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Witnesses - Competency - Testimony of Parties for or against Representatives or Heirs of Persons Deceased

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WITNESSES — COMPETENCY — TESTIMONY OF PARTIES FOR OR AGAINST REPRESENTATIVES OR HEIRS OF PERSONS DECEASED.—Among the many rules of evidence which North Dakota shares with other jurisdictions is the rule which prohibits testimony by either party, in an action by or against the representatives or heirs of a deceased person, concerning any transaction or conversation with the deceased.[1] A vestige of the common law doctrine that parties in interest were not competent witnesses in any action,[2] this rule, now popularly known as the "dead man's statute," occupies the unique position of being severely criticized by nearly all of the eminent writers on the subject.[3] In spite of this criticism, the states have generally been reluctant to discard this common law relic.[4] The proponents of the rule justify its continued existence with the arguments that without this safeguard the temptation for fraud and perjury would be too great,[5] the estates of the dead would be unduly imperiled,[6] and the right and privilege of giving testimony must be mutual.[7] The critics of the rule contend that these premises are based upon fallacy.[8] They argue that such an arbitrary rule operates as an intolerable injustice through the exclusion of just claims, that it encourages the subornation of perjury, that it is equally as important to save the estates of living men from loss by lack of proof as it is to save the estates of dead men from false

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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."

2. Morgan *et al*, The Law of Evidence 23 (1927); McCormick, Cases on Evidence 207 (2d ed. 1948).

3. See 2 Wigmore, Evidence §578 (3d ed. 1940); Morgan *et al, op. cit. supra* note 1, at 24; Taft, *Comments on Will Contests in New York*, 30 Yale L. J. 593, 605 (1921).

4. 2 Wigmore, Evidence §578 n.1 (3d ed. 1940) (only 6 states do not recognize this disqualification).

5. Owens v. Owens, 14 W.Va. 88, 95 (1878) "The temptation to falsehood and concealment in such cases is considered too great to allow the surviving party to testify in his own behalf."; 3 Jones, Evidence §773 (4th ed. 1938).

6. Williams v. Clark, 42 N.D. 107, 172 N.W. 825, 827 (1919) "It must be conceded that the rule is a salutary one and based upon sound public policy, when it is considered the great evil that might result and the loss that might occur to the estates of deceased persons . . ."; Bank of Bottineau v. Warner, 17 N.D. 76, 114 N.W. 1085 (1908).

7. Louis v. Easton, 50 Ala. 470, 471 (1873) "This right and privilege must be mutual . . . . If death has closed the lips of the one party, the policy of the law is to close the lips of the other."

8. See 2 Wigmore, Evidence §578 (3d ed. 1940) "As a matter of policy, this survival of a part of the now discarded interest-qualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words."; Morgan *et al, op. cit. supra* note 1, at 24; See Omlie v. O'Toole, 16 N.D. 126, 112 N.W. 677 (1907).

claims, and that safeguards for truth such as cross-examination offer sufficient protection against the frequent assertion of false claims.[9]

The North Dakota statute is similar to those in effect in the majority of states.[10] A few jurisdictions[11] have greatly modified or abolished the standard form of the statute. The problem posed is whether the existence of the statute in its present form in North Dakota is justified or whether the rule should be modified or abolished as has been done in those jurisdictions.

Construction of the North Dakota Statute

North Dakota, as well as most other jurisdictions, has given the statute a strict construction.[12] This would seem to indicate that the jurists recognize that there is a certain harshness embodied in the rule which should not be extended by judicial legislation. Justice Corliss, in *St. John v. Lofland*,[13] delivered an oft-quoted verbal fusilade against the expediency of the statute, stating in part:

> "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 claims, 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 ingenuity and adroitness. He who possesses no evidence to prove his case save that which such 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 is difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods—the sword of cross-examination. For these reasons, which lie on the very surface of this question of policy, we regard it as a sound rule to be applied in the construction of statutes of the character of the one whose interpretation is here involved, that they should not be extended beyond their letter when the effect of such extension will be to add to the list of those whom the act renders incompetent as witnesses."

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9. See note 2, *supra*.

10. For a compilation of the statutes see 2 Wigmore, Evidence §488 (3d ed. 1940).

11. 46 Harvard L. Rev. 834 (1933) states that only nine states have attempted legislative reform.

12. E.G., Grange v. Grange, 56 N.W.2d 688, 692 (N.D. 1953); O'Connor v. Immele, 77 N.D. 346, 43 N.W.2d 649 (1950); Carlson v. Bankers Trust Co., 242 Ia. 1207, 50 N.W.2d 1, 5 (1951); *contra*: Cocker v. Cocker, 215 Minn. 565, 10 N.W.2d 734 (1934) (liberal construction).

13. 5 N.D. 140, 143, 64 N.W. 930 (1895).

In order for the statute to be invoked, four elements must concur: a civil action or proceeding by or against executors, administrators, heirs at law, or next of kin; an action in which judgment may be rendered for or against those parties; the witness disqualified must be a party to the action or the agent of a corporation which is a party; and that witness must be attempting to testify to a transaction with the deceased.[14]

The first of these elements appears to have presented a major problem in North Dakota only in cases concerning the probate of wills. In a case of this type it was held that such is not an action against any person but is in the nature of an action *in rem,* and thus outside the scope of the statute.[15] Justice Bronson dissented, stating that the estate of the deceased was directly involved and that the probate of a will is a special proceeding within the express terms of the statute.[16] The majority opinion seems to be in accord with the view adopted in most other jurisdictions.[17]

The requirements that the action must be one in which judgment may be rendered for or against executors, administrators, heirs at law or next of kin, was construed in *Miller v. First Nat. Bank,*[18] an action brought by an administrator to recover the proceeds of an insurance policy on the life of the deceased. The trial court sustained an objection to testimony of an agent of the defendant. In reversing the decision, the majority of the court held that an action on a life insurance policy is not a claim or demand against an estate, or a claim through which the estate may benefit or sustain a loss in any way. Thus a judgment cannot be ordered for or against the executors, administrators, heirs at law or next of kin, as such. Concurring in part, Justice Burr contended that the action could be brought by the administrator only in his capacity as an administrator, and that the mere fact that the avails of the policy were not subject to the debts of the deceased but were to go directly to the heirs was not sufficient to place the administrator outside the terms of the disqualifying statute.[19]

The third requisite to the invocation of the statute—that requir-

14. N.D. Rev. Code §31-0103 (1943); *see* Miller v. First Nat. Bank, 62 N.D. 122, 242 N.W. 124, 129 (1932) (concurring in part).
15. Keller v. Reichert, 49 N.D. 74, 189 N.W. 690 (1922).
16. *See* Keller v. Reichert, 49 N.D. 74, 87, 189 N.W. 690, 695 (1922) (dissent).
17. 22 Wash. L. Rev. 211, 216 (1947) " . . . the estate as an entity is not a party in interest, since the effect of such proceeding is neither to increase or diminish the estate, but only to settle the distribution of the estate . . ."
18. 62 N.D. 122, 242 N.W. 124 (1932).
19. *See* Miller v. First Nat. Bank, 62 N.D. 122, 134, 242 N.W. 124, 128 (1932) (concurring in part).

ing the disqualified witness to be a party to the action— has been the subject of a large amount of litigation in North Dakota,[20] but apparently has presented no serious problems to the courts. A very literal interpretation has been given to this section of the statute, thereby keeping at a minimum the list of those rendered incompetent by the statute.[21] Under such a construction, agents of the parties have been held to be outside the prohibition,[22] and a mere common interest with a party to the action does not render a witness incompetent to testify.[23]

The only departure from the strict or literal construction supplied to the statute appears in the litigation concerning the term "transaction." The courts have liberally construed this term to embrace every variety of affairs which conform to the subject of negotiation, interviews, or actions between the parties, and to include every method by which one person can derive impressions or information from the conduct, condition or language or another.[24] They have construed negative testimony to be within the purview of the statute.[25] This departure from the strict interpretation, in view of other portions of the statute, is difficult to explain. Whatever the reason, the anomaly is apparently existent only in the interpretation of the term "transaction," for the courts have been careful to insure that the transaction is one which has been undertaken

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20. *E.g.*, Hampden Implement Co. v. Dougherty, 58 N.D. 817, 227 N.W. 555 (1929); Mowry v. Gold Stabeck Co., 48 N.D. 764, 186 N.W. 865 (1922); St. John v. Lofland, 5 N.D. 140 (1895).

21. O'Connor v. Immele, 77 N.D. 346, 351, 43 N.W. 2d 649 (1950) "This court has followed the rule that statutes of this character should not be extended beyond their letter when the effect of such extension will be to add to the list of those whom the act renders incompetent as witnesses."; Hampden Implement Co. v. Dougherty, 58 N.D. 817, 227 N.W. 555 (1929) (son of deceased permitted to testify that his father told him "to pay those grain checks on the car," since he was not party to action); St. John v. Lofland, 5 N.D. 140 (1895) (in an action brought by succeeding administrator, defendant permitted to testify that he paid deceased administratrix).

22. Bank of Bottineau v. Warner, 17 N.D. 76, 81, 114 N.W. 1085 (1908) (cashier of plaintiff bank permitted to testify) "The prohibition . . . covers the evidence of parties to actions or proceedings, and does not include the agents of parties." The statute was amended in 1907 to expressly prohibit testimony by an agent of a corporation, but the rule here would still apply to agents in general.

23. O'Connor v. Immele, 77 N.D. 346, 351, 43 N.W.2d 649 (1950) "It is true, that as relatives of the plaintiff, they may have had a common interest with her in the objective sought but such interest does not raise the bar of the statute."; *Cf.* Fox v. Fox, 56 N.D. 899, 902, 219 N.W. 784 (1928).

24. Gange v. Gange, 56 N.W.2d 688, 692 (N.D. 1953); Frink v. Taylor, 59 N.D. 47, 51, 228 N.W. 459 (1930); *cf.* Haut v. Gunderson, 54 N.D. 826, 829, 211 N.W. 982 (1926) (term defined, for purpose of counterclaim in tort action, as embracing "an entire occurence out of which a legal right springs or upon which a legal obligation is predicated.").

25. Hughes v. Wachter, 61 N.D. 513, 238 N.W. 776 (1931) (plaintiff not permitted to testify that decedent had never paid for certain stock).

directly with the decedent before invoking the statute.[26]

Statutory Exceptions

In addition to the testimony rendered admissible through a strict construction of the statute, the legislature has expressly placed two categories of testimony outside the scope of the statute. The first of these exceptions includes testimony by a surviving spouse relating to any conversations or transactions with the deceased spouse touching any business or property of either.[27] The second renders testimony pertaining to a transaction with the decedent admissible, if testimony relating to such transaction by the deceased has been taken prior to his death and such testimony is introduced in behalf of his executors, administrators, heirs at law, or next of kin.[28]

The first exception has presented no serious problem to the courts, but the second required considered construction in *International Shoe Co. v. Hawkinson*.[29] In that case the trial court had excluded testimony by the court reporter as to certain admissions made by the deceased in a former trial, holding that such testimony was prohibited by inference by the statute unless offered by the personal representative. In holding such testimony to be competent, the North Dakota Supreme Court stated that the statutory provision related solely to testimony taken in the proceeding or acion in which it is sought to be introduced. Thus the testimony taken at a former trial was held admissible through a strict interpretation of the ambiguity in the statute.

Waiver of the Statute

The prohibition of the statute is waived when either party is "called to testify thereto by the opposite party."[30] A question arises

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26. International Shoe Co. v. Hawkinson, 72 N.D. 622, 626, 10 N.W. 2d 590 (1943) (reversed trial court's ruling excluding testimony concerning transaction with a partnership in a suit against the representative of an alleged deceased partner) "The admission of plaintiff's testimony upon these matters would not result in any inequality in regard to the opportunity to give testimony."; Bank of Bottineau v. Warner, 17 N.D. 76, 80, 114 N.W. 1085 (1908) (evidence as to the time when a building was completed not a transaction with decedent); St. John v. Lofland, 5 N.D. 140 (1895).

27. N.D. Rev. Code §31-0104 (1943) "In any action or proceeding by or against any surviving husband or wife touching any business or property of either, or in which the survivor or his or her family is interested in any way, such surviving husband or wife, if he or she shall so desire, shall be permitted to testify under the general rules of evidence as to any or all transactions and conversations touching such business or property had with the deceased husband or wife."; See also Truman v. Dakota Trust, 29 N.D. 456, 151 N.W. 219 (1915); Perry v. Erdelt, 59 N.D. 741, 231 N.W. 888 (1930); Frink v. Taylor, 59 N.D. 47, 228 N.W. 459 (1930).

28. N.D. Rev. Code §31-0105 (1943) "If the testimony of a party to any civil action or proceeding has been taken and afterwards he shall die and after his death the testimony so taken shall be used upon any trial or hearing in behalf of his executors, administrators, heirs at law, or next of kin, the other party to the action shall be a competent witness as to any and all matters to which the testimony so taken relates."

29. 72 N.D. 622, 10 N.W. 2d 590 (1943).

30. N.D. Rev. Code §31-0103 (1943).

as to how far the competency of the witness extends when so called. Again the courts have supplied a construction such as will strictly confine the limits of the prohibition by holding that he becomes a competent witness to any portion of the transaction pertinent to the issues, and not merely to that portion about which he was interrogated.[31] However, the court has not been willing to go to extremes that would clearly defeat the purpose of the statute. Thus they have consistently refused to hold that the calling of an opposite party constitutes a waiver when such opposite party is clearly antagonistic to the estate of the deceased.[32]

Effect of the Statute on Litigation

A search of the North Dakota Reports discloses that the rule has been a subject of litigation in at least thirty-five instances. In view of the relatively short existence of North Dakota as a state this seems to be an unduly large amount of litigation,[33] and could be an indication that something needs to be done with the statute by way of revision or abolishment. The majority of these cases do not reveal on their face that any great injustice has been meted out because of the rule, but many of them do indicate that a different result could have been obtained had the rule not been invoked. In *Larson v. Newman*,[34] an action for specific performance of a land contract, the plaintiff was denied the opportunity to testify concerning a conversation he had with the decedent which, if admitted, could have proved a ratification. In *Adams v. Hagerott*,[35] a suit in equity whereby the plaintiff sought to be adjudged the

31. Frink v. Taylor, 59 N.D. 47, 228 N.W. 459 (1930) "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. It would be turning that which was intended as a shield for defense into a sword for attack and would render the adversary helpless. If a party to the action desires to have the protection afforded to him, he must not call the opposite party to testify regarding any part of that transaction or statement, unless he be willing said party have an opportunity to explain every portion of that transaction which is pertinent to the issue in the case."

32. Druey v. Baldwin, 41 N.D. 473, 172 N.W. 663 (1919) (where plaintiff called defendant executor, her husband, for cross-examination, his testimony was inadmissible since his interests were antagonistic to the interests of the estate); Bank of Bottineau v. Warner, 17 N.D. 76, 114 N.W. 1085 (1908) (testimony by a contractor, a defendant, was inadmissible even though called by plaintiff, since such testimony contradicted that of executor, also a defendant, and was antagonistic to estate); Cardiff v. Marquis, 17 N.D. 110, 114 N.W. 1088 (1908); *But cf.* Fox v. Fox, 56 N.D. 899, 219 N.W. 784 (1928) (plaintiff permitted to call his brothers, defendants, to testify to transaction whereby their father obtained the land, even though they had prayed for same relief as asked by plaintiff).

33. See Model Code of Evidence, Rule 101 (1942) for the report of the Commonwealth Fund Committee which illustrates the large amount of litigation concerning the ordinary type of dead man statute.

34. 19 N.D. 153, 121 N.W. 202 (1909).

35. 34 F.2d 899 (8th Cir. 1929).

owner as trustee of certain stock certificates found in the possession of the deceased, the court in commenting upon the intention of the deceased, stated in part:

> "From the statement of facts it is possible to draw different conclusions as to the ultimate fact of intention on the part of Mr. Gaines. Several obscure points would doubtless be cleared up could we have the testimony of the two parties directly involved in the transaction. . . . But the lips of Mr. Gaines were sealed by death, and the lips of Mr. Adams are sealed by the statutes of North Dakota."[36]

From other evidence the court found for the plaintiff. The result could possibly have been different but for the statute. Another example of possible injustice occurred in *Regan v. Jones*,[37] an action brought by the executors of the decedent on a note executed by defendant to the deceased. A judgment for the plaintiff resulted after the defendant had been precluded from testifying in relation to a verbal transaction with the decedent. He defended the action on the ground that the note was executed in payment of a stallion purchased from the decedent, and that there had been a breach of warranty under the terms of the agreement. This apparently was his only means of proving his defense since others who were present at the making of the verbal agreement could not establish that the notes were given for the stallion. In *Jester v. Jester*,[38] an action to determine adverse claims to land between the heirs of the deceased, testimony by the defendant (who was also the administrator but was sued in his individual capacity) to the effect that he had sent money to his brother (the deceased) through a bank to make payments on the land and to finance a quiet title action was held to be barred by the statute. His claim to title in the land was defeated, and he was relegated to the position of an heir in the assertion of his rights. In a more recent decision, *Larson v. Quanrud, Brink & Reibold*,[39] the administrator brought suit for the conversion of certain shares of stock allegedly pledged with the defendants by the deceased. North Dakota's Supreme Court, in affirming a judgement for the plaintiff, stated:

> "Q B & R contends that the stock, after being pledged, was later transferred to Q B & R. Testimony as to the details, if any there were, that would throw light on the transaction is incompetent in this action. . . . Because of the intervention of

36. *Id.* at 903.
37. 14 N.D. 591, 105 N.W. 613 (1905).
38. 76 N.D. 517, 37 N.W.2d 879 (1949).
39. 78 N.D. 70, 47 N.W.2d 743 (1951).

(the) statute the trial court was and this court is reduced to reliance upon circumstances and evidence of the conduct of the parties and records of the corporation in determining whether Q B & R obtained title to the stock by an outright transfer."[40]

These decisions, while not conclusively showing that any great miscarriage of justice has resulted from the statute, do indicate that a problem exists which merits consideration by the members of the bar and by the legislators of North Dakota.

Solutions in Other Jurisdictions

A few jurisdictions have adopted "modifications" of the rule with varying degrees of success. These "modifications" have been of three types: (1) admitting testimony of the survivor when it appears to the court that injustice would result without such testimony;[41] (2) permitting testimony by the survivor, but allowing no judgment or verdict to be rendered thereon unless such testimony is corroborated;[42] and (3) admitting testimony of the survivor as well as declarations of the deceased.[43]

The first of these "modifications" removes the arbitrary feature of the rule and imparts flexibility to it, but is subject to the criticism that it lacks certainty since the admissibility of testimony rests within the discretion of the trial judge.[44] It has been suggested that this type of statute is "the most workable of these modifications,"[45] but litigation in jurisdictions adopting such a "modification" has not borne out this suggestion. In New Hampshire a showing that the survivor's claim will fail without his testimony is not sufficient to make out a case of injustice.[46] Early Montana decisions construing

40. *Id.* at 76, 47 N.W.2d at 746.

41. See Ariz. Code Ann. §23-105 (1939) ". . . unless called to testify thereto by the opposite party or required to testify thereto by the court . . ."; Mont. Rev. Code §93-701-3 (1947) ". . . or when it appears to the court that, without the testimony of the witness, injustice will be done."; N.H. Rev. Laws c. 392 §§25, 26 (1942) "If the court finds that injustice may be done without the testimony of the party, the court may, in its discretion, allow such party to testify."

42. See N.M. Stat. Ann. §20-205 (1941) ". . . unless such evidence is corroborated by some material evidence."; Ore. Rev. Stat. §44.020 (1953) Makes all parties competent witnesses, §116.555 provides: "No other claim which has been rejected by the executor or administrator shall be allowed except upon some competent evidence other than the testimony of the claimant."; Va. Code §8-286 (1950) ". . . no judgement or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony . . ."

43. See Conn. Gen. Stat. §7895 (1949) "In actions by or against the representatives of deceased persons . . . the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence . . ."; Mass. Gen. Laws c. 233, §66 (1932); R.I. Gen. Laws c. 538 §4.

44. See Morgan *et al, op. cit. supra* note 1, at 29.

45. 22 Wash. L. Rev. 211, 220 (1947).

46. Morgan *et al. op. cit. supra* note 1, at 29 "The New Hampshire statute seems not to have worked for liberality. The Supreme Court has been called upon to interpret it in some forty cases . . . It is significant that in none of these adjudications has the survivor's testimony been held admissable."; See Cobb v. Follansbee, 79 N.H. 205, 107 Atl. 630 (1919).

their statute permitted the exercise of discretion by the court only when such testimony was necessary to make out a prima facie case.[47] However, a later decision has taken the view that such testimony should not be admitted "until sufficient other independent testimony has been admitted to warrant the court, in the exercise of its discretion, to render a ruling in favor of the questionable testimony."[48] This latter view has also been adopted in Arizona.[49] From the results of these constructions it is apparent that this type of "modification" will not solve all the problems existent under the standard "dead man statute."

The second "modification"—that permitting testimony by the survivor but allowing no judgement on his uncorroborated testimony—has been termed "misguided" by Wigmore.[50] He admits that it is a decided improvement over the rule of exclusion, but argues that it favors the dead above the living, that it is based upon the contingency that the claim will be dishonest with no means of disclosing its dishonesty, and that any rule which interposes a technicality to prevent judicial action upon testimony which is in fact completely believed and trusted, always contains an "abstract impropriety and injustice."[51] The Oregon decisions concerning this type of statute clearly indicate that the survivor must make out a prima facie case without his own testimony.[52] Thus this type of "modification" is also of doubtful value.

The "modification" which admits the testimony of the survivor as well as the hearsay declarations of the deceased has generally met with the most favor.[53] This type of statute has been recommended by the Commonwealth Trust Fund of New York.[54] A committee of judges, practitioners and professors was appointed by the Fund to determine through a practical test the workings of the Connecticut statute. The committee sent questionaires to judges and members

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47. Rowe v. Eggum, 107 Mont. 378, 87 P.2d 189 (1938); Roy v. King's Estate, 55 Mont. 567, 179 Pac. 821 (1919); *See* Cox v. Williamson, 124 Mont. 512, 227 P.2d 614, 622 (1951) (dissenting opinion).

48. Cox v. Williamson, 124 Mont. 215, 227 P.2d 614, 619 (1951).

49. See 46 Harv. L. Rev. 834, 836 (1933).

50. 7 Wigmore, Evidence §2065 (3 ed. 1940).

51. *Ibid.*

52. Seaton v. Security Savings & Trust Co., 131 Ore. 261, 282 Pac. 556, 559 (1929); Goltra v. Penland, 45 Ore. 254, 77 Pac. 129, 133 (1904) ". . . there must be other material and pertinent testimony supporting or corroborating that given by him, sufficient to go to the jury and upon which it might find a verdict . . ."; Morgan *et al, op. cit. supra* note 1, at 30.

53. See Morgan *et al, op. cit. supra* note 1, at 34; Model Code of Evidence, Rule 101 (1942).

54. See 2 Wigmore, Evidence §578a (3d ed. 1940); Morgan *et al, op. cit. supra* note 1, at 35.

of the bar in Connecticut. The two hundred and eighty-seven answers received were classified according to the experience those persons had had with the statute. The results showed that the opposition to the statute was in inverse ratio to their experience. Eighty-nine percent of the judges of higher courts (Supreme, Superior, and Common Pleas) favored the statute; eighty-four and one-half percent of the attorneys having experience with six or more cases favored it; sixty percent of those having experience in one or more cases favored it; but twenty of twenty-one lawyers without experience with the statute thought greater safeguards were needed. As a result of this survey the following statute was recommended:

> "No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.
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> "In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was made in good faith and on decedent's personal knowledge."[55]

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55. See note 54, *supra*.