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Graydon K. Kitchens Jr.

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EVIDENCE — APPLICABILITY OF DEAD MAN'S STATUTE TO
TORT ACTION

Plaintiffs sued the decedent's estate to recover damages for the wrongful death of their son. They alleged that their son died in an automobile accident as a result of negligent driving by decedent. In support of this claim, plaintiffs introduced the testimony of the sole survivor of the accident. The trial court received the evidence over the defendant's objection that this testimony was barred by the Louisiana Dead Man's Statute.¹ On appeal to the Louisiana Court of Appeal, *held*, affirmed. The Louisiana statute limiting the admission of parol evidence to prove a debt or liability against a deceased person is inapplicable to tort actions. *Honeycutt v. Indiana Lumbermen's Mutual Ins. Co.*, 130 So.2d 770 (La. App. 3d Cir. 1961)

In the majority of American jurisdictions a "Dead Man's

1. LA. R.S. 13:3721 (1950): "Parol evidence shall be incompetent and inadmissible to prove any debt or liability upon the part of a party deceased, if a suit upon the asserted indebtedness or liability shall have been brought more than twelve months after the death of the deceased."

Id. 13:3722: "Parol evidence shall be incompetent and inadmissible to prove any debt or liability upon the part of a party deceased, if a suit upon the asserted indebtedness or liability shall have been brought within a delay of twelve months after the death of the deceased, unless it consists of the testimony of at least one credible witness of good moral character, besides the plaintiff, or unless it be to corroborate a written acknowledgment or a promise to pay, signed by the debtor."

In 1960, after the instant case was instituted, the above statutes were amended to read as follows:

Id. 13:3721: "Parol evidence shall not be received to prove any debt or liability of a deceased person against his succession representative, heirs, or legatees when no suit to enforce it has been brought against the deceased prior to his death, unless within one year of the death of the deceased:

"(1) A suit to enforce the debt or liability is brought against the succession representative, heirs, or legatees of the deceased;

"(2) The debt or liability is acknowledged by the succession representative as provided in Article 3242 of the Code of Civil Procedure, or by his placing it on a tableau of distribution, or petitioning for authority to pay it;

"(3) The claimant has opposed a petition for authority to pay debts, or a tableau of distribution, filed by the succession representative, on the ground that it did not include the debt or liability in question; or

"(4) The claimant has submitted to the succession representative a formal proof of his claim against the succession, as provided in Article 3245 of the Code of Civil Procedure.

"The provisions of this section cannot be waived impliedly through the failure of a litigant to object to the admission of evidence which is inadmissible thereunder."

Id. 13:3722: "When parol evidence is admissible under the provisions of R.S. 13:3721 the debt or liability of the deceased must be proved by the testimony of at least one creditable witness other than the claimant, and other corroborating circumstances."

Statute² applies to tort claims as well as actions in contract.³ The policy reasons for not allowing living parties to testify against parties unable to testify in their own defense is thought to be applicable both to actions *ex delicto* and *ex contractu*.⁴ The Louisiana Dead Man's Statute is an outgrowth of a general rule prohibiting a party from testifying in his own behalf.⁵ It differs, however, from other Dead Man's Statutes in two major respects. The Louisiana statute, unlike the statutes of most other states, does not completely exclude a surviving plaintiff's testimony, but merely requires that the decedent's debt or liability be proved by the testimony of a credible witness other than the survivor, provided the suit is brought within twelve

2. During the seventeenth century the rule evolved in England that both parties to a suit were incompetent to testify because it was felt that their pecuniary interest in the litigation would increase their likelihood to testify falsely. 2 WIGMORE, EVIDENCE § 576 (3d ed. 1940). This rule remained in effect until the nineteenth century, when it was abolished in England, after which most American states followed suit. 2 *id.* §§ 576, 578. However, almost every American jurisdiction retains a vestige of the old rule in the form of a "Dead Man's Statute," which excludes the testimony of the survivor of a transaction with a decedent in a suit against the decedent's estate. 2 *id.* § 578. The rationale of these statutes is to protect an estate against claims established by testimony which could have been refuted if the decedent were alive to testify. *Hallowach v. Priest*, 113 Me. 510, 95 Atl. 146 (1915); *Zeigler v. Moore*, 75 Nev. 91, 335 P.2d 425 (1959); *Newman v. Tipton*, 191 Tenn. 461, 234 S.W.2d 994 (1950). Although these statutes have been severely criticized on the basis that they favor the dead over the living, they have survived in most American states. McCORMICK, EVIDENCE 142 (1954); 2 WIGMORE, EVIDENCE § 578 (3d ed. 1950). A few states today allow the plaintiff to testify against the decedent's estate, but only if his testimony is corroborated. N.M. R.S. § 20-2-5 (1953); VA. CODE § 8-286 (1950).

3. *Wright v. Wilson*, 154 F.2d 616 (3d Cir. 1946); *Southern Natural Gas Co. v. Davidson*, 225 Ala. 171, 142 So. 63 (1932); *Schneider v. Russell*, 32 Ill. App. 2d 112, 177 N.E.2d 5 (1961); *Hawkins v. Rye*, 233 Miss. 132, 101 So.2d (1958); *McKim v. Metropolitan St. Ry.*, 209 S.W. 622 (Mo. App. 1919); *In re Mueller's Estate*, 166 Neb. 376, 89 N.W.2d 137 (1958); *Zeigler v. Moore*, 75 Nev. 91, 335 P.2d 425 (1959); *Hardison v. Gregory*, 242 N.C. 324, 88 S.E.2d 96 (1955); *Newman v. Tipton*, 191 Tenn. 461, 234 S.W.2d 994 (1950); *Maciejczak v. Bartell*, 187 Wash. 113, 60 P.2d 31 (1936). See 58 AM. JUR. WITNESSES § 223 (1948); 97 C.J.S. WITNESSES § 133a (1957).

However, variations in wording often cause differences in result. See Annot., 80 A.L.R.2d 1296 (1961).

4. *Hallowach v. Priest*, 113 Me. 510, 95 Atl. 146 (1915).

5. The development of Louisiana Law on this subject also began with a rule absolutely prohibiting the testimony of a person interested in the cause. La. Civil Code art. 248, p. 312 (1808); La. Civil Code art. 2260 (1825). This rule remained in effect until 1867 when Article 2260 of the Civil Code was revised to provide that a competent witness is a person of proper understanding. At the same time the provision was adopted that "no interested person shall testify in any suit against the interest of the succession of a decedent in relation to any fact which took place in the lifetime of such decedent." La. Acts 1867, No. 71. After slightly more than a year this rule was deleted. Thus, once again any person of proper understanding could testify in any civil case even if he were an interested person, as is shown by LA. CIVIL CODE art. 2282 (1870). In 1906 the Louisiana legislature passed an act to limit the use of parol evidence to prove a debt or liability against the estate of a deceased person. Its wording caused difficulties of interpretation which necessitated an amendment in 1926. This act, as amended, became LA. R.S. 13:3721-3722 (1950), the statute invoked in the instant case.

months of the death. Once this witness has testified, the claimant may also testify.⁶ Other states generally do not prohibit testimony by one not a party to the suit, whereas the Louisiana statute forbids all parol evidence, whether by plaintiff or a third person if the suit is brought more than twelve months after the defendant's demise.⁷

The instant case is the first Louisiana case to rule on the applicability of the Dead Man's Statute to tort actions. Unfortunately, the court offered very little discussion of its reasons for holding that it does not. It observed merely that the statute had not been previously applied to tort actions, and expressed the opinion that it was designed primarily to apply to a case in which a person asserts contractual claims against a deceased's estate. It should be noted that the Louisiana statute uses the words "debt or liability," whereas the statutes of many other

6. See *Succession of Oliver*, 184 La. 26, 165 So. 318 (1936); *Southern Hide Co. v. Best*, 174 La. 748, 141 So. 449 (1932).

7. The Louisiana statutory limitations on parol evidence have been applied when the plaintiff has tried to collect a debt against the estate of the deceased. The statute applies to suits against a decedent's heirs who have accepted his succession unconditionally as well as to suits against a decedent's estate under administration. *Hobson v. Edelston*, 13 So.2d 141 (La. App. Orl. Cir. 1943). However, the statute has no application to litigation in which the decedent's estate or his heirs are not parties. *Leathers & Martin v. Conley*, 157 So. 607 (La. App. 2d Cir. 1935). Therefore, it seems that the Dead Man's Statute would not restrict evidence in a direct action solely against the decedent's liability insurer. In a suit by a corporation to collect a debt against a deceased, the testimony of an officer of the corporation is considered that of the plaintiff, so that the claim must be proved by the testimony of another credible witness. *Southern Hide Co. v. Best*, 174 La. 748, 141 So. 449 (1932). A failure to object to parol evidence offered against the estate of a deceased does not constitute a waiver of the objection since the evidence is not only inadmissible but also *incompetent* to prove the debt. *Succession of Coreil*, 177 La. 568, 148 So. 711 (1933); *Longino v. Longino*, 169 So. 186 (La. App. 2d Cir. 1936).

Under Civil Code Article 2277 all contracts for the payment of less than five hundred dollars which are not in writing may be proved by any competent evidence, but if the contract is for over five hundred dollars it must be proved by at least one credible witness and other corroborating circumstances. Under this article, the testimony of the plaintiff will suffice if supported by other corroborating circumstances. *Succession of Piffet*, 37 La. Ann. 871 (1885). LA. R.S. 13:3721-3722 (1950) would limit the application of this article to a situation where the debtor is alive; for if the debtor is dead, the evidence introduced to prove the debt must conform to the requirements of the statute. *Succession of Gesselly*, 216 La. 731, 44 So.2d 838 (1950). While the statute operates to limit the use of parol evidence against the estate of a deceased to prove the debt or liability itself, LA. CIVIL CODE art. 2278(2) (1870) prohibits the use of parol to prove an acknowledgment or promise to pay by the deceased person in order to take such debt or liability out of prescription, or to revive it after prescription has run. *Coreil v. Vidrine*, 188 La. 343, 177 So. 233 (1937).

The 1960 amendment to the Dead Man's Statute, quoted in note 1 *supra*, which was subsequent to the institution of the instant suit, was not designed to change the law in any respect, but only to make clear what action the claimant must take within the twelve-month limitation to preserve his right to introduce parol evidence. Three ways were provided: (1) bring suit to enforce the debt or liability against the succession representative, heirs, or legatees of the deceased;

states apply only to "transactions,"⁸ yet have been held to apply to tort claims.⁹ The Louisiana courts have not had occasion to define the scope of the word "liability," but jurisprudence from other states show this word is often interpreted to include tort actions.¹⁰ It is submitted that the use of the word "liability" gives the Louisiana statute a broader application than "debt" or "transaction" and should reasonably be interpreted to include torts.

It is perhaps true that the provision prohibiting all parol evidence unless suit is brought within a year of death would seldom apply in tort actions due to the one-year prescriptive period on the bringing of suit.¹¹ However, the requirement that testimony of a claimant be supported by another credible witness before the claimant can testify seems desirable in tort actions for the purpose of protecting estates against false claims. Had the court in the instant case applied the provisions of the Dead Man's Statute, the testimony of the survivor of the accident should have been admissible since he was not the claimant. However, the case suggests a problem where the plaintiff is the sole survivor and only eye-witness to the accident. It is submitted that the Dead Man's Statute should apply in this instance because its purpose is to protect the estates of deceased parties against unfounded claims. The statute need not be interpreted to require that the corroborating witness be an *eye-witness*.¹² It

(2) oppose a petition for authority to pay debts, or a tableau of distribution, filed by the succession representative, on the ground that the debt or liability in question was not included; and (3) submit to the succession representative a formal proof of the claim against the succession. In addition, the succession representative may preserve the claimant's right to introduce parol by acknowledging the debt or liability, by placing it on a tableau of distribution, or by petitioning for authority to pay it.

8. ALA. CODE ANN. tit. 7, § 433 (1958); ILL. STAT. ANN. ch. 51, § 2 (1950); NEB. REV. STAT. ch. 25, § 1202 (1943); NEV. REV. STAT. 48:010 (1961); N.C. GEN. STAT. § 8-50 (1953); TENN. CODE ANN. § 24-105 (1955).

9. Southern Natural Gas Co. v. Davidson, 225 Ala. 171, 142 So. 63 (1932); *In re Mueller's Estate*, 166 Neb. 376, 89 N.W.2d 137 (1958); Boyd v. Williams, 207 N.C. 30, 175 S.E. 832 (1934).

10. Lowe v. Ozmun, 137 Cal. 257, 70 Pac. 87 (1902); Price v. Parker, 197 Mass. 1, 83 N.E. 323 (1907); Pacific Power & Light Co. v. White, 96 Wash. 18, 164 Pac. 602 (1917).

11. LA. CIVIL CODE art. 3536 (1870).

12. While the cases do not contain any language specifically stating that the statute does not require an *eye-witness* other than the claimant, the court has permitted a plaintiff's testimony to be corroborated by a witness who was not an eye-witness. In *Succession of Oliver*, 184 La. 26, 165 So. 318 (1936), plaintiff sought to prove a claim for services rendered a deceased person. Plaintiff produced twelve witnesses who saw plaintiff perform the services, but none of them could testify that the deceased expected to reward the plaintiff. But the court allowed plaintiff's testimony when he produced two witnesses who said the deceased told them he expected to reward the plaintiff. Although these two witnesses

would seem, then, that a claimant should be permitted to testify if supported by witnesses testifying to circumstances.

Graydon K. Kitchens, Jr.

EVIDENCE — UNREASONABLE SEARCH AND SEIZURE —
PRE-TRIAL MOTION TO SUPPRESS

Defendants were indicted for criminally receiving and concealing stolen property. Before trial they moved for an order to suppress evidence on the basis that it was obtained as the result of an unreasonable search and seizure.¹ New York law contained no procedure for the suppression of such evidence.² The Queens County Court of New York, *held*, motion granted to the extent that a pre-trial hearing should be held. The trial court has the power, even in the absence of express statutory authorization, to consider and pass upon the propriety of suppressing evidence prior to trial. *People v. DuBois*, 221 N.Y.S. 2d 21 (Queens Cy. Ct. 1961)

In *Weeks v. United States*³ the United States Supreme Court held that it was prejudicial error in a federal criminal prosecution to admit evidence obtained by federal officers through means violative of the fourth amendment. However, the court specifically stated that the amendment was not directed to the misconduct of state officers.⁴ Later, in *Wolf v. Colorado*,⁵ the Court decided that the principle of privacy underlying the fourth amendment was protected against arbitrary state action as a part of the concept of ordered liberty embodied in the fourteenth amendment. Nevertheless, the fourteenth amendment was held not to forbid the admission in state courts of evidence obtained by unreasonable searches and seizures. In 1961 the Supreme

were not "eye-witnesses" to the agreement to reward the claimant, the court said they met the requirement of a witness other than the claimant.

1. One defendant's affidavit stated that the police officers had forced open the door of her home, entered without her consent, and conducted a search without a search warrant. The police affidavit denied these assertions. *People v. DuBois*, 221 N.Y.S.2d 21 (Queens Cy. Ct. 1961).

2. This was due to New York's long history of admission of evidence obtained through illegal searches and seizures. See *People v. Richter's Jewelers*, 291 N.Y. 161, 51 N.E.2d 690 (1943); *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926); *People v. Adams*, 176 N.Y. 351, 61 N.E. 636 (1903).

3. 232 U.S. 383 (1914).

4. *Id.* at 398.

5. 338 U.S. 25 (1949).