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George A. Rinker S.Ed.
University of Michigan Law School

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WITNESSES — "DEAD MAN'S ACT" — DISCRETION OF COURT — In an action against an executor to recover money alleged loaned to decedent, plaintiff introduced testimony of a third party regarding a conversation between

plaintiff and decedent in which decedent said, "I owe you five hundred and twenty dollars and you will get every cent of it." Plaintiff then testified, over objection, as to the circumstances and terms of the alleged loan. The transaction was oral, and there was no other evidence relating to the circumstances or terms of the loan. From a judgment for plaintiff, defendant appealed, assigning as error the overruling of his objection to plaintiff's competency as a witness under the Montana "dead man's act."[1] *Held*, affirmed. The Montana statute permits the court, in its discretion, to admit such testimony, and in this case sufficient foundation was laid[2] to make the admission of the testimony proper. *Ahlquist v. Pinski*, (Mont. 1947) 185 P. (2d) 499.

At common law, it was an established rule that a person interested in the outcome of litigation was not a competent witness on his own behalf.[3] This rule was vigorously criticized, and beginning in the latter half of the nineteenth century, legislation was adopted in all jurisdictions abolishing incompetency for interest.[4] A statutory exception has been deemed necessary, however, in practically all jurisdictions, disqualifying the survivor of a transaction with a decedent from testifying as to that transaction against the latter's estate or representative.[5] Since the statutes imposing this disqualification vary in their provisions and in the language employed, it is impossible to derive any general rules from the cases interpreting them, although several problems are common to most of the statutes. For example, Who is an "interested party"? What is a "transaction" or "communication"? Who is entitled to the protection of the statute? May the disqualification be waived? The cases are so numerous, and rest, for the most part, on such minor technicalities that an attempt to review and reconcile them would serve no useful purpose. However, some tendencies may be found. Several courts, questioning the desirability of the disqualifying statutes, interpret them so as to limit their scope as much as possible.[6] Most of the statutes expressly provide that the protection to the decedent's representative is waived if he introduces testimony or other evidence of the transaction favorable to the estate.[7] In some states, even in the absence of express statutory provision, the courts hold that the protection is waived when such evidence is introduced by the decedent's representative.[8] The general statutory rule dis-

[1] Mont. Code (1935) § 10535-3.

[2] In Pincus v. Davis, 95 Mont. 375, 26 P. (2d) 986 (1933), the court had ruled that the trial court should not admit the testimony of such a witness unless a foundation had been laid by other evidence, sufficient to warrant the court's exercise of its discretion. This requirement is not found in the statute.

[3] An excellent historical discussion of disqualification for interest may be found in 2 WIGMORE, EVIDENCE, 3d ed., 674 et seq. (1940).

[4] 2 WIGMORE, EVIDENCE, 3d ed., 693 (1940).

[5] The applicable statutes for all common law jurisdictions are set forth verbatim in 2 WIGMORE, EVIDENCE, 3d ed., 525 et seq. (1940). The same protection is often extended to guardians or other representatives of insane or incompetent persons.

[6] See, for example, St. John v. Lofland, 5 N.D. 140, 64 N.W. 930 (1895); Goehring v. Dillard, 145 Ohio St. 41, 60 N.E. (2d) 704 (1945).

[7] See Ala. Code (1940) tit. 7, § 433; Me. Rev. Stat. (1944) c. 100, § 120; S.C. Code (1942) § 692.

[8] Rock v. Gannon Grocery Co., 246 Mich. 545, 224 N.W. 752 (1929); Kinley v. Largent, 187 Cal. 71, 200 P. 937 (1921).

qualifying a survivor as a witness has been widely criticized.[9] The critics contend that justice is more often defeated by excluding the only available proof of a claim than it would be by fraudulent claims if such testimony were admitted. They contend that the inherent honesty of most people, coupled with the weapon of cross-examination and the vigilance of trial judges, is sufficient protection to decedent's estates. As yet, however, there has been no widespread modification of the rule.[10] Three distinct departures from the general rule have been tried with apparent success.[11] In New Mexico,[12] the interested survivor of a transaction is not barred from testifying, but a judgment in his favor may not be given upon his uncorroborated testimony. In Connecticut [13] and Oregon,[14] the interested survivor may testify, but if he does, any writings, memoranda, or declarations made by the decedent may be introduced to rebut such testimony. Virginia [15] combines these features, providing that the survivor's testimony must be corroborated to support a judgment in his favor, and permitting memoranda and statements of the decedent to be introduced. Three states, New Hampshire,[16] Arizona,[17] and Montanta,[18] employ the usual statutory disqualification, but add the proviso that if, in the discretion of the court, it appears that the survivor's testimony is necessary to prevent injustice, it may be admitted, with alleged abuses of discretion subject to appellate review. In the principal case, it is evident that the Montana statute gave the trial court adequate authority to rule as it did in admitting plaintiff's testimony.

George A. Rinker, S.Ed.

[9] 1 GREENLEAF, EVIDENCE, 16th ed., 493 (1899); 2 WIGMORE, EVIDENCE, 3d ed., 697 (1940); St. John v. Lofland, 5 N.D. 140, 64 N.W. 930 (1895). See also AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, comment *b* to Rule 101 (1942).

[10] Several concrete proposals have been made for alteration or abolition of the rule. See the report of MORGAN, et al. (Commonwealth Fund Committee), THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM 35 (1927), and AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, Rule 101 (1942).

[11] But see 46 HARV. L. REV. 834 (1933), where it is pointed out that the operation of the most liberal statutes has been greatly restricted by judicial interpretation.

[12] N.M. Stat. Ann. (1941) § 20-205.

[13] Conn. Gen. Stat. (1930) § 5608.

[14] Ore. Comp. Laws (1940) § 3-103.

[15] Va. Code Ann. (1942) § 6209.

[16] N.H. Rev. Laws (1942) c. 392, §§ 25, 26.

[17] Ariz. Code Ann. (1939) § 23-105.

[18] Mont. Code (1935) § 10535.