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EVIDENCE—DEAD MAN'S STATUTE—INTERPRETATION OF "TRANSACTION"—
Plaintiff was a passenger in an automobile which collided with one driven
by defendant's intestate. Both drivers were killed, and plaintiff sued de-
fendant, administrator of intestate's estate, for personal injuries, alleging
negligence. There were no other eye-witnesses to the collision, and the

trial court, relying upon the Alabama dead man's statute,¹ would not permit plaintiff to testify to any of the details or circumstances of the accident, or even to the fact that she had been involved in an accident with an automobile driven by the decedent. The jury found for defendant. On appeal, *held*, reversed. Plaintiff, passenger in an automobile with which decedent's car collided, may testify to the pertinent facts in an action against decedent's estate for personal injuries resulting from the collision. An accident between two automobiles does not constitute a transaction between the deceased driver of one automobile and a passenger of the other automobile, and, consequently the Dead Man's Statute does not apply to disqualify the passenger from testifying. *Gibson v. McDonald*, (Ala. 1956) 91 S. (2d) 679.

The purpose of the Dead Man's Statute is to prevent an interested survivor from benefiting from his own testimony when the estate of the decedent is deprived of the decedent's version of the transaction.² Without benefit of full information, the decedent's estate will be unable to contradict or cross-examine the survivor,³ who may as a result be tempted to perjure himself.⁴ The decision in the principal case rested upon the court's determination that as between plaintiff and the decedent there had been no "transaction" within the meaning of the Alabama Dead Man's Statute.⁵ Torts are generally held to be transactions within dead man's statutes,⁶ and even in Alabama an automobile accident is a "transaction" if both parties are drivers of the colliding automobiles.⁷ In the two-driver situation there is present what has been termed "mutuality of participation" on the part of those involved so as to satisfy the statutory requirement of a transaction.⁸ In the principal case, plaintiff was merely a passive victim who had no control over the collision. The court attached vital significance to this

¹ Ala. Code (1940), tit. 7, §433: "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. . . ." Italics supplied. For discussions of the various types of dead man's statutes, see 46 HARV. L. REV. 834 (1933), and VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 334 (1949).

² Duggar v. Pitts, 145 Ala. 358, 39 S. 905 (1905).

³ Van Meter, Admr. v. Goldfarb, 317 Ill. 620 at 623, 148 N.E. 391 (1925); 41 A.L.R. 343 (1926).

⁴ See Cockley Milling Co. v. Bunn, 75 Ohio St. 270 at 273, 79 N.E. 478 (1906). See also McCORMICK, EVIDENCE §65 (1954).

⁵ Principal case at 681. See note 1 *supra*.

⁶ 5 JONES, EVIDENCE, 2d ed., §2228, 2261 (1926).

⁷ Southern Natural Gas Co. v. Davidson, 225 Ala. 171, 142 S. 63 (1932), discussed in principal case at 681.

⁸ See Jeffords v. Muldrow, 104 S.C. 388 at 389, 89 S.E. 356 (1915): "The word 'transaction' . . . implies mutuality; something done by both in concert, in which both take some part." See also Borum v. Bell, Admr., 132 Ala. 85, 31 S. 454 (1902); Warten v. Black, 195 Ala. 93, 70 S. 758 (1916). But cf. Seligman v. Hammond, 205 Wis. 199, 236 N.W. 115 (1931), holding testimony of one driver about movements of deceased other driver admissible, since the collision is not a mutual transaction.

difference, and concluded that plaintiff, being little more than an observer, was no more involved in a transaction than would be a pedestrian who was injured by the collision.⁹

This requirement of "mutuality" and "concert of action" enunciated by the Alabama court is, it is submitted, an unwarranted and overly strict interpretation of the statute. Other courts have interpreted "transaction" to include situations in which the injured party was merely passive,¹⁰ or in which the witness was no more than an observer, and not a participant.¹¹ The term has been more broadly defined with reference to other considerations, e.g., if the decedent could contradict the witness of his own knowledge if alive,¹² or if the alleged transaction was a "link in the chain of liability."¹³ At its broadest, transacting has been held to encompass every variety of affair which can form the subject of negotiations, interviews or actions between two persons, and also every method by which one person can derive impressions or information from the condition or language of another.¹⁴ Under any of these definitions the plaintiff in the principal case would have been disqualified from testifying. The Alabama court rejected them all, however, and relied heavily on a questionable Wisconsin holding to the effect that an accident is not a transaction between a passenger and his driver, so that neither party is disqualified from testifying against the survivor's estate.¹⁵ The holding in the principal case and the cases relied upon by the Alabama court may be explained as further examples of the widespread lack of sympathy with the Dead Man's Statute.¹⁶ Be that as it

⁹ Principal case at 682. But query whether a pedestrian if in motion might not be a "mutual participant." See note 10 infra.

¹⁰ *Van Meter v. Goldfarb*, note 3 supra; *Abelein v. Porter*, 45 App. Div. 307, 61 N.Y.S. 144 (1899). These cases suggest that the "pedestrian" analogy of the Alabama court in the principal case, note 9 supra, is not very strong support for their decision. But cf. *Thomas v. Chicago, R. I. & P. Ry.*, (St. Louis Ct. of App. 1925) 271 S.W. 862, in which an engineer of a train which killed decedent was allowed to testify in an action by decedent's estate. In the latter case, the court did not explain its decision, nor did it discuss the existence of a transaction.

¹¹ *Griswold v. Hart*, 205 N.Y. 384, 98 N.E. 918 (1912). But cf. *Tucker v. Anderson, Admr.*, 172 Iowa 277 at 281, 154 N.W. 477 (1915), in which the witnesses who were allowed to testify were not interested in the suit. This may be a more sensible ground for the decision.

¹² *Sherrill v. Wilhelm*, 182 N.C. 673, 110 S.E. 95 (1921).

¹³ *Boyd v. Williams*, 207 N.C. 30, 175 S.E. 832 (1934); *Davis v. Pearson*, 220 N.C. 163, 16 S.E. (2d) 655 (1941).

¹⁴ *Holcomb v. Holcomb*, 95 N.Y. 316 at 325 (1884). Cf. *Warten v. Black*, note 8 supra, at 97. See also 57 W. VA. L. REV. 135 (1955).

¹⁵ *Krantz v. Krantz*, 211 Wis. 249, 248 N.W. 155 (1933). While the statute in that case required a "personal transaction," this difference in wording was rendered insignificant by the Alabama court in the principal case at 683, where the court interpreted the Alabama Dead Man's Statute's requirement of a transaction to mean a "personal transaction." Cf. *McCarthy v. Woolson*, 205 N.Y.S. 507 at 509 (1924), which held that while the accident itself was not a transaction, the fact of decedent's having been a guest in the vehicle would constitute a transaction. See also discussion in 146 A.L.R. 250 (1943).

¹⁶ See 2 WIGMORE, EVIDENCE, 3d ed., §§578, 578a (1940); Chadbourn, "California Dead Man Statute," 4 U.C.L.A. L. REV. 175 at 209 (1957); McCORMICK, EVIDENCE, §65 (1954).

may, the result is inconsistent with the clear mandate of the Alabama legislature supporting the policy of the survivor's disqualification, for it ignores the spirit of the statute in severely restricting its application. Surely perjury by a party injured by a decedent is equally likely whether the injury was inflicted upon a passenger of the other car or upon the driver of the other car. There is the same disparity of information between the two parties to the action, and the same difficulty of contradiction and cross-examination.¹⁷ We may indeed question the wisdom of the policy supporting the Dead Man's Statute,¹⁸ but where a legislature has approved that policy and given it statutory embodiment, it should be beyond the prerogative of the courts so to interpret the statute as to contravene the legislative intent.

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¹⁷ See cases cited in notes 2, 3, 4, *supra*.

¹⁸ "Are not the estates of the living endangered daily by the present rule, which bars from proof so many honest claims? Can it be more important to save dead men's estates from false claims than to save living men's estates from loss by lack of proof?" 2 WIGMORE, EVIDENCE, 3d ed., §578, p. 696 (1940).