NOTES

IOWA'S DEAD MAN RULE: THE SPECTRE OF INEQUITY

I. INTRODUCTION

At common law all persons having a direct and material interest in the outcome of a suit were excluded as witnesses.[1] This rule was based on the assumption that persons placed in a position of possible gain by the verdict would speak falsely, that jurors would be unable to discover the truth and that total exclusion of such person's testimony was the best way to protect the parties from this temptation.[2]

On August 22, 1843, England passed "Lord Denman's Act"[3] which abolished this common law rule of disqualification by interest. Eight years later the prohibition of the testimony of parties to a suit was also removed.[4] The United States soon followed England's example. In 1864, an act of Congress[5] changed the common law rule so that no longer were parties or persons testifying in federal court to be excluded as witnesses merely because of the extent of their interest in the outcome of the suit.

During this period the states also began to revise their rules of evidence.[6] The history of the revisions of the Iowa Code is typical of the pattern. When first enacted, the Iowa Code embodied the common law rule which provided that all interested persons were incompetent to testify unless called to the stand for that purpose by the opposing party.[7] In the revised code of 1860 this rule was repealed.[8] Thus, neither the extent of one's interest in the litigation, nor the fact that he was a party would work to exclude such an individual from testifying. One exception to this rule was preserved, however, and is now commonly referred to as the dead man rule.[9] In 1873 this statute was substan-

1. 2 WIGMORE, EVIDENCE §§ 575, 576 (3d ed. 1940).

2. *Id. See also* Benson v. United States, 146 U.S. 325, 336 (1892), where the court stated that "[t]he theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors."

3. 1843, 6 & 7 Vict., c. 85.

4. Lord Brougham's Act, 1851, 14 & 15 Vict., c. 99.

5. Act of July 2, 1864, 13 Stat. 351.

6. 5 JONES, EVIDENCE § 2222 (2d ed. 1926).

7. "A person who has a direct, certain, legal interest in the suit is not a competent witness unless called on for that purpose by the opposing party . . . ." IOWA CODE § 2390 (1851).

8. The pertinent statute, IOWA CODE § 3980 (1860), stated that "[n]o person offered as a witness in any action or proceeding in any court, or before any officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding or because he is a party thereto except as provided in this chapter."

9. The dead man statute of 1860 provided:

> No person shall be allowed to testify under the provision of section 3980, where the adverse party is the executor of a deceased person, when the facts to be proved transpired before the death of such deceased person, and nothing in said section shall in

tially revised,[10] but since that time its language[11] and application have remained virtually unchanged:

> No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, mentally ill, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic.[12]

However, Iowa Code, section 622.5, provides for a waiver of a party's protection under the dead man statute:

> This prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or guardian shall be examined on his own behalf, or as to which the testimony of such deceased or mentally ill person or lunatic shall be given in evidence.[13]

Until the code of 1924, sections 622.4 and 622.5 had been codified as

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any manner affect the laws now existing in relation to the settlement of estates of deceased persons, infants, or persons of unsound mind, or the attestation of any instrument required to be attested.

IOWA CODE § 3982 (1860).

10. The revised version, codified in the Iowa Code, 1873, was taken from the New York Code of Civil Procedure as amended in 1869. *See Report of Commissioners to Revise the Statutes of the State of Iowa*, 137 (1871) [hereinafter cited as *Report of Commissioners*]. The revised version provided:

> No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane, or lunatic; against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or guardian, shall be examined on his own behalf, or as to which the testimony of such deceased or insane person or lunatic be given in evidence.

IOWA CODE § 3639 (1873).

11. In 1959 the Iowa legislature decided to revamp the entire Code with respect to mental terminology. The statute was amended by substituting the word "mentally ill" for the word "insane" in the seventh line of the statute. However, it apparently neglected to change this terminology in the last line of the statute.

12. IOWA CODE § 622.4 (1977).

13. IOWA CODE § 622.5 (1977).

one.[14] Thus in determining the application of the dead man statute, the courts will construe it in light of its statutory exception.[15]

Although it has been held that one's right to testify on his own behalf is fundamental,[16] the power of the Iowa legislature to restrict this right has long been conclusively settled. In *Donnel v. Branden*,[17] a defendant in a mortgage foreclosure suit brought by the administrator of a decedent's estate challenged Iowa's dead man statute as contrary to article I, section 4 of the Iowa Constitution of 1880. This constitutional provision states in part that "[a]ny party to any judiciary proceeding shall have the right to use as witness, or take testimony of any other person not disqualified because of interest, who may be cognizant of any fact material to the case, and parties may be witnesses as provided by law."[18] The court held that this section did not limit the legislature's power to declare what constituted an "interest" sufficient to operate to disqualify a witness from testifying. Accordingly, Iowa's dead man statute was upheld.[19]

The great majority of states have retained similar statutes despite the widespread criticism which the rule has invoked throughout the decades.[20] It is obvious that the dishonest litigant will not be deterred by the dead man rule. To establish his claim a dishonest litigant may be willing to commit perjury by contriving testimony which does not fall within the statutory exclusion. Moreover, this rule will frequently prejudice the honest litigant. He will be disposed to speak truthfully, but where the truth can be established only by testimony prohibited by the rule, he may be unable to prove his claim.

The primary purposes of this Note are to aid counsel in recognizing the situations in which this statute is applicable and coping with the barriers it

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14. *See* O'Brien v. Biegger, 233 Iowa 1179, 1209, 11 N.W.2d 412, 426 (1943).

15. Estate of Dieleman v. Department of Revenue, 222 N.W.2d 459, 461 (Iowa 1974).

16. *In re* Waite's Guardianship, 14 Cal. 2d 727, 97 P.2d 238 (1939). *Contra*, State v. Rider, 194 Kan. 398, 399 P.2d 564 (1965).

17. 70 Iowa 551, 30 N.W. 777 (1886).

18. IOWA CONST., art. I, § 4 (1880).

19. 70 Iowa at 554, 30 N.W. at 780.

20. *See* St. John v. Lofland, 5 N.D. 140, 64 N.W. 930 (1895); 2 WIGMORE, EVIDENCE § 578 (1904); Report of Committee on Administration and Distribution of Deceased's Estates, *Dead Man Statutes: Their Purposes, Effect and Future*, 7 REAL PROPERTY PROB. & TRUST J. 343 (1972); Carpenter, *The Dead Man's Statute in Pennsylvania*, 32 TEMP. L.Q. 399 (1959); Chadbourn, *History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization*, 4 U.C.L.A. L. REV. 175 (1956); Ladd, *The Dead Man's Statute — Some Further Observations and a Legislative Proposal*, 26 IOWA L. REV. 207 (1941); McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A.J. 507 (1938); Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89 (1963); Ray, *The Dead Man's Statute — A Relic of the Past*, 10 SW. L.J. 390 (1956); Schulman, *Repeal the Dead Man's Evidence Act*, 25 PA. B.A.Q. 183 (1964); Comment, *The Effect of the Dead Man's Statute on the Testimony of a Party-Witness*, 21 MD. L. REV. 60 (1960); Comment, *The Case Against Oregon's Dead Man's Statute*, 49 ORE. L. REV. 50 (1969); Note, *Revaluation of the Dead Man's Statute*, 69 W. VA. L. REV. 327 (1967).

may impose. It is hoped that this analysis will demonstrate both the futility of the rule and the undue problems and injustice it may cause in litigation.[21]

II. Practical Application

A. *Witnesses Affected*

Iowa's dead man statute is a matter of evidentiary rather than substantive law.[22] Therefore, unless an objection is made, testimony otherwise inadmissible because of the Dead Man Statute will be made part of the record.[23] Unlike other competency statutes, however, a witness is precluded from testifying to particular facts not because of his inherent inability to tell the truth, but because the opposing party is probably incapable of rebutting.

Since it is incumbent on the protected party to invoke the statutory protection where it would aid his cause, counsel for a party desiring to elicit testimony from an affected witness should not refrain from placing such a witness on the stand. The above advice is especially appropriate since the Iowa courts' application of this rule to a given case has not always been clearly articulated. Thus, withholding witnesses having knowledge vital to one's case is a real risk. An erroneous determination that a witness is subject to the rule and consequent failure to place him on the stand may result in manifest injustice to one's client.[24]

B. *Party Protected*

A witness will be subject to the dead man statute where two preliminary requirements are met:

1. The witness is:
   a. a party to the suit,[25]
   b. a person who stands to lose or gain by direct operation of the judgment,[26]

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21. Although section 622.4 also applies to actions concerning testimony against the mentally ill, due to space limitations and the infrequent litigation in this area, this Note will focus on actions involving testimony against or on behalf of the estate of a decedent.

22. Connell v. Hays, 255 Iowa 261, 122 N.W.2d 341 (1963).

23. *See* Wagg v. Mickelwait, 165 N.W.2d 829 (Iowa 1969) (testimony in violation of the dead man statute will be received where the objection is brought up after the evidence is admitted, the delay being inexcusable).

24. *See, e.g.*, Klosterboer v. Engelkes, 255 Iowa 1076, 125 N.W.2d 115 (1963). In *Klosterboer*, the plaintiffs' claim was dismissed because, in erroneously assuming they were precluded from doing so under the dead man statute, they failed to testify to a transaction with the deceased which was essential to their claim. The court inferred that even if the plaintiffs had been subject to the rule, they should have attempted to present such testimony anyway, since "there was no assurance defendants would object to [the witnesses'] competency . . ., under the dead man statute, to testify upon the point under consideration." *Id.* at 1084, 125 N.W.2d at 119.

25. Ehlinger v. Ehlinger, 253 Iowa 187, 111 N.W.2d 656 (1961) (party-witness held incompetent).

26. Solbrack v. Fosselman, 204 N.W.2d 891 (Iowa 1973). In *Solbrack* an heir to the estate

c. a person through whom a party or interested person derived his interest,[27] or

d. a spouse of

i. a party to the suit,[28]

ii. a person who stands to lose or gain by direct operation of the judgment,[29]

iii. a person through whom a party or interested person received his interest,[30] *and*

2. the witness is called to testify against a party claiming to be the decedent's:

a. executor,[31]

b. administrator,[32]

c. heir at law,[33]

d. next of kin,[34]

e. assignee,[35]

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was precluded under section 622.4 from testifying against the executor because he had an interest in the outcome of the litigation. At first blush this decision appears illogical since the heir had attempted to testify as to matters tending to establish the claimant's claim, thus reducing the amount which would pass to the witness. Since such testimony was against his own interests, it would be assumed that he had told the truth. The witness, though, had siblings who were also entitled to a share in the estate. The court apparently felt that the witness had an adverse interest in seeing the shares of the others reduced, and concluded that these others should not be forced to give up their protection by his testimony. *But see* Maasdam v. Maasdam's Estate, 237 Iowa 877, 24 N.W.2d 316 (1946) (testimony of legatee against decedent's estate tending to establish plaintiff's claim for services admitted even though he was to receive $5 under the will and the testator's heirs also had an interest therein).

27. Clinton Sav. Bank v. Grohe, 115 Iowa 292, 88 N.W. 357 (1901) (mortgagor held incompetent to testify to a mistake in the terms of a first mortgage in an action against the executor of the decedent, who held a second mortgage).

28. Thompson's Estate v. O'Tool, 175 N.W.2d 598 (Iowa 1970) (defendant's wife held incompetent to testify against deceased landlord's estate with regard to conversations she might have had with the deceased regarding payment of rent).

29. *See* Schmidt v. Schurke, 238 Iowa 121, 25 N.W.2d 876 (1947) (spouse held competent to testify where husband, although having an interest in deceased's estate, had no direct interest in the outcome of the case being litigated).

30. No Iowa cases have been found arising under this particular section of the rule.

31. *In re* Kerndt's Estate, 251 Iowa 963, 103 N.W.2d 733 (1960) (daughter of deceased held incompetent to testify against the executor of the decedent's estate concerning her rendition of services).

32. Nelson v. Nelson, 245 Iowa 1225, 65 N.W.2d 154 (1954) (defendant held incompetent to testify against the administrator of the decedent's estate about an oral contract made between himself and the deceased).

33. *See* Klosterboer v. Engelkes, 255 Iowa 1076, 125 N.W.2d 115 (1963) (although opposing parties were heirs of the deceased, they were not entitled to protection where they claimed not as heirs, but as grantees of the decedent).

34. Boyles v. Cora, 232 Iowa 822, 6 N.W.2d 401 (1942) (grantees held incompetent to testify against decedent's spouse since she was deemed decedent's next of kin).

35. McAleer v. McNamara, 140 Iowa 112, 117 N.W. 1122 (1908) (protection may be invoked only where the objector proves his claim is based on as assignment in fact).

f. legatee,[35]
g. devisee,[37] or
h. survivor.[38]

Such a witness, however, will not be entirely incompetent to testify. The affected witness will only be prohibited from testifying to any personal "transactions" or "communications" which have occurred between this witness and the decedent.

Since counsel may not know precisely what questions will be asked of an affected witness, or the manner in which the witness will respond to proper questioning, the chance that prohibited testimony may be inadvertently elicited is great.[39] Therefore, the competency of an adverse witness satisfying the two preliminary requisites above should be objected to as soon as he is sworn in.[40] This places the examiner on notice that counsel intends to avail himself of the dead man rule protection. Thereafter, whenever a question is propounded or an answer made concerning a "transaction" or "communication" between this witness and the deceased, counsel should again voice his objection.[41]

Furthermore, the "continuing objection rule"[42] is inapplicable here. Since each witness must be individually considered in determining whether or not protection under the rule may be invoked, the court will not assume that objections to the competency of subsequent witnesses are intended unless expressly made.[43] Additionally, the dead man statute is directed toward the competency of the witness rather than the admissibility of his testimony.[44] That is, the same information which would be objectionable when

36. Bell v. Pierschbacher, 245 Iowa 436, 62 N.W.2d 784 (1954) (defendants claiming as legatees and devisees of decedent's estate are entitled to protection under the statute).

37. *Id.*

38. *In re* Lender's Estate, 247 Iowa 1205, 78 N.W.2d 536 (1956) (joint owner with decedent of bank account afforded protection as "survivor"); O'Brien v. Biegger, 233 Iowa 1179, 11 N.W.2d 412 (1943) (administrator of estate held incompetent to testify as to personal communication with decedent against the defendant, decedent's spouse who claimed as survivor). *But see* Boyles v. Cora, 232 Iowa 822, 6 N.W.2d 401 (1942) (spouse does not come within the term "survivor" under the dead man statute, but rather under "next of kin").

39. *See, e.g.*, Avery v. Lillie, 260 Iowa 10, 18, 148 N.W.2d 474, 478 (1967) (defendant answered a question in an unresponsive manner, the subject matter of which would ordinarily have been barred under the dead man statute).

40. Solbrack v. Fosselman, 204 N.W.2d 891 (Iowa 1973); Adler v. Abker, 251 Iowa 915, 103 N.W.2d 761 (1960); *In re* Kempthorne's Estate, 188 Iowa 70, 175 N.W. 857 (1920).

41. Adler v. Abker, 251 Iowa 915, 103 N.W.2d 761 (1960). Note, however, that the more contemporary courts may not require that this additional objection be made. *See* Solbrack v. Fosselman, 204 N.W.2d 891 (Iowa 1973)(criticizing the *Adler* opinion). *See also* Ladd, *supra* note 20, at 208-15, for a more thorough analysis of the proper form for objection.

42. The "continuing objection rule" provides that where an objection is properly raised and overruled, the court will assume that counsel objects to all evidence subsequently offered of the same class, without requiring repeated objections. 1 WIGMORE, *supra* note 1, at § 18.

43. Solbrack v. Fosselman, 204 N.W.2d 891 (Iowa 1973).

44. *Id.*; Connell v. Hays, 255 Iowa 261, 122 N.W.2d 341 (1963); *In re* Scholbrock's Estate, 224 Iowa 593, 277 N.W. 5 (1938).

received from one subject to the rule will be properly admitted when coming from one not subject to the rule. Therefore, unless the court's attention is specifically directed to the *competency* of each affected witness, an objection based on the dead man statute will be overruled.[45]

Finally, it should be noted that because the rule is directed toward competency rather than admissibility, often the facts to be proven by testimony precluded under the rule can be established by other corroborating evidence.[46] Counsel for the protected party, aware of any such corroborating evidence, may thus wish to refrain from objecting to the opposing witness' competency where such an objection would only be likely to cause unnecessary delay in the proceedings, create in the minds of the jury the belief that the client has something to hide or aggravate the trial judge.

III. Legal Application

A. *Preface*

The Iowa courts have consistently held that the dead man statute is to be strictly construed.[47] Therefore, unless all three elements are met *i.e.*, witness' status, opponent's status and subject matter of the testimony, the exclusionary rule will not be applied.[48] The party asserting a right to protection has the burden of proving all of the above elements.[49]

It should be noted though, that the dead man rule is applicable only in civil actions.[50] To impose this restriction upon a defendant in a criminal trial

45. *See* Feltes v. Tobin, 187 Iowa 11, 171 N.W. 739 (1919) (error to exclude testimony where the objection challenged its admissibility, rather than the witness' competency).

46. *See* Brierly v. Dunnick, 240 Iowa 1359, 39 N.W.2d 645 (1949) (testimony as to a conversation with the deceased, although erroneously admitted, did not warrant reversal where sufficient corroborating evidence established the same fact); *In re* Champion's Estate, 190 Iowa 451, 180 N.W. 174 (1920) (incompetent witness' testimony, erroneously admitted, was not prejudicial since the decedent's will stated the same fact). *See also In re* Willesen's Estate, 251 Iowa 1363, 105 N.W.2d 640 (1960) (erroneously excluded testimony held not prejudicial since proponents prevailed).

47. *See* note 114 *infra*.

48. *See, e.g.*, Krimlofski v. United States, 190 F. Supp. 734 (N.D. Iowa 1961) (plaintiff held competent to testify as to a personal "communication" with deceased, since action was one against decedent's insurance company rather than against his estate); Nasco Land Dev. Co. v. Osborne, 210 N.W.2d 638 (Iowa 1973) (witness allowed to testify as to a conversation between himself and the deceased in an action against decedent's estate where his interest in the outcome of the suit was not established); Carlson v. Bankers Trust Co., 242 Iowa 1207, 50 N.W.2d 1 (1951) (husband of plaintiff held competent to testify against decedent's estate where the subject matter of his testimony regarded a conversation between the plaintiff and the deceased, rather than between the witness and the deceased); O'Dell v. O'Dell, 238 Iowa 434, 26 N.W.2d 401 (1947) (plaintiff held competent to testify against decedent's estate where the testimony was not a "personal transaction" within the meaning of the statute).

49. Sisson v. Johnson, 187 N.W.2d 745 (Iowa 1971); *In re* Fili's Estate, 241 Iowa 61, 40 N.W.2d 286 (1949).

50. State v. Fowler, 248 N.W.2d 511 (Iowa 1976).

would effectively deny him his fundamental right to present witnesses to establish a defense.[51]

B. Witnesses Affected

1. *Parties*

Iowa Code, section 622.4, renders all parties to the suit incompetent to testify to the prohibited subject matter against an opponent protected by the statute. This rule applies even where the party's interest in the outcome of the suit is nominal.[52]

Few persons having little or no personal stake in the outcome of the litigation will commit perjury. In such situations, therefore, this rule serves only to create an unnecessary hinderance to the speedy and just determination of a suit. The Iowa Courts have formulated a rule to determine what constitutes sufficient interest to preclude a non-party witness from giving the prohibited testimony.[53] There is no reason why this rule cannot be applied to parties as well.

2. *Interested Persons*

A witness will be incompetent to testify to personal "transactions" or "communications" between the witness and the deceased if the witness has a present, certain and vested interest in the litigation.[54] A simple application of this rule is illustrated by *Hanke v. Bjorgo.*[55] In *Hanke,* the plaintiff claimed his mother consented to an adoption by Bluhm in consideration for Bluhm's promise to die intestate. His mother died prior to Bluhm, and Bluhm subsequently made a will. When Bluhm died, the plaintiff brought suit against his estate to enforce this oral contract. He claimed that had Bluhm kept his promise, plaintiff would have been entitled to Bluhm's estate as his mother's heir. The widower of plaintiff's mother testified to the promise Bluhm had made. The defendant objected to this testimony pursuant to the dead man statute, contending that this witness had a dower interest in the estate. The court rejected this argument. It explained that the state dower statute limits a husband's one-third entitlement in his wife's estate to that property owned by the deceased during her life. Since the witness' wife died prior to Bluhm, even if Bluhm had kept his promise his estate would not have vested in the witness' wife during her life.[56] Therefore, because the witness had acquired no dower interest in Bluhm's estate, he had no pecuniary interest in the outcome of the litigation, and, as such, was competent to testify.

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51. *See* Washington v. Texas, 388 U.S. 14 (1967).

52. *In re* Conner's Estate, 240 Iowa 479, 36 N.W.2d 833 (1949); Bohle v. Brooks, 225 Iowa 980, 282 N.W. 351 (1938); Clinton Sav. Bank v. Grohe, 115 Iowa 292, 88 N.W. 357 (1901).

53. *See* section III (B)(2) *infra.*

54. Sisson v. Johnson, 187 N.W.2d 745 (Iowa 1971).

55. 260 Iowa 1109, 152 N.W.2d 262 (1967).

56. *Id.* at 1114, 152 N.W.2d at 265.

The exclusion becomes operative, however, only where the witness' interest in the estate is one which arises out of the particular action being litigated. Thus, in *Sisson v. Johnson,*[57] the plaintiff claimed that the decedent owed him twelve thousand dollars, part of which had been used in the decedent's business. The plaintiff's witnesses, who had also filed claims as creditors against the decedent's estate, testified to "transactions" entered into between themselves and the deceased which tended to establish the plaintiff's claim. The administrator objected to this testimony under the dead man rule because these witnesses had an interest in the decedent's estate. The court held that since their interests in the estate had no direct bearing on the *instant claim* being litigated they were competent to testify. That the estate would be reduced by judgment in favor of the plaintiff, incidentally providing a lesser amount for these other creditors, was held not to be the type of interest which would preclude their testimonies under the rule.[58] Therefore, a witness will be incompetent to testify to prohibited subject matter only where it is shown that "he will either gain or lose by direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action."[59]

This disqualifying interest, however, must be pecuniary. A mere personal interest in seeing one party succeed over the other is not sufficient. As such, an employee or agent of a party will be competent to testify to a "transaction" or "communication" between himself and a decedent, in an action against the decedent's estate, unless he is either joined as a party, shown to have a personal pecuniary interest in the outcome of the suit or stands as a spouse to any such person.[60] The same holds true with respect to a friend[61] of the party or interested person, or one having a blood or marriage relationship to any such person.[62] Thus a son or daughter,[63] parent,[64] sibling[65] or in-law[66] will

57. 187 N.W.2d 745 (Iowa 1971).

58. *Id.* at 747-48.

59. Schmidt v. Schurke, 238 Iowa 121, 124, 25 N.W.2d 876, 878 (1947). *Accord,* Nasco Land Dev. Co. v. Osborne, 210 N.W.2d 638, 643 (Iowa 1973).

60. *See, e.g.,* Laing v. State Farm Fire & Cas. Co., 236 N.W.2d 317 (Iowa 1975) (agent competent); Nasco Land Dev. Co., Inc. v. Osborne, 210 N.W.2d 638 (Iowa 1973) (agent competent); Davis v. Travelers Ins. Co., 196 N.W.2d 526 (Iowa 1972) (office manager competent); Thompson v. Thompson, 164 N.W.2d 141 (Iowa 1969) (partner competent).

61. *See, e.g.,* Connell v. Hays, 255 Iowa 261, 122 N.W.2d 341 (1963) (plaintiff's friends competent); Lawse v. Glaha, 253 Iowa 1040, 114 N.W.2d 900 (1962) (defendant's friend competent).

62. This rule applies except where the witness is a spouse of the party or interested person. *See* section II (B)(4) *infra.*

63. *See, e.g.,* Thompson v. O'Tool, 175 N.W.2d 598 (Iowa 1970); Allinson v. Horn, 249 Iowa 1351, 92 N.W.2d 645 (1958); Bell v. Pierschbacher, 245 Iowa 436, 62 N.W.2d 784 (1954). This holds true despite the fact that the son or daughter is a potential heir to the claimant's estate. *See* Bird v. Jacobus, 113 Iowa 194, 84 N.W. 1062 (1901).

64. *See, e.g.,* Hanke v. Bjorgo, 260 Iowa 1109, 152 N.W.2d 262 (1967). *See also* Linnemann v. Kirchner, 189 Iowa 336, 178 N.W. 899 (1920) (witness held competent to testify to decedent's promise to pay for minor's support even though as grandfather he may at some future time be required to support minor claimants).

be competent to testify to any "transaction" or "communication" between themselves and the deceased provided that they have no present, certain and vested pecuniary interest in the action.

This vested pecuniary interest requirement exemplifies the courts' questionable view that the prospects of monetary gain will tempt one into perjury but that the fear of social or familial rejection will not. This view is contrary to common experience. While a potential heir, friend or employee may have no tangible interest in the suit, the chance that one's testimony may work to maintain an existing interest, or secure a prospective one, can equally motivate one to speak falsely.

However, the Iowa Supreme Court has not left protected parties totally vulnerable to the testimony of friends, family, employees and others derivatively interested in the outcome of the suit. In *Bell v. Pierschbacher*,[67] the court indicated that such testimony is to be "closely scrutinized and cautiously received because it is not susceptible of denial and the witness may not have been capable or desirous of accurately relating what decedent may have said."[68] This policy of strict scrutiny should be applied to all cases in which one having knowledge of the relevant facts is deceased. Proponants of the dead man rule often fail to realize that each suit is a unique controversy, and therefore, the weight to be given the witnesses' testimonies should be determined on a case-by-case basis.

The primary function of the jury is to determine the facts in light of *all* relevant evidence. The dead man statute prevents this end from being fully realized because it excludes material evidence from consideration by the jury. The more logical rule would allow the jury to hear all testimony offered, inform them as to the nature and extent of each of the witnesses' interest therein, and to allow them to decide for themselves the weight to be given such testimonies in light of all the other evidence presented.

3. *Assignors*

One "from, through or under whom any . . . party or interested person derives any interest or title by assignment or otherwise"[69] is also incompetent to testify to the prohibited subject matter against the estate of a decedent. This rule was apparently intended to prevent one from selling or assigning his cause of action, thereby ridding himself of the disqualifying interest for the purpose of circumventing the rule.

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65. *See, e.g.*, Maasdam v. Maasdam's Estate, 237 Iowa 877, 24 N.W.2d 316 (1946) (stepbrother with nominal interest in the outcome of the case held competent to testify); Kerr v. Yager, 158 Iowa 69, 138 N.W. 905 (1912).

66. *See, e.g.*, Schmidt v. Schurke, 238 Iowa 121, 25 N.W.2d 876 (1947) (sister-in-law held competent to testify).

67. 245 Iowa 436, 62 N.W.2d 784 (1954).

68. *Id.* at 444, 62 N.W.2d at 789. *Accord*, Lawse v. Glaha, 253 Iowa 1040, 1047, 114 N.W.2d 900, 904 (1962).

69. IOWA CODE § 622.4 (1977).

Where there is no evidence of underhanded motives the blind application of the rule to assignors may produce intolerably inequitable results. Such a situation is illustrated by *Clinton Savings Bank v. Grohe.*[70] Both the defendant, who was the executor of the decedent's estate, and the plaintiff held mortgages on a certain piece of property. The plaintiff sought to show that the decedent's mortgage was inferior to his because it was received from the mortgagors without consideration. The court held that the mortgagors were incompetent to testify as to any "transaction" between themselves and the deceased because they were persons from, through, or under whom the plaintiff had acquired title to the property in question.[71] This lack of proof precluded the plaintiff from establishing his claim.

4. *Spouse*

Although relatives of the affected party are competent to testify where they have no present pecuniary interest in the outcome of the suit, section 622.4 indicates that the husband or wife of any person who would be excluded under the statute is similarly incompetent.[72] This provision is now arguably obsolete. When the dead man statute was first enacted, the law regarded the wedded couple as an inseparable unit.[73] Since this is no longer true, the spouse of a party or interested person should be afforded the same opportunity to testify against the estate of a decedent as may a son or daughter.

C. *Parties Protected*

A party may invoke the dead man statute protection if he is an executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of the deceased. This holds true regardless of the extent of the party's interest in the outcome of the litigation.[74] Furthermore, protection is afforded a party against whom the *testimony* is directed, rather than against whom the action is brought. Thus a party falling under one of the classes designated by the statute will be entitled to protection regardless of whether he has brought or is defending the action.[75]

Generally, a protected party is not *required* to invoke the rule. Iowa Code, section 622.5, allows a party protected under section 622.4 to testify on his own behalf to a personal "transaction" or "communication" between himself and the deceased.[76] However, in so doing, the court will hold that he

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70. 115 Iowa 292, 88 N.W. 357 (1901).

71. *Id.* at 296, 88 N.W. at 358.

72. *See* Estate of Thompson v. O'Tool, 175 N.W.2d 598 (Iowa 1970).

73. *See, e.g.*, Duncan v. Roselle, 15 Iowa 501 (1864) (property acquired by married woman is property of her husband and thus subject to his debts).

74. *In re* Lender's Estate, 247 Iowa 1205, 78 N.W.2d 536 (1956) (legatee entitled to protection even though his interest in the outcome of the suit was nominal).

75. Hamilton v. Bethel, 256 Iowa 1357, 131 N.W.2d 445 (1964) (administrator bringing suit against the defendant on a promissory note made out to the decedent held entitled to protection).

76. Iowa Code § 622.5 (1977) provides:

waives his right to object to otherwise incompetent testimony given by the opposing party in rebuttal.[77]

Where both parties are entitled to protection, however, they are both precluded from waiving it under this provision. Thus in *In re Conner's Estate,*[78] the decedent's heirs brought an action against the decedent's executor and devisee contesting the decedent's will. The court held that the defendant executor could not avail himself of section 622.5, stating that "[t]he protection afforded by the statute [section 622.4] is a shield, not a sword. Code section 622.5, I.C.A., does not make an executor, heir competent to testify to communications between the witness and the decedent against another party protected by section 622.4."[79]

This rule greatly hinders the court's search for the truth. If the relevant evidence of both parties can be established only through testimony prohibited under the statute, the decision will be virtually rendered in the dark or not rendered at all. Furthermore, since the court presumes that the designated parties are afforded protection under the rule because they seek to guard the decedent's estate from false claims,[80] where both parties may invoke its protection it would be entirely consistent with the underlying rationale of the rule to assume that they are each equally attempting to guard the estate from the false claims of the other. Thus in such a case it would be much more logical to admit the testimonies of both, rather than to exclude both. In this way, the jury would be provided with additional material evidence to assess the worthiness of their respective claims.

Despite the seemingly broad deference to protected parties, the court has formulated one crucial qualification. A plaintiff will be entitled to protection *only* where he claims he is entitled to institute the suit *because* he is an "executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor" of the deceased.[81] Likewise, the defendant may invoke protection *only* where the suit had been instituted against him *because* he is a member of the selected group,[82] or *because* his defense is based on a claim that he is

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> This prohibition [section 622.4] shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or guardian shall be examined on his own behalf, or as to which the testimony of such deceased or mentally ill person or lunatic shall be given in evidence.

77. *See, e.g.,* Solbrack v. Fosselman, 204 N.W.2d 891 (Iowa 1973); Avery v. Lillie, 260 Iowa 10, 148 N.W.2d 474 (1967).

78. 240 Iowa 479, 36 N.W.2d 833 (1949). *Accord,* Thompson v. Thompson, 164 N.W.2d 140 (Iowa 1969); O'Brien v. Biegger, 233 Iowa 1179, 11 N.W.2d 412 (1943).

79. 240 Iowa at 492, 36 N.W.2d at 841.

80. Byers v. Byers, 242 Iowa 391, 404-05, 46 N.W.2d 800, 807 (1951).

81. *See, e.g.,* Hass v. Kaster, 246 Iowa 48, 66 N.W.2d 878 (1954) (plaintiff-executor entitled to protection where he was substituted for the original plaintiff who had died prior to trial).

82. *See, e.g.,* Maasdam v. Maasdam's Estate, 237 Iowa 877, 24 N.W.2d 316 (1946) (protection was provided since the action was taken against the defendant because he was administrator of the decedent's estate).

one of the aforementioned members.[83] Thus, in *Vipon v. Jergenson*,[84] the plaintiff passenger was injured by the decedent's alleged reckless operation of a car. An action was instituted against the car owner, the decedent's father. Since plaintiff's claim was instituted against the decedent's father because he held title to the car, rather than because of any blood relationship between himself and the decedent, he was not entitled to the dead man statute protection. The plaintiff was thus held competent to testify to all that had transpired between himself and the decedent prior to the decedent's death.

Unfortunately, not all such cases are as straight-forward as *Vipon*. In *Krimlofski v. United States*,[85] the plaintiff widow sued the defendant-insurer, claiming entitlement to the entire proceeds of her deceased husband's life insurance policy. On his initial application, the decedent had designated his wife as primary beneficiary and his parents as contingent beneficiaries. On his renewal, however, the decedent failed to make this distinction. The defendant-insurer interpleaded the decedent's parents, who claimed a two-thirds interest in the insurance proceeds. The court held that even though the insured's heirs were made parties, it did not affect the true nature of the action.[86] Since their rights did not stem from their status as heirs, but rather from their status as beneficiaries under the insurance policy, they were not protected under the dead man statute. The plaintiff was held competent to testify as to all her conversations with the decedent relevant to the issues in question.[87]

In view of the statute's purpose the result in *Krimlofski* is illogical. The dead man rule is based on the theory that a surviving party should not be permitted to testify to facts the decedent may have been able to contradict had he lived.[88] Since the lips of the deceased are just as effectively closed where the claim is against his insurance policy as where it is against his estate, the establishment of false claims is no less possible in the former situation than in the latter. It is the living who ultimately benefit in successfully establishing their claim, regardless of whether it is derived directly from the decedent's estate, or indirectly through an insurance policy which had been paid from the decedent's estate during his life.

The lengths to which the court will go in strictly construing the dead man

83. *See, e.g.*, O'Brien v. Biegger, 233 Iowa 1179, 11 N.W.2d 412 (1943) (defendant claiming as a defense that he was a survivor of the deceased held entitled to protection); Luthy v. Seaburn, 242 Iowa 184, 46 N.W.2d 44 (1951) (defendant claiming as a defense as a devisee of the deceased held entitled to protection).

84. 260 Iowa 646, 148 N.W.2d 598 (1967).

85. 190 F. Supp. 734 (N.D. Iowa 1961). Initially, the court stated that because the action was in federal court, the state's dead man statute did not apply. However, it proceeded to explain why, even if it would have been applicable, it was not applicable to the instant case. *Id.* at 740.

86. *Id.*

87. *Id.* at 741.

88. *See* Bradley v. Kavanagh, 12 Iowa 273 (1861). In *Bradley* the court indicated that "as the deceased cannot give his version of the transaction neither shall the surviving party." *Id.* at 275.

statute with respect to this status requirement is illustrated by *Thurman v. Monroe County Truck & Implement Co.*.[89] In *Thurman*, the plaintiff brought an action against the defendant corporation and the executor of the decedent's estate, the corporation's sole stockholder. The court admitted the plaintiff's testimony regarding a conversation between himself and the deceased where it was to be used against the corporation, but excluded this testimony as against the executor of the decedent's estate. It was clear that judgment against the corporation would virtually constitute judgment against the decedent's estate since the deceased had been its sole stockholder. However, the court refused to allow the corporation to invoke the dead man rule. The court held that a person afforded the corporate veil protection during his life could not ask the court, through his executor, that it be disregarded after his death to take advantage of the dead man statute protection.[90]

It is thus clear that the Iowa courts will strictly require that the party seeking to invoke the statute to bar testimony show that his interest in the suit arose out of his status as one protected by the statute. Counsel who fails to recognize instances where this requirement is not met may jeopardize his client's claim. This danger is well illustrated by *Klosterboer v. Engelkes.*[91] In *Klosterboer,* sisters of the decedent sought to cancel two deeds the decedent had executed to his two defendant brothers. The plaintiffs failed to establish their claim because they refrained from testifying under the assumption that the defendants were protected parties under the dead man statute, and that their testimony would thus be excluded. On appeal the Iowa Supreme Court explained that although the defendants were heirs of the deceased, they claimed entitlement to the deeds as the decedent's grantees. The defendants, therefore, could not have invoked protection as heirs. Furthermore, since grantees are not assignees within the meaning of the statute, the court held that the defendants' status was not protected under the statute and thus they would not have been entitled to object to the plaintiffs' testimonies regarding the "transaction" in question.[92] Since the plaintiffs' failure to testify was no fault of the court, that decision was affirmed.

Where one claims an interest as an assignee there is yet another restriction which is imposed. In *McAleer v. McNamara,*[93] the Iowa Supreme Court held that to be afforded protection as an assignee a party must prove an assignment in fact. The court reasoned that to allow a mere allegation in a pleading to operate to exclude the testimony of a witness on a particular issue would work to "take the place of proof and open the door for all kinds of

89. 255 N.W.2d 331 (Iowa 1977).

90. *Id.* at 333.

91. 255 Iowa 1076, 125 N.W.2d 115 (1963).

92. *Id.* at 1084, 125 N.W.2d at 119.

93. 140 Iowa 112, 117 N.W. 1122 (1908) (since plaintiff claimed that money was given to her gratuitously, she was a donee, not an assignee, and thus not entitled to the statute's protection).

fraud."[94] The *McAleer* court reflects the position that the application of the dead man statute should be restricted since the rule has a greater potential for producing inequities rather than avoiding them.

These cases are indicative of how far the application of the statute and its purported purpose have diverged. By affording protection to parties who claim as heirs, assignees, etc., and denying it to parties who claim as grantees or donees, the Iowa Supreme Court and the legislature have inferred either (1) that those who are involved in a suit because they are representatives or beneficiaries of a decedent's estate have more need for protection against false claims than those who are involved because of some independent tort or real estate transaction with the deceased; or (2) that the jury is less able to recognize perjured testimony in suits involving the representatives or beneficiaries of a decedent's estate than in suits involving other parties; or (3) that the claims or defenses of those involving the representatives or beneficiaries of a decedent's estate are more worthy of protection against false claims than are suits litigated for other reasons. All these assumptions are clearly unwarranted. Abrogating this rule altogether would not only make litigation easier, but would create equality among the living.

D. *Subject Matter*

1. *In General*

A witness is incompetent to testify only to the particular matters forbidden by the statute.[95] However, the statute does not clearly define these matters. As a result, what constitutes a "transaction or communication between [a] witness and a . . . deceased"[96] has been the subject of constant interpretation by the court.

In *O'Dell v. O'Dell*[97] it was held that "a witness, prohibited by the 'dead man' statute from testifying against specified persons is not incompetent to testify to facts from which inferences may be drawn tending to establish a claim or liability against, or a transaction with or a service to, one under disability or his estate."[98] But in *In re Kerndt's Estate*[99] the court stated "a

94. *Id.* at 113, 117 N.W. at 1123. *Accord,* Benson v. Custer, 236 Iowa 345, 17 N.W.2d 889 (1945). In *Benson* the plaintiff claimed the deceased gave her a deed. Since she alleged no consideration for it, the court held that she was at most a donee, and therefore not entitled to invoke the dead man rule protection. *Id.* at 352-53, 17 N.W.2d at 893.

95. Turbot v. Repp, 247 Iowa 69, 72 N.W.2d 565 (1956); Carlson v. Bankers Trust Co., 242 Iowa 1207, 50 N.W.2d 1 (1951).

96. IOWA CODE § 622.4 (1977).

97. 238 Iowa 434, 26 N.W.2d 401 (1947). Plaintiff sought, against the decedent's administrator, the annulment of an antenuptial agreement which would have effectively granted her one-third of the deceased's estate. She was permitted to testify as to a conversation between the deceased and his son which tended to establish the decedent's intent to destroy the antenuptial agreement. The opinion is well worth reading.

98. *Id.* at 446-47, 26 N.W.2d at 407-08.

99. 251 Iowa 963, 103 N.W.2d 733 (1960). The plaintiff here was precluded from testifying

claimant seeking to recover against an administrator for work or services performed for the deceased is an incompetent witness to testify to the service performed, or to any fact which tends to establish an express or implied contract between himself and the deceased."[100]

It is clear that a broad reading of the rule in *Kerndt* would altogether silence a witness subject to the dead man statute. If he testifies to "any fact" which tends to infer the alleged agreement (the entire purpose of the suit) he would be held incompetent, while testimony making no such inference would be stricken as immaterial. Thus it would appear that *O'Dell* and *Kerndt* are inconsistent.

However, in light of the Iowa Supreme Court's most recent cases which hold that the dead man statute is to be narrowly construed,[101] *O'Dell* and *Kerndt* are reconcilable. *O'Dell* stands for the proposition that a witness subject to the rule may testify to any facts, not prohibited by the statute, which would imply proof of the claim sought. *Kerndt,* on the other hand, stands for the proposition that this same witness may not testify to any facts prohibited by the statute, specifically, facts tending to show there was an express or implied contract — a "transaction" between the witness and the deceased. Thus a party attempting to recover for the value of services rendered may not testify directly that he performed these services,[102] for in so doing he is implying that they were rendered *for* the deceased, thus constituting a "transaction" between them. But this does not preclude such witness from indirectly establishing this claim by testifying to facts which imply that such services were performed.[103] Likewise, a party attempting to recover on an oral contract to repay a debt may not testify directly as to expenditures made by the witness on the decedent's property,[104] for in so doing he is implying that these expenditures were rendered for the deceased, again constituting a "transaction" between them. But this does not preclude such a witness from indirectly establishing this claim by testifying to facts which imply that such expenditures were made by him.[105]

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that she had rendered nursing services to the deceased to establish that she was entitled to compensation therefor.

100. *Id.* at 966-67, 103 N.W.2d at 735 *citing In re* Estate of Kahl, 210 Iowa 903, 911, 232 N.W. 133, 136 (1930). *Accord, In re* Koch's Estate, 256 Iowa 396, 127 N.W.2d 571 (1964); *In re* Fili's Estate, 241 Iowa 61, 40 N.W.2d 286 (1949).

101. *See* note 114 *infra.*

102. *See, e.g., In re* Kerndt's Estate, 251 Iowa 963, 103 N.W.2d 733 (1960).

103. *See, e.g., In re* Fili's Estate, 241 Iowa 61, 40 N.W.2d 286 (1954) (claimant's testimony that at the time of her purported marriage with the deceased the deceased owned almost nothing, and that through the years acquired substantial assets was inadmissible as tending to show claimant's rendition of services).

104. *See, e.g., In re* Koch's Estate, 256 Iowa 396, 127 N.W.2d 571 (1964); Griffith v. Portlock, 233 Iowa 492, 7 N.W.2d 199 (1942).

105. *See* Graham v. McKinney, 147 Iowa 164, 125 N.W. 840 (1910) (in an action for services rendered, plaintiff was not allowed to testify that she had rendered such services, but was allowed to say that she knew of no other person that had rendered the deceased services during the period she was with him).

These cases therefore illustrate that even where a witness has a disqualifying interest in the litigation he will be permitted to testify against the decedent's estate regarding any matter which in itself does not constitute a "transaction" or "communication" between the witness and the deceased. That is, a witness who would otherwise have been held incompetent will be permitted to fashion his testimony so as to avoid crossing the threshold into the legal realm of testimony excluded by the statute. In making such esoteric distinctions between direct and indirect inferences of a personal "transaction" or "communication" between the witness and the deceased, the court effectively abrogates the whole purpose of the rule.

2. *Non-Participation*

When Iowa's Dead Man Statute was first enacted the legislature intended that it be applied to prevent a witness from testifying against the decedent's estate as to *any* matter the deceased could have testified to had he lived.[106] However, in closely reading the statute, the Iowa Supreme Court has consistently held that it disqualifies a witness from testifying only as to matters concerning a "personal transaction or communication" which has taken place *"between* such witness and a person . . . [since] deceased."[107] In finding its original intent unduly restrictive,[108] the Iowa Supreme Court chose to strictly construe the dead man statute as stated.[109] Consequently, an interested person was deemed competent to testify to a "communication" or "transaction" which the deceased could have likewise testified to where it had been carried on not between the deceased and the witness, but between the deceased and another in the presence of the witness.[110]

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106. *See Report of Commissioners, supra* note 10, at 139, where it is stated:
> The fact that a person is deceased should not exclude the testimony of a party to the action unless such deceased person could have testified about the transaction, if living. If the testimony given has reference to a transaction about which the deceased knew nothing, why exclude it? On the other hand, the heir-at-law, or next of kin, can testify in his own behalf in an action when he is a party, and to a personal transaction with the deceased in a suit against another party, other than an executor. The rule is thought to be as above stated. That no interested party shall be permitted to testify as to any personal transaction or communication between him and a deceased person — as the mouth of one is closed, the other should be.

107. IOWA CODE § 622.4 (1977) (emphasis added).

108. *See, e.g.*, Hayes v. Snader, 182 Iowa 443, 444-46, 165 N.W. 1041, 1042-43 (1918):
> If [the statute is to] be construed to mean that the plaintiff may speak to no matter of which both he and the defendant had knowledge, and which decedent, if living, might deny, then the statute enacts an utter absurdity . . . . There is no statement the witness might make which the decedent might not have denied were he living . . . . The fair meaning of the definition as a whole is that the witness may not speak to something of which both had knowledge, and which decedent might deny if he were living, if the things spoken to be something said or done between him and the deceased. [I]f the possibility of denial were the deceased living is to control, the statute amounts to prohibiting the plaintiff from testifying at all, and that we will not so construe.

109. *See* Curd v. Wissler, 120 Iowa 743, 746, 95 N.W. 266, 267 (1903).

110. *See* Hart v. Hart, 181 Iowa 527, 164 N.W. 849 (1917); Steen v. Steen, 169 Iowa 264,

In 1913[111] and again in 1917[112] the legislature proposed bills intended to exclude this type of testimony also. However, they failed to pass. To date, therefore, while recognizing that the statute was intended to prevent the establishment of false claims,[113] the Iowa Supreme Court continues to refuse to extend its application by judicial construction.[114] Thus, where the witness merely overhears a conversation between the deceased and another, but does not participate therein, he will be competent to testify to what had been said.[115] "The test is whether the witness objected to as incompetent took part in the particular conversation on the subject inquired about, and if he did not, his testimony is to be received for whatever it is worth."[116]

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151 N.W. 115 (1915); VanSickle v. Staub, 155 Iowa 472, 136 N.W. 546 (1912); Wise v. Outtrim, 139 Iowa 192, 117 N.W. 264 (1908); Mallow v. Walker, 115 Iowa 238, 88 N.W. 452 (1901). *See also* cases cited in Annot., 27 A.L.R.2d 538, 543 (1953).

111. In February, 1913 identical proposals to amend this statute were made to both the House and Senate. The bill sought to insert the words "any person including", making it thus read:

> No party . . . nor . . . interested [person] . . . shall be examined as a witness in regard to a personal transaction or communication between *any person including* such witness and a person . . . deceased . . . ."

This amendment would thus have not only worked to prohibit testimony regarding a transaction or communication between a party or interested witness and the deceased, but would have prohibited such witness from testifying as to transactions or communications the deceased had engaged in with any person. Senate Journal, S.215 (Feb. 11, 1913); House Journal, H.R. 348 (Feb. 12, 1913).

112. In April, 1917 another bill proposed to the Senate sought to append to the statute "But no person otherwise disqualified by this section from testifying to any personal transaction or communication with a party since deceased shall be rendered a competent witness by reason of the fact that such person took no part in the personal transaction or communication." This proposal was clearly just a restatement of the 1913 proposals. Although passed by the Senate, the House of Representatives rejected it. History of Senate Bills, S.F. 28, Vol. 5. (April 14, 1917).

113. In Byers v. Byers, 242 Iowa 391, 46 N.W.2d 800 (1951) the court stated:

> Some of the reasons why such testimony is regarded as so dangerous and unsatisfactory is because of the ease of fabrication, the impossibility of its controversion, the grevious consequences which may result from the fallibility of human memory, understanding or judgment, and the absence of worldly sanction, since from the nature of such evidence no witness so testifying could ever be convicted of perjury.

Id. at 404-05, 46 N.W.2d at 807.

114. Thuman v. Monroe County Truck & Implement Co., 255 N.W.2d 331, 332 (Iowa 1977); Laing v. State Farm Fire & Cas. Co., 236 N.W.2d 317, 319-20 (Iowa 1975); *In re* Winslow's Estate, 259 Iowa 1316, 1320-21, 147 N.W.2d 814, 817 (1967); Carlson v. Bankers Trust Co., 242 Iowa 1207, 1213-14, 50 N.W.2d 1, 5 (1951).

115. *See* Luse v. Grenko, 251 Iowa 211, 100 N.W.2d 170 (1959) (husband of defendant held competent to testify to a conversation between the defendant and the deceased in which he took no part); Allison v. Horn, 249 Iowa 1351, 92 N.W.2d 645 (1958) (plaintiff held competent to testify to a conversation between her deceased husband and their attorney); Carlson v. Bankers Trust Co., 242 Iowa 1207, 50 N.W.2d 1 (1951) (husband of plaintiff competent); Meredith v. Cockshoot, 235 Iowa 213, 16 N.W.2d 221 (1944) (wife competent); Tucker v. Anderson, 172 Iowa 277, 154 N.W. 477 (1915) (daughters competent where they neither participated in the conversation nor had an interest in the suit). *See also* Annot., 27 A.L.R.2d 538, 543-45 (1953), and cases cited therein.

116. Carlson v. Bankers Trust Co., 242 Iowa 1207, 1213, 50 N.W.2d 1, 5 (1951).

It may be argued that this rule is justified by the possibility that the person who actually had the conversation with the deceased is both available to testify to what was said and not subject to the rule. However, since the purpose of the statute is to prevent fraud, this rule surely defeats it. A dishonest litigant can easily testify that the alleged conversation with the deceased was carried on by one who now is also dead. This testimony would be admitted with no one available to dispute it. Therefore, although this non-participation rule will *sometimes* make it possible for the honest litigant to present to the jury proof of his claim, it will *always* make it possible for the dishonest litigant to present his proof to the jury.

A warning should be made with respect to this exception. In *In re Willesen's Estate,*[117] the wife of a party testified to a conversation between the deceased and her husband, contending she did not participate therein. However, because the witness continued to use the pronoun "we" in the course of her testimony, the court held she had participated in the communication and was therefore incompetent.[118] In light of *Willesen,* when preparing a potentially affected witness, counsel should impress upon him to relate the event he observed in the third person.

The court has also refused to accept the claim of non-participation where it is shown that the conversation the witness overheard concerned a "transaction" which directly affected the witness. This rule was explained in *Maasdam v. Maasdam's Estate.*[119] In *Maasdam,* the plaintiff's parents agreed, in the presence of the plaintiff, to compensate her for her services. After her parents' respective deaths, the plaintiff sought enforcement of this promise. The court found that even if she had not verbally participated in this agreement, by her silence and subsequent conduct she acquiesced in her parents' promise and was legally affected thereby.[120] The plaintiff's act of nonrepudiation, therefore, constituted a "personal transaction" between herself and her decedents, thus rendering her incompetent to testify to that "transaction."[121]

3. *Observation*

Since the statute requires the excluded testimony to be of a personal "transaction" or "communication" between the witness and the deceased, nothing precludes the witness from testifying to any of his own observations acquired independent of any "communication" or "transaction" with the

117. 251 Iowa 1363, 105 N.W.2d 640 (1960).

118. *Id.* at 1378, 105 N.W.2d at 649.

119. 237 Iowa 877, 24 N.W.2d 316 (1946).

120. *Id.* at 892-93, 24 N.W.2d at 324.

121. *Id.* This decision illustrates the manifest injustice which may result from the application of the dead man statute. The whole tenor of the *Maasdam* opinion clearly indicates acceptance of the fact that the plaintiff cared for her parents. But because the court found that the plaintiff should not have been allowed to testify under the dead man statute, admittance of such testimony constituted prejudicial error. Judgment in her favor was therefore reversed. *Id.* at 894, 24 N.W.2d at 325.

deceased. Testimony regarding the decedent's physical condition[122] or any particular conduct engaged in by the deceased[123] will be admitted so long as knowledge of that condition or conduct was gained solely by the witness' distant observations.

A thorough explanation of the "observation" exception to the dead man rule was ennunciated in *O'Dell v. O'Dell.*[124] The plaintiff in *O'Dell* sought to prove that her husband had intended to annul their antenuptial agreement. She testified that she gave the decedent the box where this agreement had been kept and that the decedent searched through the box.[125] The defendant-executor claimed that this testimony constituted a "personal transaction" between the plaintiff and the deceased. The court rejected the defendant's contention. A "personal transaction", it held, means "some business or negotiations between two or more individuals."[126] Since the witness merely handed the box to the deceased, she was not engaging in a "transaction" with him, and was thus held competent to testify to this fact. Furthermore, the court held that since the witness merely watched the deceased look through the box, her knowledge of this conduct was also acquired independent of any "transaction" or "communication" with him, and she was thus competent to testify to this fact.[127]

There are situations, however, where one's act in observing the deceased constitutes a "transaction" with him within the meaning of the statute. For example, where a contract or other legal document must be signed by the deceased before it is legally binding, the person for whose benefit this document was made will be held a party to its execution and incompetent to testify that he observed the deceased sign it.[128] The fact that this person does not actively participate in the signing with the deceased makes him no less a party to the "transaction."[129]

In *Patterson v. Patterson*[130] the court further indicated that the participation/non-participation distinction is not determinative of a witness' competency to testify to his observations of the deceased. The plaintiff in *Patterson* filed a claim against the decedent's estate for services rendered. Her husband was held competent to testify to the services she had performed

122. *See, e.g., In re* Grahlman's Will, 248 Iowa 535, 81 N.W.2d 673 (1957) (witness held competent to testify to decedent's appearance and actions); Hayes v. Shader, 182 Iowa 443, 165 N.W. 1041 (1918).

123. *See, e.g.,* Turbot v. Repp, 247 Iowa 69, 72 N.W.2d 565 (1955) (in an action for wrongful death brought by the decedent's administrator, defendant was allowed to testify as to what he observed about the decedent's actions in operating his motor vehicle).

124. 238 Iowa 434, 26 N.W.2d 401 (1947).

125. *Id.* at 445, 26 N.W.2d at 407.

126. *Id.* at 444, 26 N.W.2d at 406 (citing Martin v. Shannon, 92 Iowa 374, 377, 60 N.W. 645, 645 (1894)).

127. 238 Iowa at 446, 26 N.W.2d at 407.

128. *See In re* Palmer's Estate, 255 Iowa 428, 122 N.W.2d 920 (1963).

129. *But see* note 142 *infra.*

130. 189 N.W.2d 601 (Iowa 1971).

even though he had helped her with this chore.[131] At first glance, it appears that the court favored the "observation" rule in disregard of the "participation" rule. In focusing on the definition of a "transaction" as set out in *O'Dell* however, *Patterson* is reconcilable.

The plaintiff in *Patterson* expected compensation from the deceased for her services.[132] In rendering these services she was therefore engaged in a business relationship with the deceased, which thus constituted a "transaction" between them.[133] Her husband's services, however, constituted a gift, since they were rendered without expectation of pecuniary reward. Because he did not participate in the "transaction" between his wife and the deceased, he was thereby competent to testify that he merely observed the rendition of his wife's services.[134]

In short, these cases illustrate that a witness will be incompetent to testify to his personal observations of a "transaction" entered into by a decedent only where it is shown that his part in the "transaction" created a legal right or obligation between himself and the deceased.

4. *Conduct*

In construing the dead man statute, the courts have also held that a witness will not be precluded from testifying to his own independent conduct. So long as such testimony is not descriptive of a "transaction" between the witness and the deceased, and does not refer to the decedent's involvement therein, it will be admitted for whatever it is worth.[135]

Thus, in *In re Wearin's Estate*,[136] suit was brought to determine the ownership of two certificates of deposit. The dead man statute prohibited the defendant from testifying that the deceased endorsed these certificates and gave them to the defendant since this constituted a "transaction" between the witness and the deceased. Instead, the defendant testified that on the day in question she saw the certificates in the hands of the deceased, and that later on that same day she found these certificates in her own hands.[137] She further testified that she recognized the signature of endorsement thereon as

131. *Id.* at 604.

132. *Id.* at 605.

133. *See In re* Kerndt's Estate, 251 Iowa 963, 103 N.W.2d 733 (1960).

134. In other words, even though he was a spouse of a party to the suit, he was competent to testify because the subject-matter of his testimony was not one precluded under the statute. The "transaction" he spoke of was made between the deceased and his wife, not between the deceased and himself.

135. *Compare In re* Long's Estate, 251 Iowa 1042, 102 N.W.2d 76 (1960) (in an action to establish plaintiff as the surviving husband of the deceased, plaintiff was held incompetent to testify that he and the deceased had taken a trip together, and that during that time they were married) *with* O'Dell v. O'Dell, 238 Iowa 434, 26 N.W.2d 401 (1947) (plaintiff allowed to testify that she and her son went into town so long as she omitted to say that the deceased accompanied them).

136. 167 Iowa 535, 149 N.W. 621 (1914).

137. *Id.* at 538, 149 N.W. at 622.

that of the decedent's.[138] The court held that such testimony was proper since it merely provided a basis for inferring the existence of the alleged transaction and was not testimony of the "transaction" itself.[139]

Such a roundabout way of introducing testimony circumvents the very purpose of the dead man statute. False claims may be established as easily through testimony creating an *inference* of false facts as through direct testimony of false facts. The dead man statute, as illustrated by the above analysis, does no more than complicate the trial process and produce unnecessary issues on appeal.

5. *State of Mind*

Just as a witness may testify to personal observations and conduct, so may he testify to his own knowledge,[140] state of mind,[141] opinion[142] or intentions[143] under the circumstances in question. There are, however, two exceptions to this rule.

The first exception to the above rule is that a witness may not testify that his opinion or knowledge was acquired through a "transaction" or "communication" with the deceased.[144] Secondly, a witness may not testify to his opinion of the decedent's state of mind with regard to the matter in controversy.[145] Thus, in *In re Allen's Estate*[146] the defendant was allowed to testify that he had considered himself married to the deceased, while in

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138. *Id.*

139. *Id.* at 539, 149 N.W. at 622.

140. *See In re* Fili's Estate, 241 Iowa 61, 40 N.W.2d 286 (1949) (witness held competent to testify as to her understanding of her relationship with the deceased since she did not testify that this belief rested on any representations or communications with the deceased); Scott v. Brenton, 168 Iowa 201, 150 N.W. 56 (1914) (witness' testimony regarding contents of a lost contract was permitted where the witness had not testified that such knowledge was acquired at the time the contract between himself and the deceased was executed).

141. *See In re* Talbott's Estate, 209 Iowa 1, 224 N.W. 550 (1929) (witness held competent to testify that when, on behalf of a partnership, he entered into a contract with a corporation, he did not intend to release his own claim against a deceased partner).

142. *Compare In re* Palmer's Estate, 255 Iowa 428, 122 N.W.2d 920 (1963) (witness held competent to testify that she recognized the signature on a will as that of the deceased) *with* Tucker v. Anderson, 172 Iowa 277, 154 N.W. 477 (1915) (plaintiff held competent to testify that a signature of receipt was not her own).

143. *In re* Allen's Estate, 251 Iowa 177, 100 N.W.2d 10 (1959) (witness held competent to testify that he considered himself married to the decedent).

144. *See, e.g., In re* Hewitt's Estate, 245 Iowa 369, 62 N.W.2d 198 (1954) (plaintiff seeking to establish a partnership contract held incompetent to testify that he believed he would have certain property as his own since that belief was based on a conversation with the deceased). *See also* note 140, *supra.*

145. *Compare* Johnson v. Fosnacht, 245 Iowa 1251, 65 N.W.2d 446 (1954) (plaintiff-attorney held incompetent to testify that there was a mutual understanding between himself and his deceased client that he would be reimbursed for expenses) *with In re* Long's Estate, 251 Iowa 1042, 102 N.W.2d 76 (1960) (although the witness was incompetent to testify that the decedent had agreed to a common law marriage with the witness, he was allowed to testify to *facts* evidencing decedent's intent to carry out such an arrangement).

146. 251 Iowa 177, 179-80, 100 N.W.2d 10, 11 (1959).

Hulme v. Stumma[147] the plaintiff was held incompetent to testify that she had a private understanding with the deceased concerning the reimbursement of an alleged loan.

Doubtless, the plaintiff in *Hulme* would have been allowed, despite the dead man statute, to testify that she had expected the decedent to repay her. The impact of this testimony on the jury would have probably been just as great as her testimony that the decedent had agreed to repay her. The dismissal of a potentially valid claim for lack of proof resulting from such frail semantic technicalities makes little sense in terms of the underlying purpose of the dead man statute.

6. *Denial*

The Iowa Supreme Court has consistently held that a witness is incompetent under the dead man statute where he denies the occurrence of a personal "transaction"[148] or "communication"[149] with a decedent just as he would be where the testimony sought serves to affirm the existence of a "transaction" or "communication." However, where the witness merely denies a fact which, if true, would raise an *inference* that a particular "transaction" or "communication" between the deceased and the witness occurred, it will not be barred by the statute. Thus, a claimant seeking compensation against the decedent's estate for services rendered to him is barred from testifying that the deceased had not paid him, for an act of remuneration between the witness and the deceased constitutes a "transaction" within the meaning of the dead man statute.[150] The same claimant, however, would be permitted to deny that the signature on an instrument discharging the deceased of his obligation to pay for these services was in fact affixed by the claimant.[151] This result is based on the court's view that testimony regarding the authenticity of a signature does not constitute a "transaction" within the meaning of the statute.[152]

The above rule presents an illogical contradiction. Where there is no document evidencing a discharge in liability, it is reasonable to assume the debt had not been paid, yet, the claimant is precluded from asserting this. Where such a document does exist, it is logical to assume the debt had been paid, yet, the claimant is allowed to affirmatively deny its validity. This

147. 204 N.W.2d 632, 633 (Iowa 1973).

148. *See, e.g.*, Lusby v. Wing, 207 Iowa 1287, 224 N.W. 5 (1929) (witness held incompetent to deny that notes were delivered to the decedent).

149. *See, e.g.*, Hass v. Kaster, 246 Iowa 48, 66 N.W.2d 878 (1954) (defendant held incompetent to testify that the decedent had not asked him to pay his debt prior to the commencement of the suit).

150. *See, e.g.*, Bell v. Pierschbacher, 245 Iowa 436, 62 N.W.2d 784 (1954) (plaintiff held incompetent to testify that he had not been compensated for his services).

151. *See, e.g.*, Tucker v. Anderson, 172 Iowa 277, 154 N.W. 477 (1915) (plaintiff held competent to deny the genuineness of her signature on receipt made out to the deceased).

152. *Id.* at 295, 154 N.W. at 482. *Accord, In re* Palmer's Estate, 255 Iowa 428, 433, 122 N.W.2d 920, 923 (1963).

application of the dead man statute thus affords a party confronted with tangible, negative proof a greater opportunity to prove his claim than the party without such evidence. The distinction made between these two situations is not only unreasonable, but is questionable in terms of the basic concepts of justice.

7. *Waiver*

Iowa Code section 622.5 provides a protected party with the right to testify to the prohibited subject matter:

> This prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or guardian shall be examined on his own behalf, or as to which the testimony of such deceased or mentally ill or lunatic shall be given in evidence.[153]

However, the exercise of this right is not without cost. That is, upon exercising this right the opposing party will be allowed to rebut such testimony.

"Rebutting testimony" is that which explains, repels, controverts or disproves evidence presented by the opponent.[154] Thus, a witness precluded from testifying under the dead man statute will be permitted to testify to matters clearly prohibited by the statute where the protected party has previously presented testimony or other evidence relating to the *same* "transaction" or "communication."[155]

The same general rule is applied where a protected party introduces tangible evidence of a "transaction" entered into by the deceased. For example, where an executor moves to introduce into evidence cancelled checks in an attempt to prove that the claimant has been paid for his or her services, he has waived his right to object thereafter to rebuttal testimony regarding the understanding the claimant had with the deceased as to these checks.[156]

This waiver will be effective, however, only where it is voluntary. Thus, if a protected party objects to the competency of a witness, and is erroneously overruled, he may offer testimony in rebuttal, but in so doing, the protected party does not waive his right to question the correctness of the trial court's

153. Iowa Code § 622.5 (1977).

154. Solbrack v. Fosselman, 204 N.W.2d 891, 895 (Iowa 1973) (citing State v. Hephner, 161 N.W.2d 714, 718 (Iowa 1968)).

155. O'Brien v. Biegger, 233 Iowa 1179, 11 N.W.2d 412 (1943). *Accord,* Thorne v. Reiser, 245 Iowa 123, 60 N.W.2d 784 (1953). In *Thorne* the decedent's heir testified to a personal "transaction" between himself and the deceased. The defendant contended that by this testimony his opponent had waived all protection provided by the statute and hence attempted to testify to a different "transaction" which he had entered into with the deceased. The court held that since the defendant's alleged "transaction" was no part of the "transaction" sought to be established by the protected party, it was not rebuttal testimony. *Id.* at 129, 60 N.W.2d at 788. The defendant was therefore held incompetent to give it.

156. *See, e.g.*, Connell v. Hays, 255 Iowa 261, 122 N.W.2d 341 (1963).

ruling as to the initial competency of his opponent's witness on appeal.[157] This rule is based on the view that a protected party should not be forced to allow the testimony of an incompetent witness to go to the trier of fact unchallenged.[158]

The protected party's rebuttal testimony, however, as is true with the rebuttal testimony of his opponent, must be limited to the same "transaction" or "communication" presented by the opposing side. Testimony regarding any other "transaction" or "communication" will be deemed a waiver of protection only as to that issue.[159]

While it is clear that rebuttal will be permitted where a protected party, examined on his own behalf, introduces evidence indicative of a "transaction" or "communication" with the deceased,[160] the Iowa Supreme Court, in at least one case, has held the waiver exception to be inapplicable where the evidence of the "transaction" or "communication" is introduced by a witness other than the protected party himself. In *Hamilton v. Bethel*,[161] the administrator of the decedent's estate offered a note into evidence supported by the testimony of a disinterested witness regarding its execution and delivery. The court held that protection under section 622.4 was waived only when the "transaction" or "communication" entered into by the deceased was testified to by a protected party "examined on his own behalf."[162] Accordingly, in *Hamilton*, because the evidence regarding the "transaction" with the deceased was not introduced by the protected party personally, his right to object to the rebuttal testimony of his opponent was preserved.

In *Edler v. Fick*,[163] however, a much more practical interpretation of the waiver exception was applied. The executor in *Elder* cross-examined the plaintiff concerning a certain conversation the plaintiff had with the deceased regarding payment for the plaintiff's services. On redirect, the plaintiff testified further to this conversation. The court held that by introducing the subject matter of the conversation by this method the protected party waived all rights to object to explanatory testimony by the plaintiff with respect to this particular conversation.[164]

Clearly *Edler* presents the better view. Under the *Hamilton* rule a protected party is given the opportunity to present an incomplete, one-sided version of the facts relating to a "transaction" or "communication" without

157. *In re* Fili's Estate, 241 Iowa 61, 40 N.W.2d 286 (1949). *Accord,* Solbrack v. Fosselman, 204 N.W.2d 891 (Iowa 1973).

158. 241 Iowa at 67, 40 N.W.2d at 290.

159. *See, e.g.,* Solbrack v. Fosselman, 204 N.W.2d 891 (Iowa 1973).

160. *See, e.g.,* Connell v. Hays, 255 Iowa 261, 122 N.W.2d 341 (1963) (executor offered checks into evidence made out to the claimant to prove payment of services rendered, thereby making claimant competent to testify that such checks were not for services, rather, they were for utilities).

161. 256 Iowa 1357, 131 N.W.2d 445 (1964).

162. *Id.* at 1363-64, 131 N.W.2d at 448-49 (construing IOWA CODE § 622.5 (1977)).

163. 252 Iowa 1367, 110 N.W.2d 665 (1961).

164. *Accord,* Meredith v. Cockshoot, 235 Iowa 213, 16 N.W.2d 221 (1944).

affording the opponent an opportunity to shed any light on his or her participation in those events. If the executor has witnesses with first hand knowledge of a particular "transaction" or "communication" engaged in by the deceased, they may act as the decedent's mouthpiece in protecting his estate. Since the lips of the deceased are not "closed by death," no reason remains for closing the lips of his opponent.

IV. Conclusion

Under Iowa's dead man statute, a witness who is (1) a party to the suit, (2) pecuniarily interested in its outcome, (3) an assignor of this interest or (4) a spouse to any such person, will be excluded from testifying to a "transaction" or "communication" between himself and one since deceased where such testimony is directed against one who claims to be involved in the suit by virtue of his status as an (1) executor, (2) administrator, (3) heir at law, (4) next of kin, (5) assignee, (6) legatee, (7) devisee or (8) survivor of the deceased person.

Since the courts refuse to extend this rule by judicial construction, all testimony which does not precisely fit within its terms is freely admitted. Thus, nothing precludes a party or interested person from testifying to his own knowledge, opinion or intention so long as it is not shown that this view was acquired through a personal "transaction" or "communication" with the deceased. Neither will one be barred from testifying to his own or the decedent's conduct, provided the act was not one which worked directly to impose or release a legally binding obligation between the witness and this deceased person. And where the witness overheard the deceased engage in a conversation with another, he may testify to this exchange, so long as he did not participate therein.

Additionally, a protected party will be deemed to have waived his right to object to the competency of a witness whose testimony falls clearly within that prohibited by the statute where such objection was not correctly or timely made or where, prior to the introduction of the objectionable testimony, this party had voluntarily introduced evidence as to the same "transaction" or "communication" itself.

The foregoing analysis should aid counsel in understanding the proper limits and application of Iowa's dead man statute. It should also serve to illustrate that this rule is much more than just an archaic nuisance. Sections 622.4 and 622.5 of the Iowa Code were originally enacted to prevent a dishonest litigant from establishing a claim against the estate of one whose personal ability to defend had been foreclosed by death. However, in view of the numerous methods by which this rule can be circumvented, it is clear that the dead man statute cannot be said with any degree of assurance to further this purpose. While its exclusion may occasionally inhibit the proof of a nonexistent claim, it more often imposes insurmountable barriers against the establishment of valid ones. Furthermore, the proponants of this rule greatly underestimate the respective abilities of both counsel and jury within the adversary system—the abilities of counsel in exposing false testimony by

cross-examination, and the abilities of the jury in recognizing the same.

Since its effectiveness is so greatly outweighed not only by the undue burden it imposes on the honest litigant, but also by the unnecessarily complex problems it creates in litigation, Iowa's dead man statute should be abolished. The decedent's estate will be adequately protected where the trier of fact, in weighing the witness' credibility, takes into account along with all the other factors, the probability and extent to which his or her testimony might have been contradicted by the deceased, had he survived.

Vreni R. Glista

A FINAL TOLLING OF THE DEATH-KNELL: THE DOCTRINE, ITS DEMISE AND CURRENT ALTERNATIVE METHODS OF APPEAL OF CLASS CERTIFICATION ORDERS.

I. INTRODUCTION

Since major changes nearly fourteen years ago,[1] the class action mechanism of Federal Rule of Civil Procedure 23[2] has been widely used[3] in causes

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1. The text of the old rule, the new rule and the Advisory Committee's notes on the new rule are set out in *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 94-107 (1966). *See also* 3B J. MOORE, FEDERAL PRACTICE ¶¶ 23.09[1]-[8] (2d ed. 1978); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375-400 (1967). *See generally Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976).

2. FED. R. CIV. P. 23. The rule as amended provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.