Florida Law Review

Volume 18 | Issue 4 Article 10

March 1966

# Evidence: Legislative Reform for the "Dead Man's Statute"

Rutledge R. Liles

*Section 7. Duties of the Attorney General.*

(a) The attorney general shall receive complaints concerning violations of the code of ethics and refer such complaints to the advisory committee on ethical standards. He may report the finding and recommendations of such committee to the governmental agency having the power to remove or otherwise discipline the officer or employee involved in the complaint, or, if criminal prosecution is warranted, to the proper state's attorney or other prosecuting officer. Upon the basis of such findings and recommendations, he may bring a civil action when the facts warrant it for the recovery of money or property received or expended by a public officer or employee in violation of his public trust.

(b) The attorney general shall receive requests for advisory opinions for officers and employees as to whether a particular case comes within the prohibitions of the code of ethics. He may refer such requests to the advisory committee on ethical standards or he may act on them himself.[16]

## EVIDENCE: LEGISLATIVE REFORM FOR THE "DEAD MAN'S STATUTE"

At common law all parties or others who were shown to have a direct pecuniary or proprietary interest in the outcome of the litigation were arbitrarily excluded as incompetent to testify.[1] Whenever persons offered as witnesses were of a class very likely to speak falsely, total exclusion from the stand was considered the proper safeguard.[2] This common law rule was based upon the hypothesis that men were so corrupted by their interests that they would perjure themselves.[3] As a result of legislation in the various states superseding the common law rule, the disqualification of parties and interested persons as witnesses is practically nonexistent.[4]

16. See N.Y. EXECUTIVE LAW §63 (11).

1. 3 JONES, EVIDENCE §762 (5th ed. 1958).
2. 2 WIGMORE, EVIDENCE §576 (3d ed. 1940).
3. P. & N. Inv. Corp. v. Rea, 153 So. 2d 865 (2d D.C.A. Fla. 1963).
4. 2 WIGMORE, EVIDENCE §576 (3d ed. 1940).

In 1874, Florida altered the common law rule of disqualification of interested witnesses by enacting section 90.05 of the Florida Statutes.[5] This statute was adopted with the objective of expanding the area in which parties to litigation are competent to testify.[6] The statute presently stands in its original form, there having been no amendments since its enactment.[7]

Although section 90.05 effectively removes interest as a bar to testimony, it is not without exception. In enacting the statute the legislature retained one vestige of the old common law regarding dealings between an interested person and one who is deceased. It exists as an exception known as the "Dead Man's Statute." In effect, the exception provides that no interested party shall be competent to testify "against" a representative of the deceased regarding any "transaction or communication" had with one who is "deceased, insane or lunatic," unless the prohibition is waived by those entitled to its protection.[8]

The Dead Man's Statute rests upon the ground of the enforced silence of the interested survivor.[9] The theory is that when one of two parties to a transaction dies, "what the living knows or would testify is excluded, because what the dead would testify if living cannot be or is not given in evidence . . . ."[10] In the words of the Florida Supreme Court, "it is only just, fair and equitable . . . wherein death has sealed the lips of one party, that the law should as

5. Fla. Laws 1874, ch. 1983, §1.

6. Catlett v. Chestnut, 107 Fla. 498, 146 So. 241 (1932).

7. See Klein v. Witte, 142 So. 2d 789 (2d D.C.A. Fla. 1962) pointing out that Florida's statute was taken verbatim from §829 of the New York Code of Civil Procedure (Now N.Y. CIV. LAW & PRAC. §4519). It is interesting to note that in 1958 a proposal was made to abolish the Dead Man's Statute, but was tabled until fuller consideration could be given such move. The Dead Man's Statute would have been replaced by the following rule: "In an action by or against the representatives of a deceased or insane person, including a proceeding for the probate of a will, evidence of any statement made on personal knowledge by the deceased or insane person, whether oral or written, shall not be excluded as hearsay. In weighing such evidence and testimony in such a case, the judge or jury shall take into account the inability of the deceased or insane person to contradict a witness and the fact that the deceased or insane person is not subject to cross-examination." Context of the proposed rule 44:10, 1958 McKinney's Sess. Law News A-370 appears in Younger, *Evidence*, 33 N.Y.U.L. REV. 1288 (1958). One commentator cited the absence of sharp standards for the application of this rule as its fundamental flaw. It should be made clear whether the judge could in his discretion exclude inherently untrustworthy dead man evidence or whether he would be restricted to a cautionary instruction to the jury. The author concludes that the judge should have the power to exclude. Younger, *supra* at 1288-89.

8. FLA. STAT. §90.05 (1965).

9. Munroe v. Carroll, 80 Fla. 206, 85 So. 193 (1920).

10. Harris v. Bank of Jacksonville, 22 Fla. 501, 507, 1 So. 140, 143 (1886).

effectively silence the voice of the other."[11]

The Dead Man's Statute is an all-encompassing rule with very few limitations on its applicability. It applies to actions *ex contractu* as well as *ex delicto*.[12] This note, however, is not designed as a survey of the statute. Rather, an attempt will be made to cast light upon the statute's internal weaknesses with suggested methods for improving these defects.

The Dead Man's Statute has been severely criticized since its enactment. A major criticism is that more honest claims are defeated by the rule than there would be fictitious claims established if all such enactments were swept away and all persons rendered competent witnesses.[13] The statute was designed to protect against false claims, not to defeat valid ones as it has often been accused. Chief Justice Drew, dissenting in *Jensen v. Lance*,[14] stated that the Dead Man's Statute was "designed as a shield – not a sword."[15] This is indicative of the general attitude that courts have adopted. Many courts have declared the policy on which the rule rests to be fallacious and weak.[16] It has been referred to as a harsh rule by the courts and legal writers alike, but it still obtains in this state. Its continued utilization can best be attributed to an attitude on behalf of the courts that the inequities caused by the rule are for the legislature and not the courts to resolve.[17] It is not unusual for a court to adopt a "hands off" approach when the statute before it is one absolute in application rather than involving interpretation. Courts often have no choice but to avoid the realm of the legislature. Here, however, the courts have openly labelled the statute harsh, inequitable, and unreasonable, and for ninety-two years the legislature has avoided any program designed to effectuate a change. It would appear that the only solution is an active campaign either to abolish or improve the statute.

Although section 90.05 is in derogation of the common law to the extent that it removes the disqualification of an interested witness, it should, because of its remedial nature, be liberally construed.[18] The exception, on the other hand, limits the remedial aspects of the statute resulting in the view that it should be strictly construed. A strict construction of the exception would reduce to a minimum the restrictions on the broader remedial statute of which it is a part.

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11. Mayer v. Mayer, 54 So. 2d 105, 107 (Fla. 1951).
12. 3 JONES, EVIDENCE §771 (5th ed. 1958).
13. Munroe v. Carroll, 80 Fla. 206, 86 So. 193 (1920).
14. 88 So. 2d 762 (Fla. 1956).
15. *Id.* at 764.
16. Munroe v. Carroll, 80 Fla. 206, 86 So. 193 (1920); Day v. Stickle, 113 So. 2d 559 (3d D.C.A. Fla. 1959); 2 WIGMORE, EVIDENCE §578 (3d ed. 1940).
17. Day v. Stickle, 113 So. 2d 559 (3d D.C.A. Fla. 1959).
18. Farley v. Collins, 146 So. 2d 366 (Fla. 1962).

The attacks levelled at the Dead Man's Statute are the same as have existed since its enactment. One of the major criticisms is that the supposed danger of false testimony by interested persons exists to a limited extent only.[19] Many valid claims have suffered at the expense of uncovering the few that are fraudulent, and as a result an intolerable injustice has been dealt to those who do testify truly.[20] The results that have arisen under the statute would lend credence to the argument that it is irrational, inconsistent, and unworkable.[21] The danger of false testimony is suppressed even more as a result of our modern pleading and discovery procedures. The pretrial conference could also be used as a device for examining the interested survivor's testimony and for arriving at some compromise as to its probable validity.

There are two primary functions of discovery: one is to obtain information that will be useful in litigation and the other is to preserve and prepare evidence.[22] Discovery could be utilized by the survivor to examine the various records and documents of the deceased to find support for his testimony. It is true that discovery is limited to parties to the action, but it would not be illogical to extend this to the representative of the deceased in the action. Should the documents be in the hands of one not a party to the action, the deposition or subpoena *duces tecum* can be utilized to obtain them.[23]

The Dead Man's Statute has also been criticized as being unnecessary. It fails to recognize the ability of the court to balance the issues and equities and arrive at a just result. Those who are of this opinion claim that the test of cross-examination and various other safeguards for determining truth are a sufficient guaranty against frequent false decisions.[24] This criticism does not apply with the apparent force of the other criticisms, however, because here the adverse party's testimony is lacking in contradiction.

Those defending the statute base their argument solely on the ground that there is no opposing testimony to meet the allegation of the interested claimant.[25] But this reasoning fails to recognize that in theory the deceased is a party and hypothetically possesses the same potential to lie as does the disqualified survivor. The rule is apparently based upon the supposed lack of a questionable species of testimony equally weak with that which is excluded. It assumes that

19. 2 WIGMORE, EVIDENCE §578 (3d ed. 1940).
20. *Ibid.*
21. *Ibid.*
22. FLORIDA CIVIL PRACTICE BEFORE TRIAL §16.1 (1963).
23. FLORIDA CIVIL PRACTICE BEFORE TRIAL §16.19 (1963).
24. 2 WIGMORE, EVIDENCE §578 (3d ed. 1940).
25. *Ibid.*

the deceased's testimony would have been true. Evidence of this is found in the fact that favorable testimony is admitted whereas adverse testimony is not. Most of the criticism levelled at the statute is well founded. Now that these faults have been brought to the surface, however, it is necessary that some effective solution be derived.

Various suggestions have been offered as solutions to the problem that now exists. Many practitioners suggest that the Dead Man's Statute be repealed altogether, leaving the question of competency and credibility to the jury. Under the statute, the competency of a witness to testify is a question of law. If the language of the statute is met, the witness is automatically precluded from testifying. By repealing the statute altogether, the question of a witness's competency would shift from one of law to one of fact. The jury could adequately decide questions that may arise, and their decision would in most cases result in fairer treatment of the parties involved in the dispute. This change would remove the arbitrary treatment that presently exists under the statute.

A solution advanced by some legal scholars is to exclude the testimony of the surviving party except when it appears to the court that injustice might result.[26] The states of Montana and Arizona have taken the lead by adding language to that effect to their laws. In Montana an interested survivor may testify "when it appears to the court that, without the testimony of the witness, injustice will be done."[27] In Arizona, neither the surviving party nor the executor or administrator of the deceased's estate is permitted to testify against the other as to any transaction with or statement by the deceased "unless . . . required to testify thereto by the court."[28] In adding this new element these states have not actually altered the entire effect of the Dead Man's Statute. By leaving the ultimate decision regarding the application of the rule to the discretion of the courts, they have merely added a degree of flexibility. But the element of flexibility, to some extent at least, lessens the absoluteness of the statute.

Another possible solution would be to allow the surviving party to testify but only when some corroborating testimony can be produced.[29] New Mexico has added such a modification by providing that the surviving party shall not obtain a verdict or judgment on evidence that he alone presents "unless such evidence is corroborated by some other material evidence."[30] Although this would appear to be a step in the right direction, this method of qualifying the sur-

26. *Ibid.*
27. MONT. REV. CODES ANN. §93-701-3 (1947).
28. ARIZ. REV. STAT. ANN. §12-2251 (1956).
29. 2 WIGMORE, EVIDENCE §578 (3d ed. 1940).
30. N.M. STAT. ANN. §20-2-5 (1953).

vivor has been criticized as possessing serious flaws.[31] Its underlying philosophy is akin to that inspiring the typical rule of exclusion.[32] The requirement of corroboration presupposes that uncorroborated claims are of such questionable verity that all must be denied, just as the rule of exclusion presupposes that the survivor's credibility is so questionable that all must be excluded from testifying.[33] The problems inherent in this type of modification are found in the area of administration. It may have the effect of encumbering the judicial process for not only must the court face the difficult task of formulating a satisfactory test, it must also decide when the test is met. Regardless of the criticism, however, the policy behind the proposal is sound, and it should not be abandoned solely because its implementing rules are difficult to formulate and apply.

Perhaps the most feasible solution is to alter the statute to permit the surviving party to testify, but at the same time allow the representatives of the deceased's estate to have admitted into evidence any extant writings or declarations of the deceased on the subject in issue.[34] Connecticut has provided for such a rule. The statutes of that state not only provide that no person is disqualified by reason of interest[35] but also that "memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence."[36] This statute is more liberal and simpler than the others but it has a great practical advantage of being easily comprehended and administered. There is some criticism to the effect that this statute opens the door to fraud or perjury, but realistically it does so no more than every other class of testimony.

In adopting this solution, a state would actually be constructing a new exception to the hearsay evidence rule. It is true that the safeguard of cross-examination of the deceased personally is not present, but neither is it present in any of the cases in which the exceptions to the hearsay evidence rule apply. The entire theory behind the exceptions to the hearsay evidence rule is the need of the proof plus the circumstances that indicate the probability of its trustworthiness.[37] Although the circumstances surrounding a transaction or communication with a deceased would not assure trustworthiness,[38] the essen-

31. Chadbourn, *History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization*, 4 U.C.L.A.L. REV. 175 (1957).

32. *Ibid.*

33. *Ibid.*

34. 2 WIGMORE, EVIDENCE §578 (3d ed. 1940).

35. CONN. GEN. STAT. §52-145 (1958).

36. CONN. GEN. STAT. §52-172 (1958).

37. Ladd, *The Dead Man Statute: Some Further Observations and a Legislative Proposal*, 26 IOWA L. REV. 207, 238 (1941).

38. But this is also true of other hearsay rule exceptions, for "the circum-