North Dakota Law Review

Volume 34 | Number 4 Article 4

1958

The North Dakota Dead Man's Statute - Waiver by Taking Depositions

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THE NORTH DAKOTA "DEAD MAN'S STATUTE"— WAIVER BY TAKING DEPOSITIONS?

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North Dakota, pursuant to Section 31-0103 of the *Code*, still clings to the statutory rule that in a suit by or against the personal representatives, neither party is qualified to testify against the other as to any transaction with the testator or intestate, unless called to testify to that transaction by the opposite party.[1] For the most part, the scholarly and reasoned arguments for abandoning the rule throughout the country have not been heeded,[2] nor, have the criticisms of the North Dakota statute provoked a change in this state.[3] Until such time as it is deemed wise to change the law, questions will continue to arise as to its application in specific cases. The general scope, interpretation and application of Section 31-0103 has already been critically analyzed in the *North Dakota Law Re-*

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1. N. D. Rev. Code § 31-0103 (1943): "In any civil action or proceeding by or against executors, administrators, heirs at law, or next of kin in which judgment may be rendered or ordered entered for or against them, neither party, except as provided in section 31-0104 and section 31-0105, shall be allowed to testify against the other as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party. Where a corporation is a party to any proceeding mentioned in this section, no agent, stockholder, officer, or manager of such corporation, shall be permitted to testify to any transaction or conversation had with the testator or intestate."

The statutory exceptions provided for in Section 31-0103, *supra*, are: (1) the testimony of the surviving spouse regarding transactions with the deceased spouse touching their business or property interests (§ 31-0104); and (2) the testimony of a party to an action in which the prior testimony of a deceased person is used in behalf of his executors, administrators, heirs at law, or next of kin (§ 31-0105).

For the statutes from other jurisdictions, see 2 Wigmore, Evidence § 488 (3d ed. 1940).

2. For example, see McCormick § 65 (1954): "Most commentators agree that . . . the expedient of refusing altogether to listen to the survivor is, in the words of Bentham, a 'blind and brainless' technique. In seeking to avoid injustice to one side, the statute-makers have ignored the equal possibility of injustice to the other. The temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard. A searching cross-examination will usually, in case of fraud, reveal discrepancies inherent in the 'tangled web' of deception. In any event, the survivor's disqualification is more likely to balk the honest than the dishonest survivor. One who would not stick at perjury will hardly hesitate at suborning a third person, who would not be disqualified, to swear to the false story."

See further, 2 Wigmore, Evidence §§ 578-578a (3d ed. 1940).

3. As to this, see St. John v. Lofland, 5 N. D. 140, 64 N.W. 930, 931 (1895): "Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them by destroying the evidence to prove such claim than there would be fictitious claims established if all such enactments were swept away, and all persons rendered competent witnesses. To assume that in that event many false claims would be established by perjury is to place an extremely low estimate on human nature, and a very high estimate on human ingenuity and adroitness. He who possesses no evidence to prove his case save that which such a statute declares incompetent is remediless. But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can contradict the survivor, who supports his claim with his oath. In the legal armory, there is a weapon whose repeated thrusts he will find it difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods, — the sword of cross-examination."

For further discussion on the need for reform in North Dakota, see N. Dak. L. Rev. 139, 139-140 & 146-148 (1954).

view, but, in the interim, a somewhat more specialized question has been raised.[4] This has to do with whether Section 31-0103 will be waived by taking the deposition of the adverse party pursuant to Rule 26 of the *North Dakota Rules of Civil Procedure.*

Of fundamental importance in considering the question is an examination of the nature and purpose of depositions as envisioned by Rule 26. It hardly requires any citation of authority for the proposition that Rule 26 has both a discovery and evidentiary purpose. Rule 26(a) provides, *inter alia,* that "any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes." Further, Rule 26(b) provides, in part, that "the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . [and it] is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." And, under Rule 26(e), a party can object "at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying." Finally, in Rule 26(f) it is provided that "a party shall not be deemed to make a person his own witness for any purpose by taking his deposition." Thus, it is apparent, in North Dakota, as under the *Federal Rules,* that Rule 26 serves the basic procedural need for discovery as well as providing a means for the preservation of testimony for purposes of trial.[5]

As noted, under Section 31-0103, a waiver occurs if either party is "called to testify . . . by the opposite party." The North Dakota Supreme Court has held, consistent with this provision, that an examination of the adverse party as a witness, either on direct or cross-examination, as to any transaction encompassed by the statute will constitute a waiver,[6] not only as to that part about which he was interrogated, but as to the transaction in its entirety.[7] The only exception to the rule which the Court appears to recognize is

4. See 30 N. Dak. L. Rev. 139 (1954).

5. See Moore, Federal Practice ¶26.04 (2d ed. 1950).

6. International Shoe Co. v. Hawkinson, 72 N.D. 622, 10 N.W.2d 590 (1943); Frink v. Taylor, 59 N.D. 47, 228 N.W. 459 (1930).

7. See Frink v. Taylor, *supra* note 6 at 462: "But if 'called to testify thereto by the opposite party,' then this bar is removed. It will be noted that if 'called to testify *thereto,*' that is, as to the transaction, the bar is removed. As soon as the plaintiff called him to testify regarding any part of the transaction, then the defendant became a competent witness to testify regarding the transaction in its entirety."

when it is demonstrated that the adverse party is clearly antagonistic to the deceased's estate.[8]

Not so obvious, however, is whether the waiver language "called to testify" relates only to testimony given at trial, or during the taking of a deposition as well.[9] In *Frink* v. *Taylor*, the Supreme Court of North Dakota, while not confronted with the question posed, is reasonably clear in its opinion that the waiver language in Section 31-0103 means the calling of the adverse party to testify as a witness during trial.[10] In consequence, the conclusion seems inescapable that, by merely taking the deposition of the adverse party, he is not "testifying" within the meaning of the waiver language of the statute. The testimony is sought for discovery, not use in evidence. There appear to be no cases on the point in North Dakota, but several Federal cases dealing with Rule 26 of the *Federal Rules* support the conclusion.

In *Duling* v. *Markun*, from the Seventh Circuit, the plaintiff-executors sued the defendant to recover a sum of money alleged to be due on a loan from the decedent to the defendant.[11] The Court held, contrary to the defendant's contention, that he was incompetent to testify under the applicable Indiana statute and that his incompetency had not been waived by the taking of his deposition. The Court said:

> "Plaintiffs did not offer the deposition in evidence. * * * We do not think that a litigant in Federal Court must . . . refrain from taking advantage of the Federal Rules pertaining to discovery . . . The Federal Rules themselves indicate that a waiver should not result from the mere taking of a discovery examination. Rule 26(f) provides, in substance, that a party shall not be deemed to make a person his own witness for any purpose by taking his deposition."[12]

Earlier, in *Anderson* v. *Benson*,[13] and in the most recent case of *McCargo* v. *Steele*,[14] the Federal District Court has reached the same conclusion on reasoning similar to that employed in the

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8. For a discussion of this exception, with a citation of authorities, see 30 N. Dak. L. Rev. 139, 144 at n. 32 (1954).

9. Of course, for the purpose of this article, it is assumed that the deposition will include statements of the adverse party relating to a part, or the whole, of the transaction with the testator or intestate. Otherwise, the question of waiver by deposition would not arise at all. See Frink v. Taylor, *supra* note 7.

10. 59 N.D. 47, 228 N.W. 459, 462 (1930). See also, note 7 *supra*. See further, the recent case of Bonogofsky v. Kraft, 92 N.W.2d 179 (N.D. 1958), concerning the waiver of the statute by *testimonial evidence*.

11. 231 F.2d 833 (7th Cir. 1956), *cert. denied*, 352 U.S. 870 (1956).

12. 231 F.2d 833, 839 (7th Cir. 1956).

13. 117 F. Supp. 765 (D.C. Nebr. 1953).

14. 160 F. Supp. 7 (W. D. Ark. 1958).

Duling case. In the *McCargo* case, the waiver language in the applicable Arkansas constitutional provision was exactly the same as that in North Dakota's Section 31-0103.[15] In the *Anderson* case, the Nebraska statute provided that the adverse party had waived his right under the statute when he had "introduced a witness who shall have testified."[16] Though varying slightly from the waiver provision in the North Dakota statute, as we have observed, it seems implicit from the *Frink* case, that this is precisely the meaning which the Supreme Court of North Dakota has given to Section 31-0103. Though there is a conflict of authority among the several states on the point,[17] all of the Federal cases found are in agreement, namely, that the mere taking of a deposition under Rule 26 of the *Federal Rules* does not waive the rule of incompetency since it does not amount to an evidentiary use of the testimony.[18]

There is one Federal case in which the District Court has held that a taking and filing of the deposition constitutes a waiver of the "dead man's statute." In *Mutual Life Ins. Co.* v. *Green*, the Court said:

> "It appears to me that the deciding feature in the case is whether or not the deposition was filed in the case and became available for use. When so taken and filed, it has in reality been used by the party taking it."[19]

The Court reached its conclusion in the face of the relevant Kentucky statute which provided that incompetency was waived if a party "shall have testified" against the adverse party.[20] In this respect it is contra to the *Duling, Anderson* and *McCargo* cases.[21] In support of its decision, the District Court said:

> "[The party taking the deposition] has used it for the purpose of obtaining all the information desired by him from a witness otherwise incompetent, who would not be required to give such information except by means of the deposition. Admissions against interest may have been secured. It has been used to help

15. Ark Const. Schedule, § 2 (1874). ". . . neither party shall be allowed to testify against the other . . . unless called to testify thereto by the opposite party."

16. Nebr. R.R.S. § 25-1202 (1943).

17. See the following annotations: 64 A.L.R. 1148 (1929); 107 A.L.R. 482 (1937); and 159 A.L.R. 411 (1945).

18. See Moore, Federal Practice ¶ 26.35 (Supp. 1957).

19. 37 F. Supp. 949, 952 (W. D. Ky. 1941).

20. See Ky. Rev. Stat. § 421.210(2) (c) (Baldwin ed. 1955).

21. It is not clear from the opinion in the Duling case whether the deposition was filed. However, it is believed that the Court would have regarded the filing, in any event, as inconsequential since the Court deemed the crucial question to be whether the deposition had been introduced in evidence. See page 317 *supra*. And, in this connection, see Rule 30(f) (1) of the North Dakota Rules of Civil Procedure which requires the filing of the deposition with the court in which the action is pending.

prepare the adversary's case, and often most effectively. It is available to be read to the jury whenever it is so desired by the party taking it to contradict any other witness on the opposing side, yet, if we accept counsel's contention, the witness's lips are sealed in Court although having been required to divulge everything out of Court. It does not seem fair to permit the adversary to cull from the deposition only those facts which are useful to him and to bar from the consideration of the jury those questions and answers which are unfavorable to him."[22]

It is significant to note that the *Mutual Life Ins. Co.* case was decided prior to *Hickman* v. *Taylor*, in which the Supreme Court of the United States said that, under Rule 26 of the *Federal Rules*, "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."[23] The point is that, so long as the testimony is obtained by deposition for discovery purposes and is not offered in evidence at trial, it is not evidentiary support for the trier of fact's decision or a part of the record for the appellate court's review.[24] Such an interpretation preserves both the underlying discovery purpose of Rule 26 and, at the same tme, gives full recognition to the policy behind the waiver provision of Section 31-0103 as stated by the Supreme Court of North Dakota in the *Frink* case:

* * * "To permit the party for whose benefit the statute is enacted to call a witness and interrogate him on some transaction pertinent to the issue, and then limit him to that part of the transaction regarding which he testified, would be giving an unfair advantage to the representative of the decedent . . . If the party to the action desire [*sic*] to have the protection afforded him, he must not call the opposite party to testify . . ."[25]

Tempting though it might be to construe the taking of a deposition as a waiver of Section 31-0103 and thus further avoid its rule of incompetency, such cannot be accomplished except by resorting to the fiction that testimony taken by deposition is evidence per se. Such is plainly not the case and any abrogation of the statute on policy grounds as set forth, for example, in the North Dakota case of *St. John v. Lofland*, would best be accomplished by abolishing the rule in its entirety.[26]

22. See note 19 *supra* at 952.
23. 329 U.S. 495, 507 (1947).
24. See Anderson v. Benson, 117 F. Supp. 765, 771 (D. C. Nebr. 1953).
25. Frink v. Taylor, 59 N.D. 47, 228 N.W. 459, 462-463 (1930).
26. See note 3 *supra*.

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Jamestown, North Dakota

June 26-27-28, 1958