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SPECIAL COMMENT

THE DEAD MAN STATUTE AND THE UNIFORM RULES OF EVIDENCE

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The impact of the Uniform Rules of Evidence upon the Florida legislature and upon legislatures generally has not been earth-shaking. But if wholesale adoption of the Rules is not to be accomplished, none the less the Rules will have performed an extremely valuable service should they merely provide a point of departure from which we may re-examine the rules of evidence as they now exist. The vast amount of scholarship which underlies both the Uniform Rules and their predecessor the Model Code of Evidence entitle them to the greatest respect even though we may reserve the right to differ. In this paper an effort will be made to re-examine one small segment of our law of evidence, the Dead Man's Statute, in the light of the Uniform Rules and of the Model Code.

The question of what, if anything, shall be done with the Dead Man's Statute is raised by the Model Code and the Uniform Rules of Evidence, and in both, after a fashion, settled by its destruction. But the answer may not be quite so simple.

The Dead Man's Statute is generally regarded as a vestige of the old Common Law disqualification for interest. England did away with

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1. UNIFORM RULES OF EVIDENCE (1953).
3. FLA. STAT. § 90.05 (1955):

Witnesses; as affected by interest

No person, in any court, or before any officer acting judicially, shall be excluded from testifying as a witness by reason of his interest in the event of the action or proceeding, or because he is a party thereto; provided, however, that no party to such action 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 transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, or administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased 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, or as to which the testimony of such deceased person or lunatic shall be given in evidence.
interest as a disqualification in the middle eighteen hundreds, and shortly afterwards the American jurisdictions followed suit, retaining only the much maligned Dead Man’s Statute in its place. Florida abolished the general disqualification for interest by statute in 1874, copying verbatim the language of the earlier New York statute which provided for disqualification of interested persons or parties only when the testimony offered was as to a transaction or communication with a person since deceased or become insane, and then only when the action was against the successor to the unavailable person, usually either an executor or administrator or the committee of a lunatic.

The possibilities for litigation in such a statute are considerable and have been adequately realized. Although the language of the various state statutes is far from uniform, the problems that arise under them are similar. Who is a party? Who is “interested”? What is a “transaction or communication”? Is the action one against the successor to the deceased? These and many similar problems have kept the courts busy and the books full. Florida activity under this statute has been modest in comparison with that of many other states, but it has been, nonetheless, typical. That it has been modest only comparatively is evidenced by the more than twenty pages of annotations which follow the statute in the Florida Statutes Annotated.

4. 6 and 7 Vict., c. 85 (Lord Denman’s Act, 1843) abolished the interest disqualification for interested persons other than parties. 14 and 15 Vict., c. 99 (Lord Broughams Act, 1851) permitted parties to testify. See 2 Wigmore, EVIDENCE, sec. 575 (3rd ed. 1940).
5. Sec. 829, New York Code Civ. Proc., now N.Y. Civ. Proc. Act, § 347. The language of the Fla. and N.Y. statutes is no longer similar, both having undergone various amendments, but the general tenor is still the same.
6. E.g., Stigletts v. McDonald, 137 Fla. 385, 186 So. 233 (1938), claimant in interpleader is a party. Although the only evidence of a gift causa mortis was the alleged donee’s testimony of the transaction with the deceased, which was stricken by the chancellor, nonetheless the finding of a gift was upheld on appeal which indicates that the court gave some weight to the stricken testimony.
7. E.g., Fields v. Fields, 140 Fla. 269, 191 So. 512 (1939). A daughter is not disqualified on grounds of “interest” in an action by her mother against the father’s estate. But see Fields v. Fields, 140 Fla. 323, 191 So. 827 (1939) where the same mother is held interested and hence disqualified to testify on behalf of the same daughter. Compare Brundige v. Bradley, 294 N.Y. 345, 62 N.E.2d 385, 386 (1945) “ . . . the applicability of the statute does not depend on whether the deceased person’s estate gains or loses by the outcome of the case . . . . with Parker v Priestley, 39 So.2d 210, 213 (Fla. 1949) . . . . the test of the interest of a witness . . . . is whether he will gain or lose by the direct legal operation and effect of the judgment.” Although these two definitions are not inconsistent, they are confusing to say the least.
8. E.g., Terwilligar v. Ballard, 64 Fla. 158, 59 So. 244, 246 (1912). “Proofs of payment to a deceased person may be made without violating the statutory or common-law rules of evidence.” But see Wicker v. Hampton, 194 Fla. 400, 140 So. 202 (1932) holding that payment is a transaction or communication within the meaning of the statute. See also Thompson v. Harris, 148 Fla. 329, 4 So.2d 385 (1941); Madison v. Robinson, 95 Fla. 321, 116 So. 31 (1931); Lewis v. Meginniss, 30 Fla. 419, 12 So. 19 (1892).
9. E.g., Tharp v. Kittrell, 151 Fla. 226, 9 So.2d 457 (1942), communication with deceased officer of corporation not within the statute.
The statute has been roundly condemned by the experts. It has been termed "archaic," a breeder of "injustice and uncertainty," and according to Wigmore is subject to the same attacks that were leveled against the general disqualification for interest. These are:

1. That the supposed danger of interested persons testifying falsely exists to a limited extent only;
2. That, even so, yet, so far as they testify truly the exclusion is an intolerable injustice;
3. That no exclusion can be so defined as to be rational, consistent and workable;
4. That in any case the test of cross examination and other safeguards for truth are a sufficient guaranty against false decision.

But it is still on the books of the majority of American jurisdictions and it bids fair to remain there until something better is offered. Both the Model Code and the Uniform Rules offer the same solution and in identical language. They abolish disqualifications and privileges and declare all relevant evidence admissible "Except as otherwise provided. . . ." The Uniform Rules do not "otherwise provide" for the dead man situation except to admit as a counterweight to the survivor's testimony and as an exception to the hearsay rule "if the declarant is unavailable as a witness," a statement "narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action." This in the opinion of the drafters is a "major reform." It is doubtful if the legislatures will share their enthusiasm. The solution they propose, along with several others, is being tried now by a few states. These various solutions may be no worse than the Dead Man's Statute, but none is wholly satisfactory.

13. Rule 9 of the Model Code, supra, and Rule 7 of the Uniform Rules, supra, read: "Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible."
14. Uniform Rules of Evidence (1953), Rule 63, (4), (c). Model Code Rule 503 (a) contains no prerequisites of good faith or that the declarant made the statement of his own knowledge, and hence theoretically would provide a more liberal exception than that of the Uniform Rules.
15. Ladd, Symposium on Uniform Rules, 10 RUTGERS L. REV. 523, 566 (1956): "If piecemeal change of the law of evidence were to be attempted, the elimination of the dead man's statute would be one of the first improvements to be made. A draft of modern Uniform Rules of Evidence would be seriously defective if they did not provide for its abolition."
16. Ibid. Dean Ladd argues that no state which has abolished the dead man's statute has ever reenacted it.
I shall consider the various proposals for reform further on in this article, but first it seems well to inquire into the exact nature of the Dead Man's Statute in an effort to see where the difficulty lies.

The almost universal distaste which the commentators display for the Dead Man's Statute and the almost equally universal respect which the legislatures seem to accord it are best explained and reconciled by a recognition of the dual function of the statute as it exists in nearly all American jurisdictions. It does deal with "interest" and is a relic from the Common Law past when all persons interested in the outcome of litigation were disqualified from testifying therein. To that extent the commentators are correct. Merely because a person is interested should be no ground for disqualification; his interest may be shown and the jury should be permitted to consider his testimony for what it is worth. But the real difficulty arises not from any interest the declarant may have, but from the fact that his testimony is not normally subject to refutation, the other party to the communication or transaction being dead. This aspect of the statute has nothing to do with the qualification of the witness, but is clearly concerned with the admissibility of relevant testimony. It is a rule of exclusion and, as such, has much to recommend it. This distinction goes far to explain not only the disputes of the experts, but also may account in some degree for the confusion of the cases construing the statute itself.

One might say that the reason for the Dead Man Statute is similar to the rule excluding hearsay. The latter is inadmissible because it cannot be tested by cross examination; the former is suspect because it cannot be tested by contradiction, the other party being dead. It is not solely because interest is involved that we shrink from allowing a party to testify to a communication or transaction with a deceased in an action against the latter's estate. Of equal, or perhaps greater, weight is that such testimony is not subject to the principal safeguard for truth—contradiction. The truth of the testimony offered, particularly if fraudulent, cannot be questioned.

Let us look here at the attacks which were leveled against the general disqualification for interest and which, according to Wigmore, are equally applicable to the Dead Man's Statute. The first is "that the supposed danger of interested persons testifying falsely exists to a limited extent only." Granted—but we are not primarily concerned with interest; we are really concerned with tests of reliability. Assuming that the sur-

17. Carr, The Proposed Missouri Evidence Code, 29 Texas L. Rev. 627, 634 (1951). The Missouri Bar in a vote taken by its Board of Governors in 1949 on the question—should the "dead man's statute" be repealed, voted "yes"—1338, "no"—1467, a vote indicating the sharp division of opinion on the subject.
18. See note 12 supra.
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vivor is a most honest person, we cannot deny that his statement is only half the fact, and that, as such, it may be dangerous to permit a jury to speculate upon it. The second charge against the statute made by Wigmore is "that even so, yet, so far as they testify truly the exclusion is an intolerable injustice." Again granted, but the question is, are they testifying truly. Is the injustice greater in excluding half the truth than in admitting but half? The third attack is "that no exclusion can be so defined as to be rational, consistent and workable." This remains to be seen. The drafters of the Uniform Rules believe that they have so defined the exclusion, by eliminating it and altering the law elsewhere. This is not an exclusion, to be sure, but it is suggested that other alternatives exist once one frees oneself from the indefensible concept of interest as a disqualification. The fourth argument against the Dead Man's Statute is conceded by Wigmore to be the weakest one. 

... that in any case, the test of cross examination and other safeguards for truth are a sufficient guaranty against false decision." What other safeguards are there? And how is cross examination to be effective against the skillful perjurer?

The solution provided by the Uniform Rules is to abolish the interest qualification aspect of the statute and to admit the evidence, attempting to justify the admission by offering an exception to the hearsay rule which would admit statements made by the deceased. This is the rule now applicable in Connecticut, Massachusetts, Rhode Island, and South Dakota. It apparently works as well as does the Dead Man's Statute.

19. Ibid. Wigmore admits that there can be no contradiction, but, persisting in regarding interest as the basis for the rule, states "... since the deceased opponent is a party, he would have been by hypothesis a potential liar equally with the disqualified survivor; so that the rule rests on the supposed lack of a questionable species of testimony equally weak with that which is excluded. There never was and never will be an exclusion on the score of interest which can be defended as either logically or practically sound."

20. See note 14 supra.
21. Conn. Rev. Gen. Stat. § 7895 (1949) admits declarations and memoranda of deceased persons in actions by or against their representatives either favorable to or adverse to the estate. The only requirement is relevancy.
23. R.I. Gen. Laws c. 538 §§ 4, 5, 6 (1938). In an action against an executor or administrator for the recovery of money where oral testimony of a statement or promise of the deceased is offered, section 4 permits statements "written or oral" and "evidence of his acts and habits of dealings tending to disprove or to show the improbability of the making of such promise or statement shall be admissible." Section 5 merely extends section 4 to cover anyone claiming title under or from the deceased. Section 6 requires that declarations of the deceased must have been made in good faith and upon personal knowledge.
24. S.D. Code § 36.0104 (1939) Deceased persons testimony in actions by or against personal representatives. 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.
25. See note 16 supra.
But if we regard the opportunity to enter statements, if any, of the deceased as a balance to the positive testimony of the survivor, it is obvious that our scales are out of order. The evidence of the survivor is still not tested; the opportunity for error is reduced but slightly.

Rule 45 (b) of the Uniform Rules vests discretion in the judge to exclude evidence where he finds its probative value outweighed by the danger of misleading the jury. It is possible that this section might be used to temper the inequity of the survivor's testimony in a proper case. If so it would introduce into the Rules an element formerly tried in New Hampshire and still present in Arizona and in the hands of a courageous judge might go far to protect decedents' estates from promiscuous plunder. But it is doubtful if the drafters of the Uniform Rules intended any such result, and it is even more doubtful that judges would be inclined to exercise their discretion in many cases.

The requirement of corroboration of the survivor's testimony has been used in several states in an effort to balance the scales once the Dead Man's Statute is eliminated. Corroboration certainly lends more credibility to the statements of the survivor. But if corroboration is available the chances are that the survivor need not testify at all and thus the same result would obtain whether the statute were in force or not. Certainly the requirement of corroboration would not lessen the amount of litigation arising from the interpretation of the statute. In every case the question would still arise as to whether or not a dead man situation existed.

But all of the solutions which have been proposed still leave one unsatisfied. The requirement of corroboration is not an answer. Perjured testimony can acquire perjured support. We still miss the test of contradiction.

26. By Chapter 182, Laws of 1953, New Hampshire abolished both its dead man statute and the exception thereto vesting discretion in the court to allow the testimony to avoid injustice and substituted therefor the present sections 516:22 and 516:25, N.H. REV. STATS. ANN. (1955). The effect of the change is to place New Hampshire in line with the Uniform Rules. Section 516:25 is identical with S.D. CODE § 36.0104 (1939) supra note 24.

27. ARIZ. CODE ANN. § 23-105 (1939) provides that in the dead man situation " ... neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward unless called to testify thereto by the opposite party or required to testify thereto by the court ... ." The last clause has been held to vest discretion in the court.

28. N.M. STAT. ANN. § 20-2-5 (1953) requires corroboration "by some other material evidence." ORE. REV. STATS. 116.555 (1955) "No ... claim which has been rejected by the executor or administrator shall be allowed by any court except upon some competent satisfactory evidence other than the testimony of the claimant." CODE OF VA. §§ 8-286 (1950) provides that in the dead man situation " ... no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; and in any such action or suit, if such adverse party testifies, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence."
The privilege of using the deceased's hearsay is an empty one if the survivor is telling a bald-faced lie. It presumes that the deceased made some positive statement about the transaction or communication allegedly existing between him and the survivor. If no transaction occurred, the most the estate could offer would be proof of silence—too slight in probative value to be admitted under any circumstances. Thus where we need it most, contradiction is impossible.

Assuming that rule 45 of the Uniform Rules could be used to permit exclusion of doubtful testimony by a survivor, it is probable that the affirmative language of Rule 7 would inhibit the court from acting. In any event inertia would be on the side of the survivor and the danger of error would not be considerably lessened.

Of all the solutions heretofore proposed perhaps the best is one requiring the judge to use discretion, not to exclude, as would be the case if Rule 45 were relied upon, but requiring his discretion to admit the testimony in the first place. This would place the burden upon the survivor where it belongs, and would give the decedent’s estate the benefit of any judicial inertia that might exist.

But there is still one other way to look at this problem. It contains elements of both the corroboration and discretion theories. Briefly, it is this: treat the Dead Man’s Statute as a privilege rather than a disqualification. After all, the statute, by its own terms, can be waived; it has many of the aspects of a privilege, and certainly it is not and never has been an absolute disqualification. Make it a privilege which must be claimed by the estate in order to keep out the testimony of the survivor. So far we are still with the dead man statute as it exists at present. But in addition to making the estate claim the privilege, grant to the survivor the right of introducing testimony as to his transaction or communication with the deceased if the judge finds that sufficient other evidence has been introduced to warrant a finding that the communication was in fact made.

This proposal is in line with Rule 28(2)(e) of the Uniform Rules which permits an exception to the confidential communications privilege under similar circumstances. Such a provision would not affect the hearsay exception granted the deceased’s representatives by Rule 63 (4)(c) of the Uniform Rules. It might read somewhat as follows:

Privilege of Personal Representative of Deceased

The personal representative of a deceased has a privilege, when action is brought by or against the estate of the deceased, to pre-

29. See Catlett v. Chestnut, 107 Fla. 498, 146 So. 241 (1933) which implies that “the rule ex necessitate rei” at common law allowed a woman's testimony to prove a common law marriage with the deceased in an action against his estate, despite her obvious interest. No such application of this rule, however, is found under the Florida statute.
vent any adverse party or interested person from testifying as to any transaction or communication with the deceased; provided, however, that if the judge finds that sufficient evidence, aside from the transaction or communication, has been introduced to warrant a finding that the communication was made or that the transaction occurred, then such privilege may not be claimed.

I am aware that such a provision is no substitute for the test of contradiction, but unfortunately the dead are dead, and contradiction of a survivor's testimony frequently cannot be achieved other than by a ouija board declaration.