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The Montana Dead Man Statute

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A party to a civil action at common law was never competent as a witness.[1] The law, as Baron Gilbert stated "removes them from testimony, to prevent their sliding into perjury" because "(i)t is . . . easy for persons, who are prejudiced and prepossessed, to put false and unequal glosses upon what they give in evidence."[2] Such disqualification of the parties for interest was completely abolished in England in the mid-nineteenth century and has been done away with in the United States with but one exception.[3] That exception limits the testimony which an interested person may give in action prosecuted or defended by the representative of a decedent's estate and is embodied in the so-called Dead Man statutes.

Montana's Dead Man statute renders incompetent as witnesses:

> "Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, as to the facts of direct transactions or oral communications between the proposed witness and the de ceased, excepting when the executor or administrator first introduces evidence thereof, or when it appears to the court, that without the testimony of the witness, injustice will be done."[4]

The Montana Supreme Court in language reminiscent of Baron Gilbert's has stated that the statute has a twofold purpose: (1) "to prevent the living party, by reason of the death of his adversary, gaining an undue advantage over the administrator" and (2) "to remove the temptation for the commission of a party by perjury."[5]

APPLICATION OF THE STATUTE

"Against the estate" The Montana statute is at variance with the Dead Man statutes of other jurisdictions in that it is limited to actions against the estate.[6] The survivor is not to be disqualified as a witness when he defends an action brought by the estate.[7] The wisdom of such a limitation is questionable, assuming that the logic of the Dead Man rule is valid, because the survivor will be guided by self interest be he plaintiff or defendant. He is equally capable in either case to take advantage of the estate's personal representative.

"Persons in whose behalf an action or proceeding is prosecuted" The statute is clear in proscribing the testimony of parties or assignors

[1] 2 WIGMORE ON EVIDENCE, section 575 (3rd ed. 1940).

[2] GILBERT, EVIDENCE, 119 (1727).

[3] MCCORMACK ON EVIDENCE, section 65 (1954).

[4] R.C.M., section 93-701-3 subd. 3.

[5] Leffek v. Leudeman, 95 Mont. 457, 463, 27 P.2d 511 (1933).

[6] "'Most of the statutes . . . read [in substance]: 'In an action by or against the state' . . . .'" HALE, *The California "Dead Man's Statute,"* 9 So. Cal. L. Rev. 35, 42 (1935).

[7] The Dead Man statute "applies only to parties . . . proceedings against an executor or administrator . . . ." Wilcox v. Schissler, 55 Mont. 246, 257, 175 P. 889 (1918).

of parties. But who are the "persons in whose behalf . . . [the] action . . . is prosecuted" to whom the statute also applies? The Montana Supreme Court has considered the problem but once, holding, that the statute did not prohibit a wife from testifying in behalf of her plaintiff husband. The Court stated that the statute excluded only those persons having a "direct legal or pecuniary interest." The wife was a competent witness because she had "no direct right growing out of the marital relationship . . . [which would] attach to the money recovered. . . ."[8] California came to a similar conclusion in holding that a witness was competent unless his interest amounted to an existing property right.[9]

"Action or proceeding" A witness is not incompetent under the Dead Man statute unless his testimony is to be presented within the course of an action or proceeding. It is clear that a motion is not an action[10] and California stated that a motion is not to be considered a proceeding within the meaning of its Dead Man statute.[11]

A counterclaim or cross-claim against an estate is an action or proceeding within the meaning of the Montana statute.[12] Should a plaintiff, however, bring an action to which the estate lodges a counterclaim a curious paradox arises. Since the statute's provisions are limited to actions against the estate, the plaintiff may testify as to the estate's counterclaim but is incompetent to testify with regard to his own claim. What ruling, then, should be made on the admissibility of the plaintiff's testimony if the claim and counterclaim arise out of the same occurrence or transaction? Montana has not decided the question but may well be guided by the California ruling that should claim and counterclaim involve the same transaction, plaintiff's testimony is admissible but only to refute defendant's counterclaim; his testimony will not be considered to prove his own claim.[13] To ensure that plaintiff's testimony to the transaction is offered only in rebuttal, it will be admitted only after the estate has given evidence making out the counterclaim.[14]

"Claim or demand" A witness is not incompetent under the statute unless his testimony is to be presented to prove a claim or demand. The words claim or demand have been interpreted quite broadly. Both terms apply to "all sorts of causes of action against the estates of dead men, whether for money claims or for property which, but for the establishment of the claim or demand, would belong to the estate."[15] California,

[8]Novak v. Novak, 141 Mont. 312, 315, 377 P.2d 367 (1963).

[9]Dennis v. Brown, 62 Cal. App. 439, 216 P. 977 (1923). The California Dead Man statute contained the identical provision.

[10]State *ex rel.* McVay v. District Court, 126 Mont. 382, 251 P.2d 840 (1953).

[11]Lohman v. Lohman, 29 Cal.2d 144, 173 P.2d 657 (1946).

[12]*See* Walsh v. Kennedy, 115 Mont. 551, 147 P.2d 497 (1938); Langston v. Curry, 95 Mont. 57, 26 P.2d 160 (1933).

[13]George v. McManus, 27 Cal. App. 414, 150 P. 73 (1915).

[14]*Id.*

[15]Delmoe v. Long, 35 Mont. 139, 152, 88 P. 778 (1907).

in contrast, viewed the words claim or demand in its recently repealed Dead Man statute as encompassing only suits for the recovery of a money judgement.[16] The California Court held, accordingly, that actions to quiet title or to establish a trust do not involve claims or demands.[17] Montana has rejected this narrow interpretation[18] and properly so because the threat of perjury is not significantly affected by the nature of the particular action.

"Direct transactions or oral communications" It must be emphasized that a witness is not incompetent under the statute unless he seeks to testify to direct transactions or oral communications with the decedent. This limitation is a significant departure from the much broader original Montana Dead Man statute which proscribed testimony "to any matter of fact occurring before the death of . . . [decedent]."[19]

Direct transactions within the meaning of the Montana statute include contracts, business agreements, legal services, and even the witnessing of a homicide perpetrated by deceased.[20] The Court has yet to decide, however, the controversial question of whether an automobile accident is a transaction within the meaning of the Dead Man statute. The majority of courts hold in the affirmative, thereby rendering the survivor incompetent to testify to the circumstances of the accident.[21] The minority, interpreting Dead Man statutes applicable only to "personal" transactions, have rejected this construction.[22] Hence, the Montana Court, when confronted with the question, will have to determine whether the term "direct transaction" includes "accidental physical interaction[s]" as well as "subjective, mental, planned interaction[s]."[23] Should the Court follow the precedent of *Anderson v. Wirkman*[24] in which the witnessing of a homicide was deemed a "direct transaction," it may well favor the broader construction. In view of the policy underlying the Dead Man statute, however, the term "direct transaction" would seem intended "to include only personal dealings of a type which are unlikely to be witnessed by disinterested observers and concerning which the estate would be hard pressed to present testimony in explanation or rebuttal."[25] Automobile accidents should not be termed "direct transactions" in this sense.

[16]Estate of McCausland, 52 Cal. 568 (1878).

[17]Poulsen v. Stanley, 122 Cal. 655, 55 P. 605 (1898).

[18]*Delmoe v. Long, supra,* note 15.

[19]The original Dead Man statute was amended by Section 1, Ch. 66, L. 1909.

[20]*See* Cox v. Williamson, 124 Mont. 512, 227 P.2d 614 (1951); Pincus v. Pincus' Estate, 95 Mont. 375, 26 P.2d 986 (1933); Harwood v. Scott, 57 Mont. 83, 186 P. 693 (1920); Anderson v. Wirkman, 67 Mont. 176, 215 P. 224 (1923).

[21]Maciejzak v. Bartell, 187 Wash. 113, 60 P.2d 31 (1931); In re Mueller's Estate, 166 Neb. 268, 89 N.W.2d 268 (1958).

[22]Turbot v. Repp, 247 Iowa 69, 72 N.W.2d 565 (1955); Shaney v. Blizzard, 209 Md. 304, 121 A.2d 218 (1956).

[23]This language which so aptly differentiates the two types of transactions is taken from 16 Okla. L. Rev. 105, 107 (1963).

[24]*Supra,* note 20.

[25]59 Colum. L. Rev. 673, 675 (1959).

Exceptions There are two exceptions to the general prohibition of the statute. First, the plaintiff may testify to transactions with decedent if the decedent's personal representative introduces evidence of that transaction.[26] Second, the trial court may in its discretion permit the plaintiff to testify if without such testimony injustice will be done. While the operation of the first exception is clear, that of the second exception is not, and the discussion will be limited to the latter.

Under what circumstances, can the trial court properly determine that injustice will be done if the plaintiff is not permitted to testify to his transaction with decedent? The early cases held that plaintiff was a competent witness if, without his testimony, he would be unable to make out a prima facie case.[27] In *Roy v. King's Estate,*[28] for example, the trial court sustained defendant's objection that plaintiff was incompetent to testify to his transaction with decedent. The Supreme Court affirmed because "it is lodged in the sound discretion of the trial court to determine in each case . . . whether the testimony is necessary to enable the plaintiff to make out a prima facie case, and thus prevent injustice . . . [T]he court did not abuse its discretion . . . for there was sufficient evidence to make out a prima facie case without plaintiff's testimony." Operation of the rule is well exemplified by *Anderson v. Wirkman.*[29] There one Jacob Maki killed plaintiff's husband and committed suicide. Plaintiff, the only witness to the killing, sued Maki's estate for wrongful death. The Supreme Court held that plaintiff was properly allowed to testify because "her cause of action would have been defeated by excluding the testimony of the only witness who could detail the facts and circumstances tending to prove that the killing was wrongful."

The later cases rejected this early rule and substituted another—that plaintiff would be allowed to testify only if he first produced foundation evidence which showed that his claim was in all probability meritorious.[30] Hence, in *Langston v. Curry*[31] the Court affirmed a ruling rejecting plaintiff's testimony because the evidence at the time of objection to plaintiff's testimony could be construed to be insufficient to show that plaintiff "had in all probability . . . a meritorious cause of action, and in the absence of such a foundation, this court is unable to say that the trial court abused its discretion . . .". The same rule was

[26] "Here there was no testimony introduced in behalf of the executor . . . . Therefore the first exception of the statute is not involved." *Cox v. Williamson, supra,* note 20.

[27] Rowe v. Eggum, 107 Mont. 378, 87 P.2d 189 (1938); Wunderlich v. Holt, 86 Mont. 260, 283 P. 423 (1929); *Anderson v. Wirkman, supra,* note 20; Roy v. King's Estate, 55 Mont. 567, 179 P. 821 (1919).

[28] *Id.* 55 Mont. at 573.

[29] *Supra,* note 20, at 180.

[30] *Novak v. Novak, supra,* note 8; Johnson v. Mammoth Load & Uranium Exploration Corp., 136 Mont. 420, 348 P.2d 267 (1960); Mowbray v. Mowbray, 131 Mont. 580, 312 P.2d 995 (1957); *Langston v. Curry, supra,* note 12.

[31] *Supra,* note 12, at 74.

stated even more clearly in the recent case of *Johnson v. Mammoth Load & Uranium Exploration Corp.*[32] as follows: "[B]efore a witness, who is declared to be incompetent by this statute will be allowed to testify to prevent an injustice, a foundation must be laid which shows that in all probability the proponent has a meritorious cause of action."

One question then remains: when will the Montana Supreme Court find that plaintiff has presented a sufficient foundation to show that his claim is in all probability meritorious? The Court "has never laid down a well defined line of demarcation between a sufficient and insufficient foundation."[33] The foundation evidence must be corroborative of the offered testimony of the witness.[34] It need not, however, amount to a prima facie case.[35] This author submits, that the Supreme Court will not reverse a ruling allowing plaintiff's testimony, provided that there is some corroborative foundation evidence which is independent of plaintiff's own testimony. The author further submits that the Court will not reverse a ruling disallowing plaintiff's testimony no matter how strong the foundation evidence appears to be. In other words, the Supreme Court allows the trial court almost absolute discretion because it has "the advantage of observing the witnesses during their testimony and [is] in a better position . . . to determine whether or not injustice would result if the plaintiff were not permitted to testify."[36] Hence, a foundation that appears weak will be found sufficient if the trial court permitted the plaintiff to testify.[37] For example in *Novak v. Novak,*[38] the Supreme Court refused to reverse the trial court's ruling allowing plaintiff's testimony, although the only foundation was that of plaintiff's wife who testified to conversations she had overheard between her husband and decedent. A foundation that appears adequate will be found insufficient if the trial court did not permit the plaintiff to testify.[39] An example is *Cox v. Williamson,*[40] in which plaintiff sought specific performance of an alleged contract which bound decedent to leave $5,000 to plaintiff, if plaintiff would care for him during his lifetime. Disinterested witnesses testified that plaintiff worked for decedent for a minimal salary and that decedent had often stated that he would leave plaintiff $5,000. The Supreme Court refused to reverse the trial court's ruling that plaintiff was an incompetent witness. Should the trial court find such testimony of decedent's declarations against interest

[32] *Supra,* note 30, at 423.

[33] Sharp v. Sharp, 115 Mont. 35, 39, 139 P.2d 235 (1943).

[34] *Johnson v. Mammoth Load & Uranium Exploration Corp., supra,* note 30. The Court held that the trial court erred in admitting plaintiff's testimony because there was "absolutely no evidence, independent of the testimony of the plaintiff, which corroborate[d] the existence of an express contract . . . ."

[35] *Sharp v. Sharp, supra,* note 33; *Rowe v. Eggum, supra,* note 27.

[36] *Novak v. Novak, supra,* note 8, at 316.

[37] *Id.*

[38] *Supra,* note 8.

[39] *See Cox v. Williamson, supra,* note 20; *Mowbray v. Mowbray, supra,* note 30.

[40] *Supra,* note 20.

an insufficient foundation, the Supreme Court will invariably deprecate the quality of such evidence.[41] The Court will readily affirm, however, if the trial court finds such declarations a sufficient foundation.[42] Hence, it would appear that the trial court abuses its discretion only should it permit the plaintiff to testify without first presenting any foundation evidence whatsoever.[43]

Waiver A plaintiff's incompetency under the Dead Man statute may be waived in two ways. There is a waiver if the executor or administrator introduces evidence of plaintiff's direct transactions or oral communications with decedent.[44] There is also a waiver if the personal representative makes no objection to plaintiff's testimony.[45] In such a case the Supreme Court will presume that the trial court properly exercised its discretion in allowing the testimony.[46]

CONCLUSION

The Dead Man rule "is deplorable in every respect; for it is based on a fallicious and exploded principle, it leads to as much or more false decision than it prevent . . .".[47] This statement aptly summarizes the prevailing opinion toward Dead Man statutes. It is felt that these statutes unjustly penalize the living for the benefit of the dead on the unfounded ground that most men will be corrupted by their interest.[48] In the majority of instances, however, courts feel that "the witnesses are honest, however much interested . . .".[49] Therefore, the statutes defeat honest claims when the survivor has no witness other than himself.

[41] *Cox v. Williamson, supra,* note 30; *Langston v. Currie, supra,* note 12. The Arizona Court has held declarations against interest an insufficient foundation for the admission of testimony by a party to the action as to a transaction between himself and decedent. Johnson v. Moilanen, 23 Ariz. 86, 201 P. 634 (1921).

[42] *See Novak v. Novak, supra,* note 8; Ahlquist v. Pinski, 120 Mont. 335, 185 P.2d 499 (1947); *cf. Sharp v. Sharp, supra,* note 33.

[43] "This is precisely the kind of case where . . . the statute should prevent the plaintiff from testifying . . . . There is absolutely no foundation . . . ." *Johnson v. Mammoth Load & Uranium Exploration Corp., supra,* note 30; *See* Bauer v. Monroe, 117 Mont. 306, 158 P.2d 485 (1945).

[44] *Anderson v. Wirkman, supra,* note 20; The plaintiff is an incompetent witness "unless the defendant waives the incompetency, which he may do, as provided in the first exception . . . ." *Roy v. King's Estate, supra,* note 27.

[45] *Walsh v. Kennedy, supra,* note 12.

[46] [N]o . . . objection was made to the testimony . . . either at the trial or upon appeal, and we cannot be the trial court in error concerning it. Presumably the court's discretion was properly exercised . . . ." *Walsh v. Kennedy, supra,* note 12.

[47] 2 WIGMORE ON EVIDENCE, section 578 (3rd ed. 1940).

[48] *Id.*; MCCORMACK ON EVIDENCE, section 65 (1964). "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 ficticious claims established if all enactments were swept away and all persons rendered competent witnesses." St. John v. Lofland, 5 N.D. 140, 64 N.W. 930 (1895).

[49] MORGAN and others, THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM, 24 (1927): "To assume that . . . many false claims would be established by perjury is to place an extremely low estimate on human nature, and a very high estimate human ingenuity and adroitness." *St. John v. Lofland, supra,* note 48.

Moreover, the statutes work a worse penalty on the honest than on the dishonest survivor because "[o]ne who would not stick at perjury will hardly hesitate at suborning a third person, who would not be disqualified, to swear to the false story."[50] Most commentators believe the jury competent to give the surviver's testimony the weight it deserves.[51] Skillful cross-examination, moreover, will foil the fraudulent claimant.[52]

The Montana Dead Man statute is not exempt from such criticism. The statute, as interpreted, penalizes the living at the expense of the dead. The honest plaintiff may testify only after the presentation of evidence showing that his claim is in all probability meritorious. His claim is, therefore, defeated if there was no witness to the transaction. The injustice of the rule is clearly illustrated by applying it to the facts of *Anderson v. Wirkman*.[53] There decedent killed plaintiff's husband and committed suicide. Plaintiff, the only witness to the killing, sued decedent's estate for wrongful death. Had the court then required foundation evidence showing the killing wrongful, plaintiff could not have recovered for she was the only witness. Happily the case was an early one and the old rule was in force—plaintiff was allowed to testify because she could not otherwise have proved a prima facie case.[54]

Legislatures in several states, recognizing the inadequacy of the Dead Man rule, have attempted to solve the problem through statutes based on an American Bar Association recommendation. That recommendation would remove the disqualification of the survivor as a witness and permit the introduction of declarations of decedent, on a finding by the trial judge that they were made in good faith and on decedent's personal knowledge.[56] The exception from the hearsay rule compensates the decedent's estate for the disadvantage of the survivor's competency. This solution has been greatly praised[51] and appears clearly preferable to Montana's present statute.

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[50]McCORMACK ON EVIDENCE, section 65 (1954).

[51]TAFT, COMMENTS ON WILL CONTESTS IN NEW YORK, 30 Yale L.J. 593, 605, (1921); McCORMACK ON EVIDENCE, section 65 (1954).

[52]*Id.*

[53]*Supra*, note 20.

[54]The old rule, however, has not been free from criticism: "In Montana . . . the decisions suggest the curious restriction that interested testimony is admissible only when needed to make a case for the jury. Lack of corroboration can hardly be supposed to make the survivor more creditable, and if this rule is based on necessity, the mere existence of a prima facie case should not exclude evidence which may be essential to secure a verdict." 46 Harv. L. Rev. 834, 836 (1933).

[55]California has recently adopted a statute based on this recommendation. See West's Ann. Cal. Evid. Code, section 1261.

[56](1938) 63 A.B.A. REP. 597, Appendix, Proposal No. 1.

[57]LADD, THE DEAD MAN STATUTE: SOME FURTHER OBSERVATIONS AND A LEGISLATIVE PROPOSAL, 26 Iowa L. Rev. 207 (1940), at 239; McCORMACK ON EVIDENCE, section 65 (1954).