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Evidence - Restrictive Interpretations of Statute Intended to Liberalize Admission of Statements by Persons Since Decesed

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EVIDENCE—RESTRICTIVE INTERPRETATION OF STATUTE INTENDED TO LIBERALIZE ADMISSION OF STATEMENTS BY PERSONS SINCE DECEASED—Defendant, while driving an automobile, struck the plaintiff's decedent, a pedestrian, causing injuries which ultimately resulted in her death. An action was brought by the plaintiff as administrator of the estate under a statute giving the right to recover for wrongful death.[1] It was contended that statements made by the deceased to members of her family in the hospital one to two weeks after the injury, such as "If she had stayed on her own side of the road, she'd never hit me," were admissible under a South Dakota statute purporting to

[1] S.D. Code Supp. (1952) §37.2201 et seq.

make statements of deceased persons receivable in actions by or against their representatives.[2] The trial court excluded the evidence and entered judgment for the defendant. On appeal, *held,* affirmed. The evidence was properly excluded since the statute pertaining to admissibility of statements of deceased persons does not apply to a wrongful death action, but is limited to actions actually involving the decedent's estate. *Larimore v. Dobbs,* (S. D. 1953) 57 N.W. (2d) 750.

At common law, all parties and persons interested in the outcome of litigation were held incompetent to testify.[3] This disqualification of interested persons as witnesses was removed by statute throughout the United States, but an exception was carved out of the old incompetency and allowed to remain in the form of enactments called dead man statutes, which excluded the testimony of the survivor of a transaction with a decedent, when offered against the estate.[4] These dead man statutes have been criticized and condemned by courts and writers as being of doubtful expediency,[5] and as tending to obstruct honest claims as often as they defeat unjust claims while fomenting an enormous amount of litigation in their interpretation.[6] Thus, it has come to be regarded as a sound rule of construction that such statutes should not be extended beyond their letter when the effect of such extension will be to add to the list of those whom the act renders incompetent as witnesses.[7] The statute under which the principal case arose supersedes a dead man statute and embodies a statutory exception to the hearsay rule providing for admission of certain statements of the deceased as well as the testimony of the survivor.[8] It is identical to the statute recommended by the Committee of the Common-

[2] S.D. Code (1939) §36.0104 provides: "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."

[3] 2 WIGMORE, EVIDENCE, 3d ed., §575 (1940).

[4] Id., §578; 5 JONES, EVIDENCE, 2d ed., §2222 (1926).

[5] St. John v. Lofland, 5 N.D. 140 at 143, 64 N.W. 930 (1895), states: "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 claim than there would be fictitious claims established if all such enactments were swept away, and all persons rendered competent witnesses." *Accord,* McKay v. Brink, 65 S.D. 472, 275 N.W. 72 (1937).

[6] "As a matter of policy, this survival of a part of the now discarded interest-qualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words." 2 WIGMORE, EVIDENCE, 3d ed., §578, p. 697 (1940). See also Ladd, "Admission of Evidence Against Estates of Deceased Persons," 19 IOWA L. REV. 521 (1934).

[7] St. John v. Lofland, note 5 supra; Reinschmidt v. Hirsch, 65 S.D. 498, 275 N.W. 356 (1937). The latter decision was decided under S.D. Rev. Code (1919) §2717 and was cited in the principal case, curiously enough, in support of an effort to limit the liberal language of the later S.D. Code (1939) §36.0104.

[8] Note 2 supra.

wealth Fund,[9] approved by the American Bar Association,[10] and urged by eminent writers on evidence as representing the enlightened policy of the future.[11] It is suggested that this type of statute may serve to eliminate much of the unjustness and some of the snarls of conflicting authority which have arisen as a result of the dead man statutes.[12] While it is generally held that statutes removing the incompetency of survivors should be liberally construed to extend rather than restrict the intended relief and to effectuate their corrective purpose,[13] the court in the principal case limits and narrows the clear remedial language by means of somewhat strained reasoning. This result is reached by reliance on cases which hold that the term "representatives" as used in statutes relating to admissibility of declarations of deceased persons does not include a representative who is merely a formal party for maintenance of a wrongful death action, but only those who sue or defend in the interest of the estate.[14] The court concludes that since a wrongful death recovery in South Dakota is not for the benefit of the estate, the statute cannot apply in such actions.[15] But these cases were decided under the often criticized dead man statutes, diametrically opposed in policy and theory to the statute before the South Dakota court, and the decisions limited the scope of the statutory restrictions in order to enlarge the competency of witnesses and make more testimony admissible. It would appear that such construction is clearly not appropriate to the liberal provisions which this court considered. The court also cited Connecticut decisions in support of its position,[16] since this state has a similar provision for admitting any relevant extant writings or declarations of the deceased party as well as the testimony of the survivor.[17] However, while holding that to come within the purview of the statutory term "representative" one must take some portion of the estate, the Connecticut court nevertheless has indicated that its statute is applicable to an action brought by the administrator of the deceased to recover damages for injuries resulting in death.[18] Whether such a statute is applicable in an action for wrongful

[9] This committee was composed of a group of distinguished scholars: Morgan, Chafee, Gifford, Hinton, Hough, Johnston, Sunderland, and Wigmore. Their proposals were embodied in the report, THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM (1927).

[10] Proposal No. 1, 63 A.B.A. REP. 597 (1938).

[11] Ladd, "The Dead Man Statute: Some Further Observations and a Legislative Proposal," 26 IOWA L. REV. 207 (1941); 2 WIGMORE, EVIDENCE, 3d ed., §§578a, 1576 (1940).

[12] 5 JONES, EVIDENCE, 2d ed., §2225 (1926).

[13] Re Keenan, 287 Mass. 577, 192 N.E. 65 (1934); Walter v. Sperry, 86 Conn. 474, 85 A. 739 (1913). See 96 A.L.R. 686 (1935).

[14] Riley v. Lukens Dredging & Contracting Corp., (D.C. Md. 1933) 4 F. Supp. 144; Reinschmidt v. Hirsch, note 7 supra.

[15] Principal case at 751.

[16] Lockwood v. Lockwood, 56 Conn. 106, 14 A. 293 (1887); Doolan v. Heiser, 89 Conn. 321, 94 A. 354 (1915).

[17] Conn. Gen. Stat. (1949) §7895.

[18] Koskoff v. Goldman, 86 Conn. 415, 85 A. 588 (1912); Dupre v. Atlantic Refining Co., 98 Conn. 646, 120 A. 288 (1923).

death might well depend upon the capacity in which an executor or administrator acts in bringing the suit,[19] but the spirit of this liberal enactment would seem to deny such a distinction.

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[19] 20 AM. JUR., Evidence §615 (1939).