spanish owners and their agents, a New

17. Day v. Stickle, 113 So.2d 559, 563 (Fla. App. 1959).

18. Kilmer v. Gustafson, 211 F.2d 781 (5th Cir. 1954); Herring v. Eiland, 81 So.2d 645 (Fla. 1954).

19. 2 WIGMORE, EVIDENCE § 578 (3d ed. 1940); Report of the Legal Research Committee of the Commonwealth Fund cited in 2 WIGMORE, EVIDENCE, *supra*; MODEL CODE OF EVIDENCE rule 92 (1942); 5 CHAMBERNYE, MODERN LAW OF EVIDENCE § 3670 (1916).

20. 2 WIGMORE, EVIDENCE § 578 (3d ed. 1940).

21. Wright v. Wilson, 154 F.2d 616, 620 (3d Cir. 1946): "We reach the result without enthusiasm. The rule excluding a survivor's testimony seems to stand in the almost unique situation of being condemned by all of the modern writers on the law of evidence. It is said to be as unsound and undesirable as the rule excluding the testimony of parties of which the survivor rule is a part. But we believe this to be a case where a rule so thoroughly established through many generations of judicial history should be removed by legislative action or court rule which applies generally and not by judicial legislation against a party in a particular case."