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The Colorado Dead Man Statute

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NOTES

THE COLORADO DEAD MAN STATUTE

ALTHOUGH the dead man statute in Colorado is older than the state itself and has been an issue in scores of decisions by the supreme court, neither its long existence nor its frequent appearance in the courtroom has contributed significantly to making it a commonly understood doctrine. The statute's underlying concept of excluding the testimony of interested persons[1] and parties to the action[2] existed at common law, and the rule was applied whether the adversary was living or dead.[3] It was reasoned that one who had an interest in the outcome of the suit would have a strong motive to distort the truth, and therefore should not be allowed to take the stand to further his own purposes.

In England the disqualification for interest remained until the middle of the nineteenth century when it was done away with in its entirety, but in this country the reform was less successful.[4] It was argued here that allowing parties and interested persons to testify would work harshly in controversies over transactions when one party to the transaction had died and the other survived.[5] And so, as the various states abolished the common law incompetency based on interest, they enacted statutes, commonly called "dead man statutes," retaining the former rule when one of the parties was deceased at the time of the trial.[6] It is not surprising, then, that the dead man statute has been called a vestigial remainder of the common law rule that a pecuniary interest renders the testimony of a witness incompetent.[7]

The common law rule came to an end in Colorado in 1870,[8] when a witness's interest in the outcome of the case was removed by

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[1] Combs v. Howard, 131 S.W.2d 206, 212 (Tex. Civ. App. 1939).

[2] 2 WIGMORE, EVIDENCE § 577, at 693 (3d ed. 1940).

[3] 97 C.J.S. *Witnesses* § 121, at 546 (1957).

[4] 2 WIGMORE, *op. cit. supra* note 2, at 695 (rule against interested persons abolished in 1843; disqualification of parties eliminated in 1851).

[5] McCORMICK, EVIDENCE § 65, at 142 (1954).

[6] Rich v. Hunter, 135 Fla. 309, 185 So. 141, 145 (1938):

> The purpose of [the dead man statute] . . . was to remove the common-law disability arising from interest, except where one of the parties to the transaction or communication was, at the time of the hearing, dead, insane, or a lunatic. In those cases the disabilities arising from interest, imposed by the common-law are retained by the statute; but the statute disqualifies those only who were disqualified by the common-law.

[7] Kamp v. Hargis Bldg. Co., 238 S.W.2d 277, 282 (Tex. Civ. App. 1951).

[8] Territorial Laws of Colorado 1870, p. 63.

legislation as a bar to his testifying,[9] except in cases within the scope of the dead man statute. Since 1881 this exception for the dead man statute has been the springboard for much litigation,[10] and the dispute continues today.[11] The dead man statute itself is currently found in Colorado Revised Statutes, section 154-1-2 (1963), where the pertinent portion provides:

> No party to any civil action, suit or proceeding, *or* person directly interested in the event thereof, shall be allowed to testify therein, of his own motion, or in his own behalf . . . when any adverse party sues or defends as . . . the executor or administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee; unless when called as a witness by such adverse party so suing or defending, and except in the following cases; [Here follows a list of seven exceptions which will be dealt with in Part IV, infra.] (Emphasis added.)

Since the statute was adopted nearly verbatim from an Illinois statute,[12] it is often helpful to refer to Illinois decisions when attempting to construe the statute or predict the course which the Colorado court may take in the future.[13]

I. PURPOSE OF THE STATUTE

In the middle of the nineteenth century when the various jurisdictions were enacting their respective versions of the dead man statute, the fundamental purpose of such statutes was said to be "to prevent a person who was, or who might be assumed to be, a partisan witness from giving his version of a transaction with another who was deceased and could not speak."[14] This idea of placing the living and the dead upon terms of perfect equality still finds a good deal of support today,[15] and the Colorado court has said that the dead man statute is "only a regulation to secure mutuality in the action itself."[16]

This concern for mutuality is at times carried to such extremes that one questions whether justice is, in fact, being served. The Colorado court on one occasion rejected the only testimony tending to establish a promissory note executed by a party who died prior to

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[9] The act has been codified and is presently found in COLO. REV. STAT. § 154-1-1 (1963): "All persons, without exception, other than those specified in sections 154-1-2 to 154-1-8 may be witnesses. Neither parties nor other persons who have an interest in the event of an action or proceeding shall be excluded. . . ."

[10] Palmer v. Hanna, 6 Colo. 55 (1881).

[11] Sussman v. Barach, 401 P.2d 608 (Colo. 1965).

[12] ILL. REV. STAT. ch. 51, § 2 (Bar ed. 1963).

[13] *In re* Shapter's Estate, 35 Colo. 578, 585, 85 Pac. 688, 691 (1906): "The rule is well settled that in adopting the statute of another state we adopt the construction given it by the courts of that state."

[14] Abbott v. Doughan, 204 N.Y. 223, 97 N.E. 599, 600 (1912).

[15] *In re* Repush's Will, 257 Wis. 528, 44 N.W.2d 240 (1950).

[16] Fadam v. Midcap, 112 Colo. 573, 578-79, 152 P.2d 682, 684 (1944).

trial, since the sole witness had a pecuniary interest, even though the court recognized that it was quite possibly preventing the establishment of an honest defense.[17] A doctrine which leads to such results is not defensible, even when the avowed purpose is to protect "estates, widows and minor heirs, who without some rule of evidence of this kind, would find themselves at the mercy of any unprincipled debtor."[18]

It would seem then, that the purpose of the dead man statute could be categorically stated as follows: (1) to prevent unjust claims against decedents' estates; (2) to place the living and the dead on equal terms; and (3) to protect widows and children. While such attempts at justifying the statute have been vigorously attacked,[19] the fact remains that the statute exists, and practicing attorneys must be aware of its requirements and scope.

II. The Statute Invoked — The Requirement of Three Essential Elements

In order to invoke the statute to exclude the testimony of a witness, there are three necessary elements, all of which must be present: (A) The witness must be a member of a class which is rendered incompetent by the statute; (B) The party against whom the testimony is offered must belong to a class protected by the statute; and (C) The testimony itself must be of a nature forbidden by the statute.[20]

A. *Classes of Persons Excluded From Testifying*

1. Interested Persons

There are actually two classes of persons which are rendered incompetent by the Colorado statute: (1) parties to a civil action where the adverse party represents a decedent; and (2) persons directly interested in the result of that action. The exclusion of testimony of "interested" witnesses has no doubt been the foundation of more litigation than any other single aspect of the dead man statute. It has been said, in general, that the true test of the interest which will disqualify a witness is whether he will "by the direct legal operation and effect of the judgment, gain or lose, pecuniarily, or [whether] the record will be legal evidence for or against him in some other action, as an establishment . . . of the matters about which he is offered to testify."[21] It is not surprising that this re-

[17] Williams v. Carr, 4 Colo. App. 363, 367, 36 Pac. 644, 645 (1894).

[18] *Ibid.*

[19] See discussion pp. 363-65 *infra.*

[20] 97 C.J.S. *Witnesses* § 132, at 557 (1957).

[21] *Id.* § 170, at 609.

quirement of "direct pecuniary gain or loss" has been often mentioned in the Colorado courts.[22]

The *directness* requirement is of particular importance. The distinction between *direct* and *indirect* interest was carefully pointed out in the case of *Eder v. Methodist Episcopal Church Ass'n,*[23] where the representatives of several churches sought the admission to probate of a will allegedly executed by one Martin Eder, deceased, naming the several churches as beneficiaries of his estate. The court allowed the attorney for the proponents of the alleged will to testify relative thereto since his fee was not contingent on the outcome of the case; it allowed the members of the several churches to testify since "the privilege of attending public worship does not . . . disqualify a witness,"[24] but it excluded the testimony of the other named beneficiaries under the will since they would gain *directly* if the will were established.[25]

It will be noted that the attorney and the members of the church would not have gone home from the trial one penny richer or poorer regardless of the outcome of the case, *i.e.,* there was no *direct* pecuniary interest. It is true that establishment of the will would have caused the church members to gain *indirectly,* and it might be contended that they had sufficient motive to distort the truth and should have been disqualified as witnesses. However, to disqualify a witness on these grounds would be to confuse incompetency with lack of credibility. The fact that a witness may be biased or prejudiced is not enough in itself to make him incompetent under the dead man statute if he is not, in fact, in a position to gain or lose *directly.*[26] It must also be noted that whereas neither the attorney nor the church members could have filled their own pockets by establishing the will, that is precisely what the named beneficiaries would have been able to do, and it was this *direct* interest which resulted in the exclusion of their testimony.[27]

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[22] *E.g.,* Eder v. Methodist Episcopal Church Ass'n, 94 Colo. 173, 29 P.2d 631 (1934); Love v. Cotten, 65 Colo. 593, 179 Pac. 806 (1919); Allen v. Shires, 47 Colo. 433, 107 Pac. 1070 (1910); Smith v. Smith, 22 Colo. 480, 46 Pac. 128 (1896); Salkregg v. Thomas, 27 Colo. App. 259, 149 Pac. 273 (1915).

[23] 94 Colo. 173, 29 P.2d 631 (1934).

[24] *Id.* at 180, 29 P.2d at 634.

[25] *Ibid.*

[26] Paschall v. Reed, 320 Ill. App. 390, 51 N.E.2d 342, 344 (1943):

> [T]he interest which will disqualify a witness to testify in a suit involving an administrator must be legal, certain and immediate interest, and such interest must be direct, certain and vested. Otherwise it does not disqualify him, and the interest in such event goes only to the credibility of the witness and not to the competency of such witness.

[27] In Lee v. Leibold, 102 Colo. 408, 79 P.2d 1049 (1938), the court pointed out the distinction between straight fees and contingent fees as bearing on "directness" of the interest. The former do not make the attorney a party in interest within the terms of the dead man statute, but a contingent fee does bring him within the scope of the statute.

Another type of "interest" problem has been presented by a series of cases involving witnesses who have a relationship to a business which is a party to the litigation. Stockholders of a national bank have been held incompetent to give testimony on behalf of the bank to establish a claim against the estate of a decedent,[28] and stockholders of a corporation were excluded as witnesses in a similar case.[29] In both cases the court reasoned that since the stockholders are the legal owners of the corporation, a direct gain of the corporation is a direct gain of the owners. Obviously, mere employees of the corporation would have no such direct interest in the outcome of the litigation.[30]

Not unlike the problem of persons who have a business relationship to a business which is a litigating party, is the question which arises where the witness is a relative of one of the parties to the action. In Colorado, a relative of a party has been held not to be directly interested and has been treated as any other witness. The wife of a legatee has been held competent as a witness to support the will,[31] and a wife has been declared a competent witness in her husband's behalf to establish his claim against a decedent's estate.[32] Certainly, if a spouse is competent, a more distant relative should not be barred by the statute, and the supreme court has so held.[33]

Just as the courts are concerned with whether or not the witness's interest is so *direct* that the judgment will actually put money in his pocket or take it therefrom, so also, a great deal of emphasis is placed upon the degree of *certainty* with which it can be determined that the gain or loss will, in fact, result. Thus, those who *might* be beneficiaries under a subsequent will if a prior will is disproved do not have a sufficiently *certain* interest to preclude their testimony at the will contest.[34]

While a pecuniary interest in the outcome of the action is always sufficient to render a witness incompetent, mere interest in the subject matter of the litigation is not, by itself, sufficient.[35] Thus, where the plaintiff attempted to establish a contract made with a person

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[28] Brown v. First Nat'l Bank, 49 Colo. 393, 113 Pac. 483 (1911).

[29] Gilmour v. Hawley Merchandise Co., 21 Colo. App. 307, 121 Pac. 765 (1912).

[30] Ainsworth v. Ainsworth, 102 Colo. 392, 79 P.2d 1045 (1938).

[31] *In re* Hatfield's Will, 21 Colo. App. 443, 122 Pac. 63 (1912); *accord,* White v. Bower, 56 Colo. 575, 136 Pac. 1053 (1913).

[32] White v. Christopherson, 46 Colo. 46, 102 Pac. 747 (1909).

[33] Burnham v. Grant, 24 Colo. App. 131, 134 Pac. 254 (1913).

[34] Hughes v. Williams, 300 Ill. App. 108, 20 N.E.2d 860 (1939). *But see* Brantner v. Papish, 109 Colo. 437, 126 P.2d 1032 (1942), where the court believed it evident that the children of the deceased would inherit her estate if the will were disproved, and consequently excluded their testimony.

[35] Popejoy v. Bahr, 67 Colo. 385, 176 Pac. 947 (1919).

since deceased,[36] the supreme court held that it was error to exclude the testimony of a witness who had a case pending which involved the same contract. The court pointed out that the witness would be interested only in the validity of the contract, not in the outcome of the particular suit. "In order to disqualify a witness, his interest . . . must be in the event of the particular case, and not merely in the question to be decided therein."[37]

It has been seen that the interest must be both *direct* and *certain* if the testimony of the witness is to be rejected. Apparently, a third requirement, which has received little attention, is that the interest cannot be nominal. Only one Colorado case has dealt with this requirement.[38] Where a testator's nephew had been "cut off" with a legacy of one dollar, he was allowed to testify as to the validity of the will since "[the] dollar bequest could not reasonably be considered as conferring a material interest upon [the nephew] . . . ."[39] It would seem that this case poses a somewhat provocative precedent since the court has left itself open to future determination of the monetary value which is necessary before interest exists. Is it an absolute value or a value relative to the entire estate? Should it matter whether the legatee is wealthy or poor? The line must be drawn somewhere, but there has, as yet, been no indication of what will be done.

In all of the cases discussed thus far, the interested witness has always been excluded when offered to testify in an action where his testimony would directly benefit him. It should be noted here that the dead man statute itself provides that the witness shall be barred only when he testifies "of his own motion, or in his own behalf."[40] Thus, where the witness testifies against his own interest, the statute is not a bar.[41] The logic employed here is no doubt similar to that which created the exception to the hearsay rule when the out-of-court declarant makes statements against his own interest.[42] If the witness is willing to testify under oath to facts adverse to him financially, he is presumed to be telling the truth.

2. Parties

Interested witnesses are not the only persons disqualified by the dead man statute; parties to the action are also excluded. The Colo-

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[36] Love v. Cotten, 65 Colo. 593, 179 Pac. 806 (1919).

[37] *Id.* at 596, 179 Pac. at 807.

[38] Lamborn v. Kirkpatrick, 97 Colo. 421, 50 P.2d 542 (1935).

[39] *Id.* at 424, 50 P.2d at 544.

[40] COLO. REV. STAT. § 154-1-2 (1963).

[41] Sussman v. Barash, 401 P.2d 608 (Colo. 1965); *In re* Thomas' Estate, 144 Colo. 358, 356 P.2d 963 (1960).

[42] See generally MCCORMICK, EVIDENCE §§ 253-56 (1954).

rado court first invoked the statute in 1894,[43] saying: "[N]o party is allowed to testify of his own motion where the adverse party defends as an heir, etc., of a decedent . . . ." The statute has since been referred to on numerous occasions.[44] Although most of the matters litigated involve claims against a decedent's estate, the statute is equally applicable where it is the estate that makes the claim.[45] It would appear, then, that any party to an action is automatically incompetent where the adverse party represents a decedent's estate.

But what of situations where the individual is named as a party but is neither a necessary party to the action nor a real party in interest? He is technically a party to the action, but he has no *direct* and *certain* interest in the outcome thereof. The Colorado court addressed this problem in *Klein v. Munz,*[46] where it was said:

> [T]his statute was not intended to, and does not, permit an executor to join an uninterested person as a party defendant and thereby deny him the right to testify. Certainly the interest of such defendant must be shown before the bar of the statute may be invoked.[47]

The court has taken a similar stand where the person whose testimony was excluded was a necessary party but not a real party in interest:[48]

> There is a vast difference between those who are required to be made formal parties, or those who have no personal interest in the result of the controversy, and those who are required to be made parties because of the respective personal and property interests involved in the issue to be determined. . . .[49]

It becomes obvious from this discussion that the disqualification of parties is really a result of their being "interested" persons.

Although the Colorado court has not dealt squarely with the problem, it would appear that if a person is, in fact, a proper party to the action, the accompanying fact that the plaintiff's motive in making him a party was merely to prevent him from testifying for his co-defendant will not prevent the application of the disqualifying statute.[50] However, the mere naming of a person as a party could never be enough to invoke the statute against him if he is never served with process and therefore does not appear as a party. The

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[43] Carpenter v. Ware, 4 Colo. App. 458, 461, 36 Pac. 298, 299 (1894). The statute referred to is the predecessor of COLO. REV. STAT. § 154-1-2 (1963).

[44] Reiter v. Pollard, 75 Colo. 203, 225 Pac. 222 (1924); Temple v. Magruder, 36 Colo. 390, 85 Pac. 832 (1906); *accord,* Young v. Burke, 139 Colo. 305, 338 P.2d 284 (1959); *In re* Eder's Estate, 94 Colo. 173, 29 P.2d 631 (1934); Stratton v. Rice, 66 Colo. 407, 181 Pac. 529 (1919).

[45] Keeler v. Hoyt, 57 Colo. 120, 140 Pac. 191 (1914).

[46] 87 Colo. 223, 286 Pac. 112 (1930).

[47] *Id.* at 225, 286 Pac. at 113.

[48] Risbry v. Swan, 124 Colo. 567, 239 P.2d 600 (1951).

[49] *Id.* at 577, 239 P.2d at 606.

[50] Sullivan v. Corn Products Ref. Co., 245 Ill. 9, 91 N.E. 643 (1910).

Illinois court has so held.[51] Similarly, it has been established in Colorado that where an action has been commenced and one party subsequently dies, the executors of his estate have the right to be substituted as parties notwithstanding the consequent effect of the exclusion of witnesses under the statute.[52]

A misunderstanding of the statute has resulted in some confusion as to whether or not the administrators, executors, heirs, etc., are themselves competent to testify. The wording of the statute is relatively clear in this regard. It provides specifically that no party or interested person shall testify where "any adverse party" represents a deceased person. It follows from this language that neither the administrator nor executor is to be barred from testifying, but that only those persons and parties "adverse" to the administrator or executor shall be disqualified from testifying. In general, "an executor or administrator is usually a competent witness where he is a party in his representative capacity, at least where he is a witness on behalf of the estate he represents."[53] The Illinois court has so held with respect to both administrators[54] and heirs.[55] This is not to say however, that one who represents a deceased person is never rendered incompetent by the dead man statute. Fact situations present themselves where the party adverse to the administrator or heir also represents a decedent, and in such a case the statute would disqualify both parties.[56]

B. *Classes of Persons Protected*

The dead man statute provides that the following persons shall receive its protection: "the executor or administrator, heir, legatee or devisee of any deceased person, or . . . guardian or trustee of any such heir, legatee or devisee."[57] This list is neither long nor complex, and it leaves little room for doubt or argument. Any person who sues or defends in one of these capacities is within the scope of the statute, and all others are outside of its protection. Where a party is within a protected class and his co-party is not, the latter may not invoke the statute.[58] Thus, the statute does not actually make the

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[51] Sankey v. Interstate Dispatch, Inc., 339 Ill. App. 420, 90 N.E.2d 265 (1950).

[52] Butler v. Rockwell, 14 Colo. 125, 23 Pac. 462 (1889).

[53] 97 C.J.S. *Witnesses* § 155, at 596 (1957).

[54] Bailey v. Robison, 244 Ill. 16, 91 N.E. 98, 100 (1910): "The disqualification under the statute is not against the party suing or defending as administrator, but against the party suing or defending adversely to the administrator."

[55] Weiss v. Beck, 1 Ill. 2d 420, 115 N.E.2d 768, 774 (1953): "It is not the heir who is disqualified from testifying under the Evidence Act, but it is the party adverse to the one suing or defending as an heir that is disqualified."

[56] *In re* Shapter's Estate, 35 Colo. 578, 85 Pac. 688 (1906).

[57] COLO. REV. STAT. § 154-1-2(1) (1963).

[58] Haffner v. Van Blarcom, 84 Colo. 565, 569, 272 Pac. 621, 622 (1928): "[T]he protection of the statute extends only to adverse parties within the designated class and not to their co-parties not within such class."

witness incompetent for *all* purposes, and where there are multiple defendants, only some of whom represent decedents, the witness's testimony will be admitted as against those defendants who are not legal representatives or heirs of a decedent.[59] However, the mere fact that such a person *could* be joined as a party defendant will not remove the disqualifying effect of the dead man statute where the only adverse party actually named in the suit represents a decedent's estate.[60]

Not only is the protection of the dead man statute limited to the legal representatives of deceased persons, but that representative capacity must be alleged and proved before the protection of the statute may be invoked. This rule was established in the leading case of *Prewitt v. Lambert,*[61] where the court stated that when a person sued individually undertakes to defend as an administrator, he must establish by positive averment and proof at a preliminary proceeding that he is the administrator and thereby is entitled to the protection of the statute.

There has been some question raised concerning the availability of the protection of the dead man statute to partnerships and corporations following the death of a partner or corporate officer. In the case of a corporation, the statute apparently does not bar the admission of statements made by a corporate officer which are binding on the corporation even though the officer dies prior to trial.[62] This conclusion is perhaps best explained by the fact that the officer is not a real party in interest, and, therefore, any protection to which his administrator would be entitled if sued alone should not extend to the corporation.[63] Where partnerships are concerned, the protection available is specifically controlled by statute,[64] and the distinguishing factor determining admissibility is whether one or more of the surviving partners were present at the time of the

[59] Watson v. Woodley, 71 Colo. 391, 207 Pac. 335 (1922); *accord,* Sauer v. First Nat'l Bank, 75 Colo. 119, 224 Pac. 227 (1924) (defendant defended in her individual as well as representative capacity); Gabrin v. Brister, 65 Colo. 407, 177 Pac. 134 (1918) (defendant was sued as executrix and in individual capacity); Nesbitt v. Swallow, 63 Colo. 194, 164 Pac. 1163 (1917).

[60] Cree v. Becker, 49 Colo. 268, 112 Pac. 783 (1911).

[61] 19 Colo. 7, 34 Pac. 684 (1893).

[62] Garden of Gods Village v. Hellman, 133 Colo. 286, 294 P.2d 597 (1956).

[63] It would appear that Colorado is definitely in the minority in its holding that a corporation is not within the class of protected persons. 97 C.J.S. *Witnesses* § 212, at 654 (1957).

[64] COLO. REV. STAT. § 154-1-4 (1963):

> Conversation of deceased partner. — In any action, suit or proceeding, by or against any surviving partner or joint contractor, no adverse party or person adversely interested in the event thereof, shall be rendered a competent witness to testify by virtue of section 154-1-1, to any admission or conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation.

original conversation or transaction. The Colorado court has held that where the surviving partner who was so present is also defending as the legal representative of the deceased partner's estate, the decedent's admission or conversation is admissible against the defendant in his capacity as surviving partner and inadmissible against him in his representative capacity.[65] The only limitation imposed is a proper jury instruction relating to the purposes for which the testimony is being admitted. It is obvious that this interpretation has diluted the effect of the dead man statute in those fact situations where a surviving partner is also the representative of his deceased associate since it allows the jury to hear the evidence regardless of the fact that the adverse party represents a decedent. A similar problem results where the court admits the testimony in cases where the decedent's representative has a co-party who is not protected by the dead man statute.

C. *Testimony Excluded*

It should be noted at the outset, when addressing the problem of the testimony excluded by the dead man statute, that it is really the witness who is excluded, not his testimony. The statute does not render any evidence, as such, incompetent. It simply bars proof of certain matters by *particular witnesses*: "[T]he reason for rejection of the testimony necessarily is the incompetency of the person, not the testimony."[66] In any given action, there may be nothing objectionable about any particular evidence coming in, provided it is given by a competent witness.

Furthermore, the disqualification extends only to testimony relating to facts *occurring before the death of the decedent.*[67] If the witness is, in fact, an interested person or a party to the suit, and if the testimony he desires to give on his own behalf is related to facts which occurred prior to the decedent's death, "the character of his his testimony and the subject matter about which he testifies are totally unimportant."[68]

There has been some question as to the effect of a writing introduced on behalf of a witness otherwise rendered incompetent by the statute. The court has distinguished between two types of writings: (1) self-serving statements written by the witness himself; and (2) statements written by persons other than the witness. The former are incompetent and are therefore not admitted, particularly

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[65] Savard v. Herbert, 1 Colo. App. 445, 29 Pac. 461 (1892).

[66] Balla v. Sladek, 381 Pa. 85, 112 A.2d 156, 160 (1955).

[67] Keeler v. Hoyt, 57 Colo. 120, 140 Pac. 191 (1914).

[68] Jones v. Henshall, 3 Colo. App. 448, 451, 34 Pac. 254, 255 (1893).

where they were written after the death of the decedent.[69] The latter are admissible, provided they are properly authenticated, but the incompetent witness cannot himself verify them.[70] This is a perfect example of the rule that while the evidence itself may not be incompetent, the witness may be.

A somewhat different problem is presented where the offered writing is a book account. Colorado Revised Statutes, section 154-1-3 (1963) provides that any party or interested person is allowed to testify as to his book accounts and entries therein, but it has been held that this enabling statute is neither an amendment of, nor an exception to, the dead man statute.[71] The result is that while the account books themselves are admissible if the proper preliminary proof is given, the witness who is rendered incompetent by the dead man statute cannot give that preliminary proof.[72]

III. Nature of the Action

Just as the statute makes no distinction regarding the type of testimony which it will exclude, neither does the nature of the action affect the working of the statute. The prohibition is the same in equity as in law,[73] although it has no application in criminal cases since the wording of the statute specifically limits it to "civil actions." There is no reason to believe that the Colorado court would disagree with the general rule that the dead man statute covers the competency of witnesses in any civil proceeding, regardless of form or class, before any tribunal, whether the action be legal or equitable.[74]

IV. Objections and Cross-Examination

In order to avail himself of the protection of the dead man statute, a party must make a timely objection on the grounds of incompetency,[75] and failure to make such an objection waives it. Where

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[69] Butler v. Phillips, 38 Colo. 378, 392, 88 Pac. 480, 484 (1906): "The claimant being disqualified as a witness by virtue of [the dead man statute] . . . , no self-serving statement made by him in the form of a letter could be competent evidence."

[70] Carpenter v. Ware, 4 Colo. App. 458, 36 Pac. 298 (1894) (letters written to his children by one since deceased; held, widow not competent to verify said letters).

[71] Wilson v. Warner, 83 Colo. 280, 282, 264 Pac. 657, 658 (1928): "Had it been the intention of the Legislature to make book accounts also an exception, it would have included them among the others." *Accord,* Oswald v. Dawn, 143 Colo. 487, 354 P.2d 505 (1960).

[72] Haines v. Christie, 28 Colo. 502, 66 Pac. 883 (1901).

[73] Williams v. Carr, 4 Colo. App. 368, 36 Pac. 646 (1894); Whitsett v. Kershow, 4 Colo. 419 (1878).

[74] 97 C.J.S. *Witnesses* § 133, at 564 (1957).

[75] Faden v. Midcap, 112 Colo. 573, 577, 152 P.2d 682, 684 (1944): "It is incumbent upon the party seeking to take advantage of the incompetency of a witness to interpose an objection on that ground, in the absence of which the objection is deemed waived and the witness is properly allowed to testify." *Accord,* Rigsbry v. Swan, 124 Colo. 567, 239 P.2d 600 (1951); Fister v. Fister, 122 Colo. 432, 222 P.2d 620 (1950); Brown v. First Nat'l Bank, 49 Colo. 393, 113 Pac. 483 (1911); Cree v. Becker, 49 Colo. 268, 112 Pac. 783 (1911); Temple v. Magruder, 36 Colo. 390, 85 Pac. 832 (1906); Jones v. Henshall, 3 Colo. App. 448, 34 Pac. 254 (1893).

situations arise in which a person is competent to testify to some matters and incompetent as to others, the objection should not be made until he is asked to testify to the matters as to which he is incompetent.[76] However, if the objection is made when the witness takes the stand, "the party tendering him should state what he proposes to prove by him, so that the court may know that it is proper."[77]

So that his objections may be timely, counsel must know at what point in time the witness becomes incompetent. In the case of an "interested" witness, from what point in time must the interest have existed? Apparently, interest in the event of the suit must be determined as of the time the testimony is offered rather than at the time the action was filed.[78] If the witness has a disqualifying interest at the time he is questioned in the courtroom, an objection is timely and proper. Similarly, when a party to an action dies during its progress prior to the introduction of the testimony objected to as incompetent, the objection is proper since "incompetency at the time the witness is sworn is the test."[79]

The party entitled to the protection of the dead man statute can waive it not only by failing to make timely objection, but also by himself calling the otherwise incompetent witness to testify.[80] Furthermore, once the witness becomes competent in this manner, the competency extends to any and all testimony pertinent to the issues of the case,[81] and he is not limited to the specific topics about which his adversary questioned him. And if the witness is rendered competent to testify at one trial, the competency obtains at subsequent trials of the same cause.[82]

Cross-examination of a witness incompetent under the dead man statute can have the same effect as calling that witness to testify.[83] However, cross-examination must bring out facts to which the witness would otherwise have been incompetent to testify before it

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[76] Parker v. Hilliard, 106 Colo. 187, 193, 102 P.2d 734, 736 (1940).

[77] *Ibid.*

[78] Miller v. Hepner, 136 Colo. 48, 314 P.2d 604 (1957).

[79] 97 C.J.S. *Witnesses* § 138, at 577 (1957).

[80] COLO. REV. STAT. § 154-1-2 (1) (1963) provides that a witness who would otherwise be incompetent under the dead man statute is free to testify "when called as a witness by such party suing or defending."

[81] Allen v. Shires, 47 Colo. 433, 436, 107 Pac. 1070, 1071 (1910): "[W]hen . . . a disqualified witness is called by the adverse party and examined by him as a witness upon certain matters pertinent to some of the issues in the case, such witness is thereby rendered competent for all purposes." *Accord,* Jerome v. Bohm, 21 Colo. 322, 40 Pac. 570 (1895); Warren v. Adams, 19 Colo. 515, 36 Pac. 604 (1894).

[82] Finch v. McCrimmon, 100 Colo. 315, 67 P.2d 623 (1937).

[83] Stender v. Cunningham, 123 Colo. 5, 10, 225 P.2d 52, 54 (1950):

> We are unable to escape the conclusion that by cross-examination of [the] proponent concerning conversations and transactions occurring prior to the death of the decedent, the proponent was thereby rendered competent to testify for all purposes and that the inhibitions of the statute do not apply.

will have the effect of lifting the bar of the statute. Merely cross-examining a witness to such an extent as to disclose his interest and consequent incompetency is not a waiver of the right to object to the witness's competency.[84]

V. Statutory Exceptions

The dead man statute in Colorado is subject to seven exceptions which are found in Colorado Revised Statutes, section 154-1-2 (1963), subsections (1)-(7). The first of these provides quite simply that parties and interested persons shall not be barred from testifying to any fact which occurred subsequent to the death of the deceased person.[85] The clarity of this exception allows it to speak for itself, and it has been upheld in several decisions.[86]

The second exception relates to situations where an agent of the deceased testifies for the administrator (or executor, heir, etc.) regarding a conversation or transaction between that agent and an opposing party. It is provided that such testimony by the agent makes the adverse party competent to testify to that same conversation or transaction.[87] Obviously, since the deceased's lips are no longer sealed, due to his agent's appearance to speak for him, the need for equality between the living and dead no longer requires that the adverse party remain silent. However, the adverse party's testimony must be confined to facts concerning the same transaction or conversation to which the agent has testified. If it can be shown that the agent's testimony relates to something other than a specific transaction or conversation, the exception does not apply.[88] Although no cases can be found on point, it would seem logical that this latter statement is applicable to all statutory exceptions dealing specifically with "transactions" or "conversations."

The third exception allows the adverse party to testify where the administrator himself takes the stand, or an interested person does so in his behalf, and testifies to a conversation or transaction

[84] Cordingly v. Kennedy, 239 Fed. 645 (8th Cir. 1917).

[85] Colo. Rev. Stat. § 154-1-2(2) (1963): "In any such action, suit or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person."

[86] *E.g.*, Eder v. Methodist Episcopal Church Ass'n, 94 Colo. 173, 29 P.2d 631 (1934); Kitts v. Hill, 89 Colo. 186, 300 Pac. 610 (1931); Tourtellotte v. Brown, 18 Colo. App. 355, 71 Pac. 638 (1903).

[87] Colo. Rev. Stat. § 154-1-2(3) (1963):

> When . . . any agent of any deceased person, shall testify in behalf of any person suing or being sued, in either of the capacities above named, to any conversation or transaction between agent and the opposite party or parties in interest, such party or parties in interest may testify concerning the same conversation or transactions.

[88] Stratton v. Rice, 66 Colo. 407, 181 Pac. 529 (1919) (dated deposit slips and checks in deceased's handwriting offered by administrator to show deceased's location at a certain time did not constitute a "transaction" or a "conversation").

between the deceased and the opposite party.[89] Here again, the adverse party's testimony must be limited to the specific transaction or conversation about which the administrator or interested person testified.

Under the fourth exception, the adverse party can testify when a witness who is neither a party, an interested person, nor an agent of the deceased, testifies to a conversation or admission by that adverse party prior to the decedent's death, but not in the decedent's presence.[90] A simple example will help to clarify this exception. Where an administrator brought an action for money owed by the defendant to the deceased, the administrator introduced into evidence a letter from the defendant to an heir-at-law written prior to the death of the decedent.[91] The heir-at-law authenticated the letter. Analyzing these facts in light of the requirements of the fourth exception, it can be seen that: (1) the witness was not a party, an interested person, or an agent of the deceased; (2) the letter was written and sent prior to the decedent's death; and (3) the letter was not written or received in the decedent's presence. Having thus satisfied the requirements of the exception, it would not be error to allow the defendant to testify in rebuttal. The court so held.

The fifth exception permits the adverse party to testify when the deposition of the deceased has been introduced into evidence at the trial, but the testimony is limited to matters contained in the deposition.[92] The exception applies only where the deceased's legal representative is the one who introduces the deposition.[93] Nor is it enough that it merely be shown that the deceased's deposition was, in fact, taken; it must actually be introduced at the trial.[94]

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[89] COLO. REV. STAT. § 154-1-2(4) (1963):

> When . . . any such party suing or defending, or any person having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or parties in interest, then such opposite party in interest shall also be permitted to testify as to the same conversation or transaction.

[90] COLO. REV. STAT. § 154-1-2(5) (1963):

> When . . . any witness not a party to the record, or not a party in interest, or not an agent of such deceased person, shall testify in behalf of any party in such action, suit or proceeding, to any conversation or admission by any adverse party or parties in interest, occurring before the death and in the absence of such deceased person, such adverse party or parties in interest may also testify to the same admission or conversation.

[91] Denver Nat'l Bank v. McLagen, 133 Colo. 487, 298 P.2d 386 (1956).

[92] COLO. REV. STAT. § 154-1-2(6) (1963):

> When . . . the deposition of such deceased person shall be read in evidence at the trial, any adverse party or parties in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency.

[93] Levy v. Dwight, 12 Colo. 101, 107, 20 Pac. 12, 15 (1888): "[T]he introduction of such testimony by the living party will not make such party a competent witness in his own behalf."

[94] *Id.* at 103, 20 Pac. at 14.

The sixth exception provides that if the adverse party or interested person made an admission to, or had a conversation with, or knows of things connected with, the decedent, he can testify thereto notwithstanding the fact that the conversation, admission, or other fact occurred prior to the decedent's death, *provided* a member of the decedent's family over sixteen years of age, or an heir, legatee or devisee over sixteen years of age was present at the time and is now present to testify, or can be procured for the purpose of giving such testimony.[95] The rationale here is that the relative, heir, legatee, or devisee will adequately represent the interests of the estate to avoid any danger of the adverse party's working a fraud. Thus, the exception will usually be utilized by the court where it finds the witness to the transaction is representing the estate within the "spirit of the statute."[96]

The seventh and final exception seems to have been seldom invoked in the Colorado courts. It merely provides that if a defendant has ever been required to testify regarding his having concealed the will or other property of the deceased, the written record of such testimony is admissible on the defendant's behalf if it relates to the estate of the decedent.[97] There has been no construction of this exception by the supreme court.

CONCLUSION

Notwithstanding its adoption by nearly all of the states, the dead man statute has been the target of severe criticism since its inception, and its attackers have insisted that it excludes far more valid claims than false ones. It has been contended that the restriction should be relaxed and that methods of investigating truth be substi-

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[95] COLO. REV. STAT. § 154-1-2(7) (1963):

> [A]ny adverse party or parties in interest may testify as to any conversation or admission, or as to all matters and things connected with the subject matter of said action, suit or proceeding, and which conversation and admission and matters and things, occurred before the death and in the presence of such deceased and also in the presence of any member of the family of such deceased person over the age of sixteen years, or in the presence of any heir, legatee or devisee of such deceased person over the age of sixteen years; provided, that such member of the family, heir, legatee or devisee as the case may be, is present at the hearing of said action, suit or proceeding, or whose testimony is or may be procurable at such trial.

[96] Walker v. Walker, 131 Colo. 328, 281 P.2d 1010 (1955); Koch v. Garnier, 110 Colo. 562, 136 P.2d 673 (1943); Brantner v. Papish, 109 Colo. 437, 126 P.2d 1032 (1942).

[97] COLO. REV. STAT. § 154-1-2(8) (1963):

> When the defendant in any such suit has previously been required to testify under the provisions of section 153-5-20 or section 153-10-42, the testimony so given if reduced to writing, or the stenographic minutes thereof, so far as the same relates to the estate concerning which or for the benefit of which such suit is brought, and is relevant to the issue in such suit and competent under the general rules of evidence, may be read in behalf of such defendant.

tuted. Thus, it has been suggested that cross-examination, the scrutiny of witnesses by the court and jury, and the power of circumstantial evidence to discredit the oral testimony of an interested witness are sufficient to uncover any fraudulent scheme which may be afoot.[98]

It may well be that Jeremy Bentham touched on what is the real heart of the current arguments against the dead man statute when he questioned the basic logic of any rule which excluded the testimony of interested persons:

> Does it follow, because there is a motive of some sort prompting a man to lie, that for that reason he will lie? That there is danger in such a case is not disputed; but does the danger approach to certainty? This will not be contended. If it did, instead of shutting the door against some witnesses, you ought not to open it to any. An interest of a certain kind acts upon a man in a certain direction opposite to the path of duty; but will he obey the impulse? That will depend upon the forces tending to confine him to that path—upon the prevalence of the one set of opposite forces or the other. All bodies on or about the earth tend to the centre of the earth; yet all bodies are not there. All mountains have a tendency to fall into level with the plains; yet, notwithstanding, there are mountains.[99]

The question, then, should be not whether a witness has an interest in the outcome of the suit, but rather whether, under all the circumstances, it is likely that his interest will affect the competency of his testimony and whether sufficient safeguards have been provided to prevent this potential danger. To continue to uphold the dead man statute as a necessary means of maintaining perfect equality between the living and the dead is to confuse theory with practical effects. As Professor Wigmore has so ably pointed out, the theory of incompetency based on interest is reducible in its essence to a syllogism, both premises of which are quite obviously fallacious:[100] first, whenever persons likely to give false testimony are offered as witnesses, the only proper safeguard against a false decision is total exclusion from the stand; second, persons having a pecuniary interest in the outcome of a suit are likely to give false testimony; therefore, such persons should be totally excluded. The first premise simply fails to recognize the alternatives available and their proven effectiveness (e.g., cross-examination, careful scrutiny of the witness by the court and jury, and the effect of circumstantial evidence to discredit the testimony of an interested witness), while the second premise overlooks Bentham's appropriate acknowledgement of the fact that a man's actions will be determined by the interaction of his impulse to lie, with the forces which tend to counter-balance such an im-

[98] Taft, *Comments On Will Contests In New York*, 30 YALE L.J. 593, 605 (1921).

[99] 7 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 393 (Bowring ed. 1827).

[100] 2 WIGMORE, EVIDENCE § 576, at 686 (3d ed. 1940).

pulse, not the least of which is the moral influence of the oath, and the feeling of futility in attempting to perpetrate a fraud in the face of vigorous cross-examination by opposing counsel and careful scrutiny by the judge and jury.

A number of states have already recognized the basic illogic of the dead man statute and have implemented alternative schemes for dealing with cases involving transactions, one party to which had died. In Oregon and New Mexico[101] no recovery is allowed if based on the adverse party's sole testimony. There must be corroboration of some sort. In Connecticut, Virginia, and Oregon, the adverse party's testimony is admitted along with any writings or declarations of the deceased party which relates to the same subject.[102] New Hampshire and Arizona exclude the adverse party's testimony except when the court feels that injustice will result from such exclusion.[103] The Connecticut statute, in particular, has won wide acclaim from the practicing attorneys in that state, as well as approval from more than 80% of the judges,[104] thereby indicating that experience has shown it to be valuable.

It is submitted that the Colorado General Assembly would be well-advised to re-evaluate the actual merits of retaining the dead man statute in light of what would appear to be a discrepancy between the common law theory on which the statute is founded and the practical realities of its operation.

Lowell J. Noteboom

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[101] *Id.* § 578, at 697.

[102] *Ibid.*

[103] *Id.* § 578, at 698.

[104] *Id.* § 578(a), at 699.