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# THE DEAD MAN'S STATUTE — A RELIC OF THE PAST†

by

Roy R. Ray\*

IN Texas we have a statute which is popularly known as the Dead Man's Statute.<sup>1</sup> Most lawyers at one time or another have had occasion to invoke it or have it enforced against them. Lawyers and judges alike will agree that its interpretation is surrounded with much uncertainty, and a vast number will admit that its application has been the source of many injustices. For a perspective from which to view the statute a brief historical statement will be helpful.

As students of evidence know, the English Common Law disqualified all parties to a suit from giving testimony. The rule came into existence around 1500 and prevailed for over four hundred years. The general theory of disqualification was this: the best method of securing the truth is to exclude certain classes of witnesses who are apt to speak falsely. One such group is persons who have a primary interest in the event of the action. Therefore they should be excluded. Professor Wigmore gave the perfect answer to this reasoning by stating that both of the premises of the syllogism are unsound: first, that pecuniary interest does not make it probable that the party will commit perjury, and second, even if it did, the risks of false decisions are not best avoided by excluding such testimony. Jeremy Bentham made a determined attack upon this disqualification in his great work on Evidence published in 1827, and public opinion was gradually changed until it was finally believed that truth would be better ascertained and justice administered by doing away with the disqualification. In 1843 and 1851 statutes were enacted in England accomplishing this result. Within a few years this reform had spread to most of our states. The change in Texas came in 1871 by a statute which is now Article 3714, TEX. REV. CIV. STAT. (1925). It reads: "No person shall be incompetent to testify on

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† The substance of this paper has been used as an address before the Dallas and Tyler Bar Associations.

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<sup>1</sup> TEX. REV. CIV. STAT. (1925), art. 3716.

account of color, nor because he is a party to a suit or proceeding or interested in the issue to be tried."

At the same time and by the same act which removed the disqualification by interest, Texas set up an exception in case of testimony as to transactions with decedents. In this respect the common-law disqualification of interested parties was retained. The text of the statute (now Article 3716, TEX. REV. CIV. STAT. (1925)) reads as follows:

In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transactions with such decedent.<sup>2</sup>

It is not the purpose here to discuss the interpretation of the statute in all its ramifications.<sup>3</sup> Space limitations alone would prevent this. But this article will attempt to show that the Dead Man's Statute is not the best remedy for the supposed disease and to point out the dangers of injustice which come from excluding in these cases all interested parties. A doctor may not in a suit against the patient's estate testify to visits he has made or the treatment given.<sup>4</sup> A surgeon suing decedent's administrator for his fee may not testify to the performance of an operation.<sup>5</sup> One

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<sup>2</sup> For statements as to the purpose of statute see, *Mores v. Wills*, 67 Tex. 109, 5 S.W. 675, 676 (1887); *Whatley v. Whatley*, 169 S.W.2d 989 (Tex. Civ. App. 1943); *Kamp v. Harvis Bldg. Co.*, 238 S.W.2d 277 (Tex. Civ. App. 1943) *error ref. n.r.e.* In *Scott v. McKibban*, 110 S.W.2d 72, 76 (Tex. Civ. App. 1937) the court sets forth five conditions which must be met before a witness will be declared incompetent under the statute. The statute is not applicable to criminal prosecutions. *Green v. State*, 153 Tex. Crim. 442, 221 S.W.2d 612 (1949).

<sup>3</sup> Detailed treatment of the application of the statute and its interpretation by the courts is found in *McCORMICK AND RAY, TEXAS LAW OF EVIDENCE* §§325-336 (2d ed. 1956). The courts have repeatedly stated that the statute is to be strictly construed and its terms not extended by judicial construction. *McCORMICK AND RAY, op. cit. supra*, §324, note 31. But they appear to have given only lip service to the principle of strict construction. For examples of what appear to be clearly unwarranted judicial extensions, see *Holland v. Nimitz, infra* note 9; *International Traveler's Insurance Ass'n v. Bettis, infra* note 11, *Andreades v. McMillan, infra* note 12, and *Ragsdale v. Ragsdale, infra* note 8.

<sup>4</sup> *Garwood v. Schlichenmaier*, 60 S.W. 573 (Tex. Civ. App. 1901).

<sup>5</sup> *Anderson v. Caulk*, 5 S.W.2d 816 (Tex. Civ. App. 1928), *aff'd*, 120 Tex. 253, 37 S.W.2d. 1008 (1931).

who claims to be a creditor for moneys advanced to a decedent<sup>6</sup> or for goods sold to him<sup>7</sup> may not testify as to those transactions. In a will contest on the grounds of insanity the interested members of the family who would naturally know most about the mental capacity of the decedent are barred from giving their knowledge to the jury.<sup>8</sup> And the Supreme Court has gone so far as to hold that the evidence is not admissible even though it is based solely on the witness's observation of the acts and conduct of the testator and is not in any way the result of conversation with or statements by the testator.<sup>9</sup> Moreover, when third persons not interested in the estate have testified that one of the family, taking under the will, has used undue influence, that party is barred from taking the stand and denying the claimed wrongdoing.<sup>10</sup> Surely this is most unfair.

One of the most glaring instances of extreme and unjust hardship imposed by the statute, not upon some outside claimant, but upon the dead man's kin whom he sought to protect, is illustrated by the case of *International Travelers Insurance Assn. v. Bettis*.<sup>11</sup> In this case Mr. Bettis, a rancher, had purchased an accident insurance policy which was payable to his estate. While the policy was in force Mr. Bettis died of blood poisoning resulting from an injury to his finger, and his administrator sued on the policy. To prove the accident, a son of Mr. Bettis, who was one of his heirs, testified that he and his father, by themselves, a few days before his father's death were tightening the wire upon a pasture fence, and that while they were working the wire slipped and a barb caught his father's hand, causing the injury which later became fatally infected. The Supreme Court in reversing the lower courts, held that under our statute the son, the only eye-

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<sup>6</sup> *Madero v. Calzado*, 281 S.W. 328 (Tex. Civ. App. 1926).

<sup>7</sup> *Horlock v. Guardian Trust Co.*, 274 S.W. 204 (Tex. Civ. App. 1925).

<sup>8</sup> *Ragsdale v. Ragsdale*, 142 Tex. 476, 179 S.W.2d 291 (1944). This is one of the leading cases and the opinion is devoted to a discussion and interpretation of the statute. It also emphasizes the rule that the party seeking to get the evidence in may not put before the jury the fact of reliance upon the statute by the other party.

<sup>9</sup> *Holland v. Nimitz*, 111 Tex. 419, 232 S.W. 298 (1922). (Proceeding to contest probate of a will. Evidence by daughter and heir of testatrix, that from observation of her acts, conduct and mental and physical condition, she was of the opinion that testatrix was insane at time of making will, excluded).

<sup>10</sup> *Harris v. Harris' Estate*, 276 S.W. 964 (Tex. Civ. App. 1925). See also *Holland v. Nimitz*, *supra* note 9.

<sup>11</sup> 120 Tex. 67, 35 S.W.2d 1040 (1931), reversing the Dallas Court of Civil Appeals, 3 S.W.2d 478 (1928).

witness to the accident, was disqualified, since this was a transaction with the decedent. This appears to be an unwarranted judicial extension of the phrase "transaction with" far beyond what the legislature could have intended.

In recent years the disqualification under the statute has been extended to a suit for personal injuries arising out of an automobile collision, brought by the survivor against the estate of the person killed. In *Andreades v. McMillan*,<sup>12</sup> Michael Andreades sued the administrator of Charles Cummings, deceased, for damages arising out of personal injuries to himself and wife as the result of a collision between an automobile driven by plaintiff and one driven by the deceased. The trial court refused to allow plaintiff Andreades to testify as to the facts, circumstances and occurrences surrounding the collision, and made a similar ruling with respect to plaintiff's wife. If Andreades was disqualified so was his wife, since she is considered an interested party. The El Paso Court of Civil Appeals reluctantly affirmed the lower court decision on the ground that it felt bound by the Supreme Court's interpretation of the statute in the *Bettis* and other cases. Most of the opinion, however, was devoted to quotations from text writers and law review articles, criticizing the Dead Man's Statute, and it is clear that the court was not in sympathy with the statute. It said, "It is difficult to explain either the source or the reasoning behind this statute."<sup>13</sup> Further, the court said, "while we here have some grave doubts that the judicial extension of Art. 3716 as set forth in *Holland v. Nimitz* ought to include the facts of the case at bar, we feel constrained by the language of the above cases to so hold."<sup>14</sup> Of course, the writer is prejudiced in favor of these two statements since the court quoted extensively from his own words.<sup>15</sup> This extension of the statute's application to personal injury suits arising out of automobile collisions can only add to the range of possible injustices.

The reason usually offered in support of the statute is that to permit survivors to testify would place in peril the estates of the dead. The remedy given by the statute is to close the mouths of all

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<sup>12</sup> 252 S.W.2d 477 (Tex. Civ. App. 1953).

<sup>13</sup> *Id.* at 478.

<sup>14</sup> *Id.* at 480.

<sup>15</sup> McCORMICK AND RAY, TEXAS LAW OF EVIDENCE 226, 241 (1st ed. 1937).

surviving parties who are interested on behalf of the estate or against it. It is believed that this remedy is too drastic and that it does more harm than good. Admitting that there is some danger, as there always is when a vital witness is unavailable, that injustice may be done by reason of false claims against the estate, what is the best remedy? The estates of the living are endangered by the present rule which bars from proof honest claims. It is surely not more important to save dead men's estates from false claims than to save living men's estates from loss by lack of proof.

The present statute seems open to all of the objections which were successfully urged against the interest disqualification in general. This incompetency has been severely condemned by leading writers. Thirty-five years ago a prominent member of the New York Bar said:

This restriction not infrequently works intolerable hardship in preventing the establishment of a meritorious claim. Furthermore, it has been enforced with the most rigorous literalness and has been the occasion of a labyrinth of subtle decisions. A long experience leads me to believe that the evils guarded against do not justify the retention of the rule. In the early development of our jurisprudence the testimony of all interested witnesses was excluded; but experience gradually led to the conclusion that the restriction should be relaxed and more reliance should be placed upon the efficacy of our process of investigating truth. Cross-examination, for instance, has been found to be well calculated to uncover a fraudulent scheme concocted by an interested party; and where that has failed, the scrutiny to which the testimony of a witness is subjected by the court and by the jury, has proven efficacious in discovering the truth, to say nothing of the power of circumstantial evidence to discredit the mere oral statement of an interested witness.<sup>16</sup>

In 1927 an experienced Texas trial lawyer made the following indictment of our statute:

(1) It prevents recovery of just debts from the estate of decedent debtors. If the number of honest men is greater than the number of dishonest men, the number of honest claims against decedents is likely to be greater than the number of dishonest claims. A statute which closes the mouth of honest and dishonest claimants alike does more harm than good, especially in view of the fact that the dishonest claimant, if allowed to testify, is likely to be defeated anyhow. (2) The

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<sup>16</sup> Taft, *Comments on Will Contests in New York*, 30 YALE L. J. 593, 605 (1921).

time consumed in applying and interpreting the statute is out of all proportion to the doubtful good it does. A statute so difficult of definite limitation should be one of undoubted desirability before it is justified. The statute cannot meet this test. (3) It has so befogged our decisions that the Courts and the Bar do not yet know the limitations of the rule.<sup>17</sup>

Wigmore, the greatest of our evidence scholars, uttered this scathing denunciation of the rule:

As a matter of policy, this survival of a part of the now discarded interest-disqualification 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.<sup>18</sup>

In addition to the injustices which it imposes, the Dead Man's Statute burdens the parties with uncertainties and appeals. For almost three-quarters of a century our courts have been struggling with the interpretation of this statute. With what result? A labyrinth of decisions which has brought confusion rather than clarity. If you will consult VERNON'S ANNOTATED CIVIL STATUTES (which does not include all the decisions) you will find some fifty columns of fine print annotations under Article 3716. At about eight points or paragraphs to a column this means about four hundred points decided. Some three-fifths of these have been decided since 1926.

What, then, is the solution? In Texas there is a Committee for the Improvement of the Law of Evidence, the membership of which includes the evidence teachers in the various law schools and distinguished lawyers and judges. This group has proposed several worth-while improvements in the law of evidence. In 1951 three of its proposals were enacted by the Legislature; i.e., Business Records Act, Official Records Act, and the Simultaneous Death Act.<sup>19</sup> In 1953 the Committee proposed a modification of Article 3716. The bill was reported favorably by the House Judiciary Committee after a thorough hearing, but it had a high number and it was never reached on the House Calendar.

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<sup>17</sup> Cheek, *Testimony as to Transactions with Decedents*, 5 TEXAS L. REV. 149, 172 (1927).

<sup>18</sup> WIGMORE, EVIDENCE §578 (3d ed. 1940).

<sup>19</sup> For a discussion of these statutes see Ray, *Three New Rules of Evidence*, 5 SW. L. J. 381 (1951).

The text of the suggested statute is as follows:

Section 1. In actions by or against executors or administrators, in which judgment may be rendered for or against them as such, and in all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent, the following provisions shall apply:

(a) Either party if otherwise qualified shall be competent to testify;

(b) If any party shall testify to any transaction with or statement by the decedent, any adverse party may prove the statements, oral or written, of the decedent, relevant to the matters in issue, as evidence of the facts stated;

(c) In passing on the credibility of the testimony of a party as to any transaction with or statement by the decedent, his interest shall be considered, and if his testimony though uncontradicted is not satisfactory and convincing, the court or jury shall not be bound to find in accordance therewith, and in a case tried to a jury the jury shall be instructed as provided in this paragraph.

Section 2. This act shall be applicable only to actions instituted after its effective date.

The proposed modification of Article 3716 would make all interested parties competent to testify in suits involving transactions with deceased persons, just as they are in all other suits. This means that the main resources for exposing false testimony available in all cases would be relied on here. These are, of course, the bringing of honest witnesses when they are available to counter the false with the true, and secondly, the test of cross-examination by which fraud and perjury can so often be exposed.

But the present bill provides additional safeguards.

First, if one of the parties testifies to a transaction with the deceased, this opens the door to the other parties who would usually be those defending the interest of the estate, to introduce evidence of statements made by the deceased in his lifetime, as evidence of the facts stated, thus making him a witness for himself from the grave. If someone claimed an oral contract or payment, what the deceased wrote or said about the matter would give his version to the court. This would often be an effective answer to false claims.

Second, it provides that the jury will be told that in passing



on the credibility of the testimony of an interested party they shall consider his interest in weighing his evidence.

Third, the judge will explain to the jury that if his testimony though uncontradicted is not satisfactory and convincing to them they shall not be bound to find in accordance therewith.

It is believed that these provisions open the door to honest witnesses now barred, and as to dishonest ones, provide reasonable protection. The average Texas jury will be inclined to view with great caution the testimony of a party-witness to a transaction with one now dead, when he is not supported by other witnesses. The provisions of this act insure that the jury's attention will be called to the need of such action.

The proposed statute omits any reference to suits involving guardians of infants and insane persons, which are included in the provisions of the existing Article 3716. This omission is made because of the relative infrequency with which questions about competency of parties arise in respect to actions by or against guardians, because of the need for simplicity, and because to omit them will permit parties in such suits to testify under Article 3714, which is probably the most satisfactory disposition.

In connection with such a proposal for reform it is well to look to the experience of other states. Nine states, including Louisiana, New Mexico, Virginia, Massachusetts, Connecticut, New Hampshire, Oregon, Rhode Island and Arizona, and one territory, Alaska, have abolished or never had the disqualification of parties to testify in these cases. In other words, they have rejected the restrictions of the Dead Man's Statute. There are three types of statutes. In New Mexico, Oregon and Virginia the testimony is received but no recovery is permitted in such cases on the party's testimony alone without some sort of corroboration. Connecticut, Virginia and Oregon also receive any extant writings or declarations of the decedent along with the testimony of the survivor. New Hampshire and Arizona exclude the testimony except where the court thinks that injustice may be done unless the testimony of the party be received. A thorough study of these interested survivor statutes and their practical workings was made by the Legal Research Committee of the Commonwealth Fund. Its report contains a masterly discussion of the subject and the need for

reform.<sup>20</sup> The committee concluded that both theory and experience justified the abolition of the rule disqualifying an interested survivor and the establishment of a rule making all relevant statements of the decedent admissible. They recommended the enactment of a statute to accomplish this result.<sup>21</sup>

Among the statutes abrogating the disqualification of the survivor of a transaction with a decedent the oldest and most approved is the Connecticut statute. It was studied by a committee which submitted a questionnaire to the profession in that state. The questionnaire asked the Connecticut lawyers and judges whether in their experience this rule caused injustice, or aided in the ascertainment of truth. Two hundred answers from persons having had trial experience with the statute gave the following percentages in favor of the statute: higher court judges, 89%; practitioners with some experience, 60%; practitioners having experience in six or more cases, 84%. In 1937-38 the American Bar Association Committee on the Improvement of the Law of Evidence (consisting of three judges, one practitioner, and Mr. Wigmore, chairman, and advised by a group of 65 lawyers from all the states) recommended the adoption of the Connecticut statute. The members were unanimous and the advisors voted 46 to 3 in favor of the statute. This statute with some changes and additions has served as the basis for the proposed modification of Article 3716.

It is believed that the proposed changes in Article 3716 have the great practical advantage of being easily understood and administered. Moreover, this writer feels that they will aid in the ascertainment of truth and at the same time provide sufficient

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<sup>20</sup> COMMONWEALTH FUND, THE LAW OF EVIDENCE—SOME PROPOSALS FOR ITS REFORM 22-25 (1927).

<sup>21</sup> The text of the proposed statute is:

"No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.

"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 in good faith and on decedent's personal knowledge."

For an account of recent legislative changes which tend to eliminate the statutory disqualification of the Dead Man's Statute see 23 Wis. L. Rev. 491, 495 (1948).

The Model Code of Evidence of the American Law Institute sweeps away all disqualifications of witnesses, including that of the survivor of a transaction with a decedent. Rule 101. For a discussion see McCormick, *The New Code of Evidence of the American Law Institute*, 20 TEXAS L. REV. 661 at 665 (1942).

safeguards without disqualifying the survivor. It is expected that proposed legislation will again be presented to the 1957 Legislature and it is hoped that the lawyers of Texas will actively support this needed improvement in our jurisprudence.

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