Maryland Law Review

Volume 21 | Issue 1 Article 6

The Effect of the Dead Man's statute on the Testimony of a Party-witness - Ridgley v. Beatty

Herbert J. Belgrad

Comments and Casenotes

THE EFFECT OF THE DEAD MAN'S STATUTE ON THE TESTIMONY OF A PARTY-WITNESS

Ridgley v. Beatty[1]

The plaintiff, son-in-law of the decedent, sued the executor of her estate on a promissory note given by the decedent to the plaintiff to reimburse him for moneys he had expended at her request. Judgment was rendered for the plaintiff by the Circuit Court of Baltimore County, and the executor appealed, contending that the trial court had erred in allowing the plaintiff to testify in violation of the Dead Man's Statute.[2] Specifically, the executor objected to the introduction of evidence as to payments on the decedent's mortgage and other bills made by the son-in-law to third persons, asserting that the relevance of these payments was to show a consideration for the note in question. According to the executor, such evidence was barred by the statutory prohibition against proof of agreements between the plaintiff and the decedent. The Court of Appeals denied this contention and, in affirming the judgment of the trial court, held that the son-in-law was properly permitted to identify each check which he had given to a third person and which represented payments on behalf of the decedent, and to describe the check and state the items for which the check was given.

There is no doubt that, absent special circumstances, the prohibition of the Dead Man's Statute will preclude proof via the testimony of an interested survivor as to a statement made by or transaction had with a decedent in the execution of a promissory note like the one sued on here; but, as the Court points out, "the statute does

[1] 222 Md. 76, 159 A. 2d 651 (1960).

[2] 4 MD. CODE (1957) Art. 35, § 3, provides:

> "In actions or proceedings by or against executors, administrators, heirs, devisees, legatees, or distributees of a decedent as such, in which judgments or decrees may be rendered for or against them, and in proceedings by or against persons incompetent to testify by reason of mental disability, no party to the cause shall be allowed to testify as to any transaction had with, or statement made by the testator, intestate ancestor or party so incompetent to testify, either personally or through an agent since dead, lunatic or insane, unless called to testify by the opposite party, or unless the testimony of such testator, intestate, ancestor, or party incompetent to testify shall have already given in evidence, concerning the same transaction or statement, in the same cause, on his or her own behalf or on behalf of his or her representative in interest. . . ."

not go so far as to render a party within its terms absolutely incompetent as a witness."[3] Thus, testimony as to the giving of checks or the making of cash payments to the decedent's creditors could not be properly excluded by the court as long as the party witness did not connect these payments with any agreement or understanding had with the decedent. In the present case, the dealings about which the plaintiff testified were with third persons and, therefore, could not constitute a direct transaction with the decedent.

Since the precise question presented here is admittedly novel to the Maryland court, it is important to consider decisions on similar questions in other jurisdictions. In a Kentucky case, it was held that the testimony of the husband that he paid his deceased wife's nursing bills was beyond the prohibition of the Dead Man's Statute.[4] Such payment constituted a transaction between him and third persons (nurses) and was neither a transaction with his wife nor an act done by the wife. Similarly, the Supreme Court of California allowed the plaintiff to identify a promissory note given to her by the decedent during his life as the note described in the pleadings and permitted her to testify that her claim on the note had not been paid.[5] However, the statutory prohibition prevented her testifying as to transactions which had occurred prior to the death of the decedent. A New York case allowed the claimant to testify that she alone had paid for family supplies and foodstuffs, since such testimony related to transactions between her and third persons, namely the tradesmen, and not with the decedent.[6]

The Maryland Court of Appeals in citing a New Jersey case,[7] seems to approve the following test used by that court for determining what is excluded as a "transaction with" a decedent in the statutory sense: "whether, in case the witness testifies falsely, the deceased, if living, could contradict it of his own knowledge."[8] Such a test, however, can only be useful if applied with reservation to a limited fact-situation. For example, applying the test to the present case dealing with checks given and cash paid by the plaintiff to third persons, the court held that "the decedent, if living, could not of her own knowledge

[3] *Supra*, n. 1, 654.
[4] Williams v. Balmut, 298 Ky. 249, 182 S.W. 2d 779, 781 (1944).
[5] Herbert v. Lankershim, 9 Cal. 2d 409, 71 P. 2d 220, 222 (1937).
[6] Sager v. Door, 51 Hun. 642, 4 N.Y.S. 568, 569 (1889).
[7] Hollister v. Fiedler, 17 N.J. 239, 111 A. 2d 57, 62 (1955).
[8] *Supra*, n. 1, 655.

have contradicted the witness," and concluded that such "evidence was not barred by the statute and was therefore properly admitted."[9] But the same test applied to the testimony of the survivor of an auto collision would exclude his observations as to the movement of his car, or the course and speed of the decedent's car, etc., a result directly contrary to the holding of the Court of Appeals in the recent Maryland case of *Shaneybrook v. Blizzard.*[10] As pointed out in that decision, the word "transaction" in the Statute imports a mutuality or concert of action, whereas the relationship between the respective drivers was fortuitous and involuntary.[11]

The Dead Man's Statute requires three things if it is to operate to exclude testimony. First, there must be a protected party against whom the testimony is offered. Article 35, Section 3, specifically identifies such persons: executors, administrators, heirs, devisees, legatees, or distributees of a decedent. In its interpretation of this section, the Maryland Court of Appeals has adopted a narrow construction as exemplified by several rulings. The Court, in admitting evidence by parties in caveat proceedings, found that such proceedings are not within the prohibition of the Statute, since the action is not brought against the executors as such but specifically for the purpose of agreeing on an executor.[12] This section was also held not applicable to action by a once-named beneficiary of an insurance policy against the last-named beneficiary to recover proceeds of the policies; the claimant's testimony as to agreements or transactions with the decedent did not affect the interests of any of the parties specifically set out in the Statute.[13]

Secondly, there must be a witness whom the Statute renders incompetent. For example, in a suit against an executor for compensation for board and services furnished by the plaintiff to the testator, the plaintiff would be incompetent to testify as to services rendered and

---

[9] *Id.*

[10] 209 Md. 304, 121 A. 2d 218 (1955).

[11] So, it would seem from the reasoning in the Shaneybrook case that if the decedent in the subject case had without the plaintiff's knowledge observed the plaintiff paying the bills, the Statute should not apply, and it is arguable that the same result should be reached if the decedent's presence had been known but was irrelevant to the transaction which in fact took place.

[12] Griffith v. Benzinger, 144 Md. 575, 125 A. 512 (1924); Hamilton v. Hamilton, 131 Md. 508, 120 A. 761 (1917).

[13] Sheeler v. Sheeler, 207 Md. 264, 114 A. 2d 62 (1954).

compensation received,[14] but, a third person may testify,[15] although the presence of such third person who is competent to testify does not remove the statutory bar as to the party.[16] Also, relying on Article 35, Section 3, the Court of Appeals prohibited the testimony of a third person who repeated self-serving declarations made by a party to the suit.[17] In that case an executor brought suit to recover money transferred by the decedent prior to his death, and the lower court erroneously permitted the witness to testify to certain things that the party-defendant had told her with reference to services performed for the decedent.[18] In another case the Court held that the stockholders of a corporate plaintiff are not parties to the suit within the meaning of the Statute[19] and would be competent witnesses. On the other hand, a nominal party to a suit has been included within the prohibition, despite the fact that he has no interest in the outcome.[20]

Though the Dead Man's Statute may bar the testimony of a party-witness, case law allows third persons to testify to statements made by or transactions had with the decedent. For example, in a suit in assumpsit against an executrix, the plaintiff's son, present when his mother made an agreement with the decedent, was permitted to testify as to the agreement while his mother could not.[21] Further, under the waiver provision of Article 35, Section 3, a witness called to testify by the opposite party may testify responsively to otherwise prohibited matters. When the opposite party asks a question, he not only invites but requires an answer and thereby waives any right to object to a responsive answer.[22]

Finally, there must be such testimony as is prohibited by the Statute. Only such testimony as is related to trans-

---

[14] Giering v. Sauer, 120 Md. 295, 87 A. 774 (1913).
[15] Snyder v. Cearfoss, 187 Md. 635, 51 A. 2d 264 (1946).
[16] Ortel v. Gettig, 207 Md. 594, 116 A. 2d 145 (1954).
[17] Jones, Exec. v. Selvaggi, 216 Md. 1, 139 A. 2d 246 (1958).
[18] It is difficult though to understand the reference to the Dead Man's Statute since the Statute, by its terms, merely continues a portion of a common law testimonial disqualification of parties and has nothing to do with non-party witnesses. The hearsay rule seems to be clearly applicable to the disputed testimony.
[19] Downs v. Maryland & Del. R.R. Co., 37 Md. 100 (1872).
[20] Smith v. Humphreys, 104 Md. 285, 65 A. 57 (1906); Allers, Trustee v. Leitch, 213 Md. 390, 131 A. 2d 458 (1957).
[21] *Supra*, n. 15.
[22] Heil v. Zahn, 187 Md. 603, 51 A. 2d 174 (1947). For further discussion of the waiver provision of Art. 35, § 3, see Cross v. Iler, 103 Md. 592, 64 A. 33 (1906); Duvall v. Hambleton & Co., 98 Md. 12, 55 A. 431 (1903); Whitridge v Whitridge, 76 Md. 54, 24 A. 645 (1892); Foley v. Bitter, 34 Md. 646 (1871).

actions had with the decedent is objectionable, but dealings with third persons, as in the present case, are not included in the prohibition. Unquestionably, an affirmative reply by a party-defendant to a question relating to transactions with the plaintiff's decedent is prohibited, but the court has also ruled that a denial is just as much within the proscription of the statute — "a witness testifies to a 'transaction' no less when she denies than when she affirms a transaction with a party deceased."[23] As pointed out in an earlier discussion, one doubtful area which has recently been clarified by the Court of Appeals concerns the testimony of survivors to an automobile collision; the Court has ruled that Article 35, Section 3 does not exclude a party's testimony as to the movement of the survivor's car, the observed course and speed of decedent's car, and the place of collision, because this is not a "transaction."[24] Further, the Court cautions that Section 3 of the Statute must be read in the light of Section 1, which provides generally that witnesses shall not be excluded from giving evidence by reason of interest, "except as hereinafter excepted," but "generally speaking, the exception [Section 3] has been rather narrowly construed."[25]

First enacted by Chapter 109, Acts of 1864, the Maryland Dead Man's Statute remains merely as a remnant of the common law disqualification of all interested witnesses.[26] By Chapter 495, Acts of 1902, the exception was expressed basically in the present form with amendments added in Chapter 661, Acts of 1904. The general

---

[23] *Supra*, n. 17, 11. The court decided that the following questions were clearly improper: "Did you at any time exert on him any undue influence or influence of any kind?" and "Did you at any time perpetrate any fraud on Mr. Weinman?"

[24] Shaneybrook v. Blizzard, 209 Md. 304, 121 A. 2d 218 (1955). The reasoning of the court is discussed *supra*, at note 10.

[25] *Id.*, 309.

[26] 4 MD. CODE (1860) Art. 37, §§ 1-7, entitled *Competency of Witnesses*, makes no reference to testimonial disqualifications of parties but contains restrictions as to the admissibility of testimony of Negroes, mulattoes, or Indians in evidence. With the repeal of these sections by Md. Laws 1864, Ch. 109, the Legislature enacted substitute sections in an attempt to abolish the common law disqualification of witnesses because of interest; however, by Art. 37, § 2, the lawmakers reflected the lingering doubts of that day in the form of the first Dead Man's Statute in the state:

> "When an original party to a contract or cause of action is dead or shown to be lunatic or insane or when an executor or administrator is a party to the suit, action, or other proceedings, the other party may be called as a witness by his opponent, but shall not be admitted to testify on his own offer or upon the call of his co-plaintiff or co-defendant otherwise than now by law allowed, unless a nominal party."

purpose of the Statute was to equalize the position of the parties by imposing silence on the survivors as to transactions with or statements by the decedent[27] or at least by requiring those asserting claims to produce testimony from disinterested persons.[28] Over the years the Statute has been applied in many decisions in this state; and as one case expresses it, "the doctrine of *stare decisis* as well as the constitutional limitations on the respective powers of the legislative and judicial branches of our government forbid us now to change these decisions. If the rule of evidence is to be altered, the General Assembly, and not the courts will have to indicate in what respect and how."[29]

With an eye toward possible amendment, the Maryland State Bar Association recently set up a special committee to consider revision of Article 35, Section 3, in order to bring Maryland into line with the more liberal procedures prevailing in some other jurisdictions. The modern trend of evidence law is to place more and more of the available evidence before the trier of fact, allowing him to evaluate the probative value of such evidence. A suggested draft of the revision[30] was submitted to the members of the Association for their consideration in an interim report,[31] after which the committee drafted the following report:

> "It is the conclusion of this committee that human nature has not changed in the century that has intervened since the Dead Man's Evidence Rule became the law of this State by Act of the Legislature in 1864. Practically every experienced trial lawyer and judge with whom this matter has been discussed feels that the Rule serves a useful purpose.[32] There is a danger

---

[27] *Supra*, n. 16; Kenny v. Peregoy, 196 Md. 630, 78 A. 2d 173 (1951).

[28] Grove v. Funk, 131 Md. 694, 104 A. 368 (1917).

[29] O'Connor v. Estevez, 182 Md. 541, 545, 35 A. 2d 148 (1943).

[30] Draft of Proposed New Section 2 of Article 35:

> "In any action by or against the representative of a deceased person, including an action concerning probate of a will, or by or against a person incompetent to testify by reason of mental disability, no written or oral statement of the decedent or incompetent shall be excluded as hearsay if the judge shall first find that the statement was made by the decedent or incompetent at a time when he was competent, and that it was made in good faith and on his personal knowledge prior to the commencement of the action."

[31] Daily Record, April 14, 1958.

[32] But *cf.* Morgan, et al., *The Law of Evidence, Some Proposals For Its Reform* (1927) 31-32, discussing the response of the Connecticut bench and bar to that state's statute abolishing the rule of incompetency as to interested survivors and also admitting relevant hearsay statements by decedents:

> "Of twenty-one lawyers without experience, twenty thought greater safeguards necessary. Of one hundred and fifty-two having ex-

> in every case when there is only a single survivor that he will present a fraudulent or exaggerated claim. At best his claim will be colored. It is difficult if not impossible in fact to refute such a claim, because direct evidence is frequently not available. The practical experience has been that the Rule is an effective and useful safeguard against such claims, and that, if the claim is valid, it is usually possible to assemble sufficient admissible evidence to support it without the evidence of the survivor, or that opposing counsel will not stand on the Rule when he is convinced that the claim is just. Thus any apparent inequities in the Rule are philosophical and not actual."[33]

The committee recommendation that the Statute remain in its present form, since "there are not sufficient potential inequities in the practical application of the rule to warrant dispensing with the safeguards against real inequities and injustice which it affords,"[34] was adopted by the Association at its annual meeting in June, 1959.

The committee decision is directly contrary to the current of comment by experts elsewhere, which so strongly advocates revision or abolishment of the Dead

---

perience, sixty percent were satisfied with the statutes as they are. The Justices of the Supreme Court were unanimously of this opinion, and eighty-one percent of the Supreme Court Judges agreed. Of the four Common Pleas Judges, three believed additional safeguards advisable. Outside of these, the only class of lawyers opposed to those provisions were those who had little or no experience with them. And those of experience who suggested amendment usually advised only the requirement of preliminary findings by the judge or the requirement of corroboration.

Whether the provisions need amendment or not, they are decidedly to be desired if they aid in the ascertainment of truth rather than tend to encourage fraud and perjury. Upon the application of this drastic test all the judges of the Supreme and Superior Courts found them good; only one judge of the Common Pleas Court dissented, while one other was in doubt. Therefore, out of nineteen judges of the higher courts, seventeen, or over eighty-nine percent, believed that these provisions aid in the ascertainment of truth. Of all lawyers and judges having any experience, seventy percent regarded them as beneficient while only thirteen and five-tenths percent considered them harmful. Of those having experience in more than five cases, eighty-four and five-tenths percent thought them a positive help in the correct solution of litigated issues, and only in the group having no experience at all was the majority opinion to the contrary. In a word the opposition to these statutes is in inverse ratio to experience with them."

[33] Transactions Maryland State Bar Association, 64th Annual Meeting, 1959, 227.

[34] *Supra*, n. 33.

Man's Statute.[35] For example, Dean Wigmore in his careful analysis has stated that the rule rests on "superficial reasoning;" he objects to the fact that the exclusion of such evidence precludes honest claims of the living and that there is no more justification "to save dead men's estates from false claims then to save living men's estates from loss by lack of proof."[36]

The committee report defends the Statute on the theory that the reduced possibility of contradiction will encourage falsehood and that such claims will be difficult or impossible to refute in the absence of direct evidence. However, the suspicion with which the testimony of an interested witness is regarded and the safeguards of cross-examination and circumstantial evidence make such deception unlikely.

Because it fails to render the witness totally incompetent, but, as discussed previously, only incompetent as to certain subject matters of testimony, the Statute appears to rest on false assumptions about the psychology of party-witnesses. Thus, if a witness were prone to falsify, he could do so as to matters not within the range of exclusion and in this way still establish a claim. Further, in providing that the surviving party or interested party may testify only if called by the adversary, the Statute in effect denies a recovery to the survivor who, without an outside witness or written agreement has rendered services, lent money, or furnished goods, which the representative of the decedent's estate declines to pay.[37] In addition, the case law has allowed third persons to testify to statements and transactions[38] under circumstances which would bar the testimony of a party-witness, thereby blocking perjury only to encourage subornation of perjury by a party wishing to circumvent the effect of the Statute.

As the committee itself admits in its interim report,[39] the inconsistent interpretations of the Statute appear artificial — "it seems obvious that the court, in trying to

[35] *Supra*, n. 29. See also AMERICAN LAW INSTITUTE MODEL CODE OF EVIDENCE (1942), Rule 101 and Comment; THE UNIFORM RULES OF EVIDENCE (1953), Rule 7; 2 WIGMORE, EVIDENCE (3rd ed. 1940) §§ 578, 578a; MORGAN, THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM (1927), 24 (published under the auspices of the Commonwealth Fund).

[36] WIGMORE, *loc. cit. supra*, n. 35.

[37] It is only fair to note that many meritorious claims are paid because fairminded counsel refuse to invoke the Statute where technically available, But why should the claimant be dependent on the whim of opposing counsel?

[38] *Supra*, n. 15.

[39] *Supra*, n. 31.

balance the equities of matters before it, has enforced the evidentiary bar or found exceptions, depending on circumstances of the particular case." The report further points out that "the volume of cases in which the rule has been before the Court of Appeals demonstrates either the difficulty of its application or the harshness of its result from which many appellants have hoped to obtain relief by appeal." It would seem to follow from these comments that a statute which continues to mystify able courts and good lawyers in its endless complexities of interpretation and application should be revised or abolished.

Herbert J. Belgrad