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The Ohio "Dead Man" Statute

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Inasmuch as the discussion in the *McMurray* case concerning implied warranties is merely *obiter*, the "sealed package" issue in the case of an ordinary sale by description is not yet completely settled in Ohio. The court in the *Owitz* case was very careful to limit the conclusion it reached to a sale by sample in a sealed package as distinguished from an ordinary sale by description. It is to be hoped that when confronted squarely with a "sealed package" case in an ordinary sale by description, the Ohio Supreme Court will accept the better view as represented by the *Dow Drug Co.* and *Goljatoska* cases.

MARSHALL I. NURENBERG

The Ohio "Dead Man" Statute

WHILE THE common law disqualification of parties to a suit to testify has generally been abrogated by statute,¹ legislative restrictions have been imposed on the competency of certain parties or interested persons to testify in actions involving the representative of a deceased person or such other person as the legislatures have sought to protect by these restrictions.² The scope of this note is to analyze the restrictions of this kind in Ohio.

The competency of a witness in actions involving the representative of a deceased person, or such other person set forth in the statute, is regulated by Ohio General Code Section 11495, commonly known as the "Dead Man" statute, which provides that, with certain exceptions:³

A party⁴ shall not testify when the adverse party is the guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person.

Because this statute is an exception to the section making witnesses competent generally,⁵ the Ohio courts have stated that it will be strictly construed in order to admit testimony,⁶ but it will not be construed so as to admit testimony obviously intended to be barred.⁷

¹ *E.g.*, OHIO GENERAL CODE § 11493: "All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."

² 3 JONES, EVIDENCE § 772 (4th ed. 1938). See Note, 170 A.L.R. 1242 (1947).

³ The exceptions are taken up separately.

⁴ In this note the party made incompetent to testify by the "Dead Man" statute will be referred to as the "unprotected" party; the party that may invoke the statute as the "protected" party; and the party the protected party represents as the "disabled" party.

⁵ OHIO GENERAL CODE § 11493. See note 1 *supra*.

The reasons for this statute are said to be two. First, the legislature sought to prevent a party from having unlimited opportunity to make statements which cannot be denied because of the death or some disability of the one who would be in the best position to deny them.⁸ Second, it is in the public interest to guard the estates of decedents against the setting up of fraudulent defenses, and fraudulent claims or unfounded causes of action, by closing the mouth of a witness adverse to one whose mouth has been sealed by death.⁹

STATUTE ONLY DISQUALIFIES PARTIES

The Ohio "Dead Man" statute disqualifies a person as a witness only when he is a party to the suit. One who is not a party is not disqualified as a witness merely because he may be interested in the result of the litigation.¹⁰ A "party" refers only to an actual litigant.¹¹ Even though a person is a party to the suit, in order to be disqualified as a witness he must be more than a nominal party;¹² he must be a real party to the suit, and this depends on the actual antagonism of the parties' interests, and not on their mere classification as plaintiff and defendant in the case.¹³

To be adverse the parties must hold the affirmative and the negative of an issue made or some material portion thereof.¹⁴ A person can not be made incompetent as a witness by improperly including him as a party.¹⁵

⁸ *Goehring v. Dillard*, 145 Ohio St. 41, 60 N.E.2d 704 (1945); *In re Estate of Butler*, 137 Ohio St. 96, 28 N.E.2d 186 (1940); *Cockley Milling Co. v. Bunn*, 75 Ohio St. 270, 79 N.E. 478 (1906).

⁷ *Kight v. Boren*, 39 Ohio L. Abs. 96, 67 N.E.2d 48 (1943) (Wife seeking to open and vacate a divorce decree after the death of the divorced husband came under the "Dead Man" statute despite the provision of Ohio General Code Section 11988 declaring that parties to a divorce proceeding are competent to testify against each other).

⁸ *Kight v. Boren*, 39 Ohio L. Abs. 96, 67 N.E.2d 48 (1943); *Butler v. Youngflesh*, 68 Ohio App. 342, 41 N.E.2d 147 (1941); *Roberts v. Briscoe*, 44 Ohio St. 596, 10 N.E. 61 (1887).

⁹ *Stream v. Barnard*, 120 Ohio St. 206, 165 N.E. 727 (1929); *Banning v. Gorshall*, 62 Ohio St. 210, 56 N.E. 1030 (1900).

¹⁰ *Butler v. Youngflesh*, 68 Ohio App. 342, 41 N.E.2d 147 (1941) (witness was plaintiff's sister); *Hess v. Clutz*, 8 Ohio App. 57 (1917) (wife of plaintiff); *Kight v. Boren*, 39 Ohio L. Abs. 96, 67 N.E.2d 48 (1943); *Keyes v. Gore*, 42 Ohio St. 211 (1884).

¹¹ *Powell v. Powell*, 78 Ohio St. 331, 85 N.E. 541 (1908).

¹² *Butler v. Youngflesh*, 68 Ohio App. 342, 41 N.E.2d 147 (1941); *Cockley Milling Co. v. Bunn*, 75 Ohio St. 270, 79 N.E. 478 (1906).

¹³ *In Wolf v. Powner*, 30 Ohio St. 472 (1876), it was held error to exclude the testimony of one who had merely joined with his wife as a plaintiff because of her coverture, the court explaining that he was not the real party but only a formal or nominal party.

¹⁴ *Niederlehner v. Weatherly*, 78 Ohio App. 263, 69 N.E.2d 787 (1946).

¹⁵ *Brocsa Chemical Co. v. Langsenkamp*, 32 F.2d 725 (6th Cir. 1929); *Loney v. Walkey*, 102 Ohio St. 18, 130 N.E. 158 (1921).

It matters not whether the parties stand upon the same¹⁶ or opposite¹⁷ sides of the case, as long as they are adversely related in the action and the issues at the time of the trial.

The facts of the case and the substantive law involved determine when the parties are adversely interested. In two cases¹⁸ a co-maker of a note in default for answer was allowed to testify in a suit on the note brought by a protected party against the other co-maker. In each case the court found that the two makers were principal and surety, and held that since only the surety had answered the principal was allowed as a witness. He did not stand with the answering defendant as a party to the suit because a discharge of the surety does not decrease the liability of the principal. However, in *Baker v. Jerome*¹⁹ a co-maker who was in default of answer was held incompetent to testify in a suit against his co-maker by a protected party. The court stated that since no evidence was offered to show that the co-makers were anything but principals, the defendant in default of answer had the right to avail himself of the successful defense of usury set up by his co-maker, and thus stood with the answering co-maker as a party to the suit.

The fact that for many purposes the agent and the principal are considered as one had raised some problems under the "Dead Man" statute. It appears to be settled law in Ohio that the agent of one who is an unprotected party to a suit is not, because of the principal-agency relation, held incompetent as a witness. The general view is that no fiction of identity of principal and agent operates to defeat the admission of evidence.²⁰ Thus in *Shaub v. Smith*²¹ it was held that a vendor's agent who sells goods for his principal is not rendered incompetent as a witness to the circumstances of the transaction because of the death of the vendee. Likewise, the officers of a corporation may testify where the corporation is the unprotected party, even though the courts recognize that a corporation can act only through its agents.²² In the case where the agent with whom the unprotected party

¹⁶ *Edwards v. Edwards*, 24 Ohio St. 402 (1873).

¹⁷ See note 14 *supra*.

¹⁸ *Baker v. Kellog*, 29 Ohio St. 663 (1876); *Bell v. Wilson*, 17 Ohio St. 640 (1867).

¹⁹ 50 Ohio St. 682, 35 N.E. 1113 (1893).

²⁰ 58 AM. JUR., *Witnesses* § 270.

²¹ 50 Ohio St. 648, 35 N.E. 503 (1893).

²² *In re Estate of Kennedy*, 82 Ohio App. 359, 80 N.E.2d 810 (1948). It is a general rule that a statute which in terms applies only to a party to the record is not, by construction, to be made to embrace those who are not parties, even though they have an interest in the event of the suit. *Cockley Milling Co. v. Bunn*, 75 Ohio St. 270, 79 N.E. 478 (1906).

has transacted business is now dead, the principal being still alive or the transaction having occurred after the death of the principal, Ohio courts allow the testimony of the unprotected party even though there may be no other witness to the transaction.²³

When the agent is himself a party to the suit, his testimony is subject to the same tests of competency that are applicable to the testimony of other parties. Thus, he may be incompetent to testify as a witness as to his own agency or as to an alleged contract made as an agent.²⁴

Cases have arisen where the testimony of the witness is competent against one defendant and incompetent against another defendant. It has been held²⁵ that where separate judgments against the defendants can be entered, the testimony of the witness should be allowed if it is competent as to one. It is necessary, however, that the court be sufficiently advised that the evidence is being offered only against the one. If separate judgments cannot be entered the testimony cannot be admitted.²⁶

WAIVER OF THE STATUTE

At one time it was held²⁷ that the "Dead Man" statute is intended to carry out a policy of the law and the testimony might be rejected by the court even where no objection was offered by the protected party. Today, it is apparently recognized²⁸ that the exclusion of testimony is a privilege which the protected party may waive.²⁹

Thus the "Dead Man" statute does not prevent the protected party from calling the unprotected party to testify.³⁰ In *Roberts v. Brisco*,³¹ where the

²³ *Trumpler v. Royer*, 18 Ohio App. 151 (1918); *First National Bank v. Cornell*, 41 Ohio St. 401 (1884); *Cochran v. Almack*, 39 Ohio St. 314 (1883); *Vulcan Corp. v. Hanzel*, 37 Ohio App. 75, 174 N.E. 146 (1930). However, where a corporation is the protected party, the unprotected party is not competent to testify to transactions or communications with the deceased agent of the corporation who conducted the business, as the corporation, being a mere artificial person, cannot be the survivor of an agent and can have no knowledge of the transaction or communication in question. 3 JONES, EVIDENCE § 789 (4th ed. 1938)

²⁴ *Roberts v. Remay*, 56 Ohio St. 249, 46 N.E. 1066 (1897).

²⁵ *Totten v. Estate of Miller*, 139 Ohio St. 29, 37 N.E.2d 961 (1941).

²⁶ See Note, 23 Ohio Op. 107 (1939).

²⁷ *Brown v. A Raft of Timber*, 1 Handy 13, 12 Ohio Dec. Rep. 1 (1854).

²⁸ *Roberts v. Briscoe*, 44 Ohio St. 596, 10 N.E. 61 (1887); *Borgerding v. Ginocchio*, 69 Ohio App. 231, 43 N.E.2d 308 (1942); *Crowe v. Vickery*, 23 Ohio App. 83, 155 N.E. 247 (1927); *Atley v. Atley*, 20 Ohio App. 497, 152 N.E. 761 (1925); 42 OHIO JURISPRUDENCE § 160, pg. 167

²⁹ *Farley v. Lisey*, 55 Ohio St. 627, 45 N.E. 1103 (1897). An objection on the ground that the evidence is incompetent is sufficient; it is not necessary to object to the witness as incompetent.

³⁰ OHIO GENERAL CODE § 11497. "At the instance of the adverse party, a party may be examined as if under cross-examination, either orally, or by deposition, like any other witness "

unprotected party claimed that the statute created a complete bar and he could not therefore be called to testify, the court explained that what was intended for the benefit and the protection of the estate should not be permitted to operate as a source of injury by denying the protected party evidence. The court pointed out that the facts upon which the protected party founds his claim or defense may be known only to the unprotected party, and the legislature could not have intended to place the estates of deceased persons at a disadvantage by depriving them of evidence within reach and necessary to their protection against fraud.³²

Failure of the protected party to object to the testimony of the unprotected party also constitutes a waiver of the privilege.³³

An interesting waiver problem arose in the case of *Verbsky v. Burger*³⁴ which throws some doubt on whether the statute is a prohibition or a privilege. In that case both parties were protected parties under the "Dead Man" statute and the plaintiff tried to call the other party to testify. A majority of the court held that she could not do so since both parties were protected parties and that the statute "provides specifically and unambiguously that 'a party shall not testify' — language too plain to require construction." The dissent, citing many Ohio cases and legal works in accord, stated that Section 11495 does not make a witness within the limitation of the statute incompetent as such under all circumstances, but that it creates a privilege in the protected party by which such protected party may, under certain circumstances, prevent a party from testifying. Being a privilege it may be waived. The dissent pointed out that in addition to those cases authorizing waiver there are numerous cases considering other issues arising out of the examination of parties under conditions similar to those involved in this case, and that in none of those cases was the right to conduct such examination contested. The dissent further stated that this testimony of defendant would not be considered a waiver of defendant's rights, so as to permit the plaintiff to then testify against the defendant, since the waiver of defendant's rights under the fourth exception to the "Dead Man" statute could arise only from his voluntary testimony. Though this case has not been overruled it would appear that the view of the dissent is the more logical because if one in whose favor the statute operates may waive the protection by failing to object to the testimony of the unprotected party, he

³¹ 44 Ohio St. 596, 10 N.E. 61 (1887).

³² The unprotected party should not be able to complain, for thereafter he is competent by reason of Ohio General Code Section 11495-(4) to testify in his own behalf to any matter relevant to any issue in the case of which he has knowledge. *Stream v. Barnard*, 120 Ohio St. 207, 165 N.E. 727 (1929); *Alger v. Alger*, 10 Ohio App. 93 (1918).

³³ *Kaiser v. Whetstone*, 33 Ohio L. Abs. 432 (1941).

³⁴ 146 Ohio St. 235, 65 N.E.2d 695 (1946).

certainly should be able to do it by affirmatively calling him as his own witness, even though the other party is also a protected party.

EXCEPTIONS TO THE STATUTE

The state legislature, perhaps cognizant of the fact that the "Dead Man" statute has met with criticism, has from time to time provided exceptions to the statute. They are intended to provide for particular situations where the admissibility of the testimony would tend to secure rather than to prevent equality. In many respects these exceptions have been liberally construed to conform to the court's policy of admitting evidence rather than excluding it.

The first exception permits an otherwise unprotected party to testify as to:

- (1) The facts which occurred after the appointment of the guardian or trustee of an insane person, and, in the other cases, after the time the decedent, grantor, assignor, or testator died.³⁵

The unprotected party is allowed to testify as to these facts for they do not come within the reason of the statute. Death or insanity has not sealed the disabled party's lips as to these facts, he never having had knowledge of them. However, mere lack of knowledge by the disabled party is not sufficient to make the unprotected party competent. Thus, in *Nolan v. Harbere*³⁶ an unprotected party could not testify to a fact which occurred after the disabled party was insane, but before his insanity had been officially declared, even though the facts of the case were not within his personal knowledge.

In *Price v. The Cleveland Trust Co.*³⁷ the unprotected party, in order to prove the ownership of his claim against the protected party, attempted to prove an oral assignment which took place before the other's death by testifying that after the death of the disabled party there was in force an assignment of the claim. In sustaining the objection that this testimony was improper the court explained that where proof of the existence of a fact after the death of a disabled party relates to the existence of such fact prior to his death, which continued to exist after death, the evidence of such fact after death is incompetent because it did not "occur" after death.

The second exception allows the unprotected party to testify

- (2) When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness, a party may testify on the same subject.³⁸

³⁵ OHIO GENERAL CODE § 11495-(1).

³⁶ 3 Ohio App. 45 (1914).

³⁷ 81 Ohio App. 221, 77 N.E.2d 621 (1947).

³⁸ OHIO GENERAL CODE § 11495(2)

Here it has been held that the reason for the rule of incompetency no longer obtains, since the disabled principal's mouth is not closed by death, inasmuch as his agent is liable to testify as fully about the matter as the principal would have been had he not died.³⁹ However, if the disabled principal's agent died prior to the time of the trial, the unprotected party is incompetent to testify to facts occurring before the death of the disabled party.⁴⁰

The third exception states that:

(3) If a party, or one having a direct interest, testifies to transactions or conversations with another party, the latter may testify as to the same transactions or conversations.⁴¹

Chronologically this exception was enacted after the waiver principles, above discussed, had been judicially delineated. The purpose of this provision is to extend the right of the unprotected party to testify beyond these judicially determined limits.⁴² The "direct interest" referred to in this exception means an interest in the event of the suit — a pecuniary interest, for example.⁴³

The unprotected party can not qualify himself as a witness within this exception by calling the protected party as upon cross-examination, for the exception applies only where the protected party testifies voluntarily to protected matters.⁴⁴ Similarly the rule of the present exception does not extend to the case where a person has improperly, upon his application, been made party defendant or plaintiff with the protected party. In such cases, say the courts, that person is not a party to the suit within the meaning of the statute so as to enable the unprotected party to testify after such person has testified to the same transaction.⁴⁵

The fourth exception states that:

(4) If a party offers evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversation or admissions.⁴⁶

As in the case of the third exception the purpose of this provision is to enlarge the right of the unprotected party to testify.⁴⁷ The phrase "conversations or admissions" in this exception means oral statements only.⁴⁸

³⁹ Union Trust Co. v. Johnson, 42 Ohio App. 301, 182 N.E. 137 (1931).

⁴⁰ Floro v. Wasdworth, 43 Ohio App. 1, 182 N.E. 594 (1929).

⁴¹ OHIO GENERAL CODE § 11495 (3).

⁴² Stream v. Barnard, 120 Ohio St. 206, 165 N.E. 727 (1929).

⁴³ Williams v. Longley, 3 Ohio C.C. 508, 2 Ohio C. Dec. 292 (1888).

⁴⁴ Hickox v. Rogers, 33 Ohio App. 97, 168 N.E. 750 (1928).

⁴⁵ Williams v. Longley, 3 Ohio C.C. 508, 2 Ohio C. Dec. 292 (1888).

⁴⁶ OHIO GENERAL CODE § 11495 (4).

⁴⁷ Stream v. Barnard, 120 Ohio St. 206, 165 N.E. 727 (1929).

It has been held that this phrase does not apply to written admissions for the reason that written admissions speak for themselves; they are composed of the very words chosen or adopted by the person against whom they are offered in evidence and thus do not present the problems of inaccuracy and ambiguity raised by oral statements.⁴⁹

The protected party may offer the evidence by anyone, including the unprotected party, upon either direct or cross-examination. If the evidence is introduced by the protected party or one of his witnesses, the unprotected party is thereby rendered competent to testify fully concerning the same transaction or admission.⁵⁰ However, if the evidence is offered by calling the unprotected party as upon cross-examination, the unprotected party is thereby rendered competent to testify to any matter that is relevant to any issue in the case.⁵¹

The fifth exception states:

(5) In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with, or admissions by, a partner or joint contractor since deceased, unless they were made in the presence of the surviving partners or joint contractor. This rule applies without regard to the character in which the parties sue or are sued.⁵²

Thus the unprotected party cannot be excluded completely from testifying concerning his relations with the deceased; he is competent to testify as to the acts done or the statements made by the deceased in the presence of the survivor.⁵³ The reason for the general statutory rule is lacking where the evidence is available at the time of trial by the surviving partner or joint contractor because the evidence of the unprotected party might be readily controverted by the survivor.⁵⁴

It is immaterial whether the suit is brought against the survivor alone or against him and the deceased party jointly. The same rule applies in either action.⁵⁵ As the statute has nothing to do with the survivor, the survivor himself may of course testify.⁵⁶

⁴⁹ *Jackson v. Ely*, 57 Ohio St. 450, 49 N.E. 792 (1897).

⁵⁰ *Whitehead v. Parsons*, 16 Ohio L. Abs. 274 (1934).

⁵¹ *Stream v. Barnard*, 120 Ohio St. 206, 165 N.E. 727 (1929); *Rankin v. Hannan*, 38 Ohio St. 438 (1882); *McNaughton v. Presbyterian Church*, 35 Ohio App. 443, 172 N.E. 561 (1930). Cf. *Miller v. Miller*, 32 Ohio L. Abs. 459 (1939).

⁵² *Stream v. Barnard*, 120 Ohio St. 206, 165 N.E. 727 (1929); *Alger v. Alger*, 10 Ohio App. 93 (1918).

⁵³ OHIO GENERAL CODE § 11495 (5).

⁵⁴ *Baxter v. Leith*, 28 Ohio St. 84 (1876); *Troop v. Freed Fireworks Co.*, 38 Ohio L. Abs. 571 (1943); *Steigert v. Steigert*, 57 Ohio App. 255, 13 N.E.2d 583 (1936); *Schlarman v. Heyn*, 19 Ohio App. 64 (1923); *Brinker v. Schreiber*, 8 Ohio Dec. Rep. 759 (1885).

⁵⁵ *Harrison v. Neely*, 41 Ohio St. 334 (1884); *Roberts v. Davis*, 66 Ohio App. 527, 35 N.E.2d 609 (1940).

The sixth exception states that:

(6) If the claim or defense is founded on a book account, a party may testify that the book is his account book, that it is a book of original entries, that the entries therein were made in the regular course of business by himself, a person since deceased, or a disinterested person. The book shall then be competent evidence in any case, without regard to the parties, upon like proof by any competent witness.⁵⁷

The book must be one of original entry⁵⁸ and the charges in the book account must be contemporaneous with the transactions.⁵⁹ If the book of original entry has been destroyed the ledger can be introduced, if the transcript to the ledger was properly made.⁶⁰ The party offering the book account may be questioned as to his habits of making mistakes and may be impeached by showing that his books have a reputation for being inaccurate.⁶¹

The seventh exception states that:

(7) If after testifying orally, a party dies the evidence may be proved by either party on a further trial of the case, whereupon the opposite party may testify to the same matter.⁶²

This exception relates to testimony taken in the same suit.⁶³ When either party introduces the testimony of the disabled party, taken at a previous trial, the fundamental reason for the statute creating the incompetency is removed. In this situation fraud or injustice cannot be done by permitting the unprotected party to testify.⁶⁴ In construing this exception it has been held that the testimony of the disabled party in a former action may be offered by the unprotected party in a subsequent suit in his own behalf. However, the unprotected party may not introduce it for the purpose of contradicting it.⁶⁵

⁵⁷ *Harrison v. Neely*, 41 Ohio St. 334(1884).

⁵⁸ *Schlarman v. Heyn*, 19 Ohio App. 64(1923).

⁵⁹ OHIO GENERAL CODE § 11495(6). It appears that few cases have been decided under this exception since the enactment in 1937 of OHIO GENERAL CODE SECTION 12102-23, the Uniform Business Records as Evidence Act.

⁶⁰ *Baxter v. Leith*, 28 Ohio St. 84(1875).

⁶¹ *Bogert v. Cox*, 4 Ohio C.C. 289, 2 Ohio C.Dec. 551(1890).

⁶² *Burr v. Shute*, 2 Ohio C.C.(N.S.) 343, 14 Ohio C. Dec. 62(1902); *Kennedy v. Dodge*, 19 Ohio C.C. 425, 10 Ohio C. Dec. 360(1899).

⁶³ *Sheridan v. Tenner*, 5 Ohio C.C. 19, 3 Ohio C. Dec. 10(1890).

⁶⁴ OHIO GENERAL CODE § 11495(7). *Cf.* *Quartors v. Lamping*, 3 Ohio L. Abs. 125(1924). Prior to the enactment of this statute in its present form, where a deceased witness was one of the parties, and the administrator became a party, the administrator could not introduce the former evidence of the decedent. *Hoover v. Jennings*, 11 Ohio St. 624(1860).

⁶⁵ *Conett v. Squair*, 17 Ohio Déc. (N.P.) 65, 3 Ohio L. Rep. 558(1906).

⁶⁶ *Matthews v. Heider*, 22 Ohio Dec. (N.P.) 399(1912).

⁶⁷ *Conett v. Squair*, 17 Ohio Dec.(N.P.) 65, 3 Ohio L. Rep. 558(1906)

The eighth exception states that:

(8) If a party dies and his deposition be offered in evidence the opposite party may testify as to all competent matters therein.⁶⁶

This exception clearly relates to former testimony in the same suit, and not to testimony taken in another suit or another court though between the same parties.⁶⁷ However, the deposition of a disabled party is admissible in an action properly revived.⁶⁸ In the case of an action properly revived the unprotected party may introduce such testimony of the disabled party into evidence in his own behalf, but he cannot do so for the purpose of contradicting it by taking the stand himself and testifying.⁶⁹

If the protected party files a deposition of the disabled party but does not offer it in evidence at the trial of the case, he does not waive the statutory privilege against testimony of the unprotected party.⁷⁰

The competency of a deposition is to be determined by the rules applicable to the witness himself if present. Thus, although the witness was competent to testify when the deposition was taken, yet if he is a party to an action and the adverse party has died since the deposition was made, it is incompetent against the personal representative of the adverse party.⁷¹

Further exceptions to the general exclusionary rule are provided in the last paragraph of the "Dead Man" statute, which reads:

Nothing in this section shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil; and when a case is plainly within the reason and spirit of the next three preceding sections, though not within the strict letter, their principles shall be applied.

Where the administrator of the deceased person sues the otherwise unprotected party for the wrongful death of the deceased, the otherwise unprotected party may testify in his own defense.⁷² This wrongful death exception does not apply where the injured party died from other causes after the accident,⁷³ and suit has been brought for the personal injuries.⁷⁴

⁶⁶ OHIO GENERAL CODE § 11495 (8). If a party dies and his deposition is offered in evidence it is admissible. *Hoover v. Jennings*, 11 Ohio St. 624 (1860).

⁶⁷ *Conett v. Squair*, 17 Ohio Dec. (N.P.) 65, 3 Ohio L. Rep. 558 (1906)

⁶⁸ *Goehring v. Dillard*, 145 Ohio St. 41, 60 N.E.2d 704 (1945).

⁶⁹ *Conett v. Squair*, 17 Ohio Dec. (N.P.) 65, 3 Ohio L. Rep. 558 (1906).

⁷⁰ *Prince v. Abersold*, 123 Ohio St. 464, 175 N.E. 862 (1931); *Isabella v. Feiss*, 26 Ohio L. Abs. 382 (1938).

⁷¹ *Bettman v. Hunt*, 9 Ohio Dec. Repr. 396 (1883).

⁷² *Ransom v. Haberer*, 13 Ohio C.C. (N.S.) 511 (1910)

⁷³ *Cox v. Waltz*, 13 Ohio L. Abs. 364 (1932)

⁷⁴ In *Barber v. Kihlken*, 17 Ohio L. Abs. 599 (1934), the unprotected party brought action for personal injuries. The protected administrator by cross-petition sought judgment for the wrongful death of his intestate but during the trial submitted

The legislature has withdrawn a will or codicil contest from the operation of the "Dead Man" statute.⁷⁵ In such cases the sole reason for the prohibition wholly fails, as the parties are not in privity with the deceased, the property and estate left by him is neither increased nor diminished by the result of the trial, he could never have been a party to the controversy nor testified in relation to its subject matter, and no evidence in favor of either party was lost by his death.⁷⁶

An action involving the validity of a deed, will or codicil, within the meaning of the statute, is one involving an attack upon the legal sufficiency of the instrument, and a party may offer evidence under this exception only as to circumstances directly bearing upon the legal sufficiency of the instrument attacked.⁷⁷ Therefore, the statute does not include an action to construe a will,⁷⁸ or an action to establish or enforce a trust under the will or deed.⁷⁹ It is wholly immaterial that the action is one for money only, if the determination of the right to the money claimed in any way involves the validity of a deed by the decedent.⁸⁰

The so-called "reason and spirit" clause cannot be invoked or applied in contravention of the express provisions of the statute relative to the competency of witnesses.⁸¹ The law is not that the exceptions are to be multiplied by judicial construction, but that the principles of the three sections mentioned in the "reason and spirit" clause are to be applied when a case,

to dismissal of the cross-petition. By way of dictum the court noted that had the cause been submitted upon the issues made on the cross-petition, the testimony of the unprotected party would have been competent on those issues; but even then the court must instruct the jury not to consider the testimony of the unprotected party upon the issues made on the petition.

⁷⁵ *Wilson v. Wilson*, 7 Ohio N.P.(N.S.) 435(1908). The statute also contains an exception permitting a party to testify concerning a deed.

⁷⁶ *Wolf v. Powner*, 30 Ohio St. 472(1876).

⁷⁷ *Rieger v. Hotel Rieger Co.*, 124 Ohio St. 152, 177 N.E. 211(1931); *Murdock v. McNeely*, 1 Ohio C.C. 16, 1 Ohio C. Dec. 9(1885).

⁷⁸ *Miller v. Miller*, 15 Ohio C.C.(N.S.) 481, 34 Ohio C.C. 43, *modified*, 88 Ohio St. 609, 106 N.E. 665(1913), *modified and aff'd on rehearing* 90 Ohio St. 28, 106 N.E. 666(1914).

⁷⁹ *Marker v. Menke*, 10 Ohio L. Abs. 688(1931); *Rieger v. Hotel Rieger Co.*, 124 Ohio St. 152, 177 N.E. 211(1931); *Paddock v. Adams*, 56 Ohio St. 242, 46 N.E. 1068(1897).

⁸⁰ *Tootle v. Lane*, 12 Ohio L. Abs. 273(1932). (However, an action for damages for false representation made by the deceased grantor as to the quantity of land in a certain tract purchased by the plaintiff, where no demand for relief is based upon the validity of the deed given by the decedent, is purely a demand for money, in no way involving the deed, and the plaintiff is not competent to testify as to the representation.)

⁸¹ *Loney v. Walkey*, 102 Ohio St. 18, 130 N.E. 158(1921); *Powell v. Powell*, 78 Ohio St. 331, 85 N.E. 541(1908); *Keyes v. Gore*, 42 Ohio St. 211(1884); *Cochran v. Almack*, 39 Ohio St. 314(1883).

not within their letter, is plainly within their reason and spirit.⁸² In *Sternberger v. Hanna*⁸³ it was held that to warrant the application of this clause the case must be plainly within the "reason and spirit" of Ohio General Code Section 11493, which makes all persons competent to testify except those therein named, as well as within Ohio General Code Sections 11494 and 11495, which relate to the exclusion of certain named persons, under the special circumstances therein named.

Specific application of this rule to Section 11495 is found in the case of *Butler v. Youngflesh*.⁸⁴ It was there held that the "reasons and spirit" clause was not intended to enlarge or diminish the class of persons prohibited from testifying by the first paragraph of the section, but was intended solely to liberalize and enlarge the exceptions contained in the intervening paragraphs, which set forth circumstances under which a party may testify notwithstanding his general disqualification as set forth in the first paragraph.

In one situation, which may be termed a judicial exception to the "Dead Man" statute, the unprotected party can testify as to matters that occurred before the death of the other party to the suit. In *Robertson v. Polters*⁸⁵ the court stated that the "Dead Man" statute has no application to proceedings against an unprotected party upon complaint of an executor under Ohio General Code Section 10506-67, relative to discovery of concealed or embezzled assets, and does not prohibit the unprotected party so cited from testifying as to transactions with the executor's decedent. "It would be strangely incongruous if a person thus accused were prohibited from speaking in his own defense."⁸⁶

CONCLUSION

It is apparent from a review of the statute, its exceptions and the interpretations, that a great deal of litigation has resulted without certainty of construction being achieved. The legislature has attempted to strike a

⁸² *Cockley Milling Co. v. Bunn*, 75 Ohio St. 270, 79 N.E. 478 (1906).

⁸³ 42 Ohio St. 305 (1884)

⁸⁴ 68 Ohio App. 342, 41 N.E.2d 147 (1941).

⁸⁵ 58 Ohio App. 204, 206, 16 N.E.2d 485,486 (1937).

⁸⁶ *Ibid.*

⁸⁷ "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 decisions than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words." 2 WIGMORE, EVIDENCE 697 (3d ed. 1940)

⁸⁸ "The modern tendency of the law of evidence is to open the doors to all material and relevant proof and let those reasons which operated to deny competency on admissibility be used to test weight and credibility." Ladd, *Admission of Evidence Against Estates*. 19 IOWA L. REV. 521,538 (1934)