North Dakota Law Review

Volume 24 | Number 4 Article 6

1948

Evidence - Dead-Man's Statute - Interpretation - Application - Suggested Legislative Action

D. W. Butts

CASE NOTE

EVIDENCE — DEAD-MAN'S STATUTE — INTERPRETATION — APPLICATION — SUGGESTED LEGISLATIVE ACTION. When the administrator of decedent filed her final account, there were objections to several items of disbursements by plaintiff, sole heir of decedent. One of these items was the amount of a loan repayed to X. Plaintiff contends that to allow X to testify to his conversations with the decedent is contrary to the Oklahoma statute which makes inadmissible testimony of a party in regard to conversations or transactions with a deceased person. In District Court the evidence was admitted, and on appeal it was *held*, that the judgment be affirmed. X was not a party to the action and, therefore, the testimony in question was admissible, his interest in the result was not considered a factor in the determination. *Gibbs v. Barksdale*, 184 P2d 755 (Okla. 1947).

The statute involved in the instant case, Okla. Stat. C. 12, sec. 384 (1941), is identical with N. D. Rev. Code sec. 31-0103, which forbids any party to an action or a proceeding by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered for or against him, to testify to any transaction or conversation made by the testator or intestate unless called to testify by the opposite party, The purpose of this statute is to prevent any party from securing an undue advantage in the proof of transactions or conversations with a party whose lips are sealed by death. *Druey v. Baldwin*, 41 N. D. 473, 172 N. W. 663 (1921). Various tests have been set up by the courts in determining the competency of evidence concerning transactions with deceased persons by living persons who participated in those transactions. One who was merely interested in the result was held incompetent. *Wood v. U. S.*, 10 Ct. Cl. 395 (1881) (husband attempted testimony as to manner in which his wife received money in a transaction with the decedent); In re Barrett's Estate, 48 S. D. 302, 204 N. W. 167 (1925) (deceased's son and heir held unable to testify in regard to a note which was a claim against the estate). A party having a direct financial interest in the result is incompetent where the adverse party sues or defends in a representative capacity. *Wright v. Whitaker*, 137 Ill. App. 598 (1907). If the witness is interested in the result and if his testimony tends to protect that interest, he has been held not qualified to testify to statements or transactions with the decedent. *Farmers' Exchange Bank v. Moffett*, 256 Ky. 160, 75 S. W. 2d 1063 (1934) (deceased's son in attachment proceedings against the father's realty). Whether the witness will gain or lose by operation of the judgment or that the record will be legal evidence for or against him in another action, is used as a test in *Lyon County National Bank v. Carsten Winter Estate*, 214 Iowa 533, 242 N.W. 600 (1932): *In re Bernardini's Will*, 264 N.Y.S. 479, 238 App. Div. 433 (1933); *Laka v. Krepteck*, 261 N. Y. 126, 184 N.E. 732, 88 A.L. R. 243 (1933). Many courts have discarded the "interest" idea and hold such a statute must be strictly construed, and where the statute in terms excludes only parties, one who is not a party to the action, is competent, although he may be interested. *Corbett v. Kingam*, 19 Ariz. 134, 166 Pac. 290 (1917); *Merriman v. Wickersham*, 141 Cal. 567, 75 Pac. 180 (1904);

Hampton Implement Co. v. Dougherty, 58 ND 817, 227 N.W. 555 (1929); *Witte v. Koeppen*, 11 S.D. 598, 79 N.W. 831 (1899). Another example of the strict construction placed upon this statute is stated in *Bottineau Bank v. Warner*, 17 N.D. 76, 14 N.W. 1085, 17 Ann. Cas. 312 (1908), where Mr. Chief Justice Morgan said, "A statute prohibiting the parties to a suit against the estate of a decedent from giving evidence, is construed not to extend to include agents of the parties, to do so would obviously be adding to the terms of the statute." It may be well to note at this time that courts will generally not allow a party who would be competent as a witness to be made a party defendant, merely to silence him. *Bromley v. Washington Life Ins. Co.*, 122 Ky. 402, 92 S.W. 17, 5 L.R.A. (N.S.) 747 (1906). The extension of the statute by interpretation, to include persons interested in the outcome as well as parties to the action, has been criticized by many textwriters. 2 WIGMORE EVIDENCE sec. 578; (3d ed. 1940) MORGAN, THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM, 24 (1927). Mason Ladd, writing in 26 Iowa L. Rev. 207 (1941), sets forth a proposed statute which, by providing that, "In actions, suits, or proceedings by or against the representative of deceased or insane persons, including proceedings for the probate of wills or proceedings in which successors in interest of such persons are parties, any statement of the deceased or insane person, while sane, whether oral or written, shall not be excluded as hearsay," completely nullifies the rule. In line with this policy of abolishing the rule is Mr. Justice Corliss stating in *St. John v. Lofland*, 5 N. D. 140, 64, N. W. 930 (1895), that "to assume that in the event (that the dead-man's statute was no in existence) 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 statute declares incompetent, is remidiless. 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 oath. In the legal armory there is a weapon whose repeated thrusts he will find it difficult, if not impossible, to parry if his testimony is a tissue of falsehoods—the sword of cross-examination." Although the bad effects of the statute can be mitigated by the limiting interpretation which it was given in the instant case, the final solution appears to be only in legislative action.

D. W. BUTTS
THIRD YEAR LAW STUDENT
UNIVERSITY OF NORTH DAKOTA