



**PennState**  
Dickinson Law

**DICKINSON LAW REVIEW**  
PUBLISHED SINCE 1897

---

Volume 62  
Issue 2 *Dickinson Law Review - Volume 62,*  
1957-1958

---

1-1-1958

## The Dead Man's Rule as Applied to Tort Actions in Pennsylvania

Gordon E. Stroup

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

---

### Recommended Citation

Gordon E. Stroup, *The Dead Man's Rule as Applied to Tort Actions in Pennsylvania*, 62 DICK. L. REV. 174 (1958).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol62/iss2/7>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

## THE DEAD MAN'S RULE AS APPLIED TO TORT ACTIONS IN PENNSYLVANIA

There is always danger of injustice when a vital witness is unavailable. This is especially true when a party to a transaction dies and his testimony is lost, for there is danger that injustice may be done by reason of false claims against his estate. To counteract this danger, most states, including Pennsylvania, have what is commonly known as a "Dead Man's Rule." Generally, this is designed to prevent a surviving party or witness to the transaction, who has a direct pecuniary or proprietary interest in the result of the suit, from testifying as to anything that occurred before the death of the deceased party. Hence, the object of this rule is to place the parties on an equal footing, and to prevent one of them, to the detriment of the other, from taking unfair advantage of the fact that the lips of the deceased have been sealed by death. However, these rules have been condemned by many of the modern writers on the law of evidence as creating as much injustice as they prevent.<sup>1</sup> It is apparent that while such a rule may prevent a dishonest person from testifying falsely, it equally bars the testimony of honest litigants, and hence does harm. The Uniform Rules of Evidence propose abolition of the Dead Man's Rule entirely,<sup>2</sup> but admit as a counterweight to the survivor's testimony and as an exception to the hearsay rule, statements made by the deceased concerning the transaction.<sup>3</sup> This is the rule now adopted in Connecticut,<sup>4</sup> Massachusetts,<sup>5</sup> Rhode Island,<sup>6</sup> and South Dakota,<sup>7</sup> and in those states it appears to have been successful.<sup>8</sup> Such a major reform<sup>9</sup> has yet to be accepted by our legislature, although the Committee of the Pennsylvania Bar on Judicial Administration

---

<sup>1</sup> 2 WIGMORE, EVIDENCE, 578, 696 (3rd. ed. 1940). Wigmore attacks it with characteristic vigor: "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."

MCCORMICK, EVIDENCE HANDBOOK, 142, 143 (1954). "Slowly, the law-makers are being brought to see the blindness of the traditional survivor's evidence Acts, and liberalizing changes are being adopted."

<sup>2</sup> UNIFORM RULES OF EVIDENCE, Rule 7. "Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible."

<sup>3</sup> UNIFORM RULES OF EVIDENCE, Rule 63, (4), (c).

<sup>4</sup> CONN. REV. GEN. STAT. § 7895 (1949)

<sup>5</sup> MASS. ANN. LAWS c.233 § 65 (Supp. 1954)

<sup>6</sup> R.I. GEN. LAWS c.538 § 4, 5, 6 (1938)

<sup>7</sup> S.D. CODE § 36.0104 (1939)

<sup>8</sup> Ladd, *Symposium on Uniform Rules*, 10 RUTGERS L. REV. 523, 566 (1956).

<sup>9</sup> *Ibid.*

voted overwhelmingly in favor of the new rules.<sup>10</sup> Despite the repeated attacks upon its soundness, the Dead Man's Rule is still the law in our Commonwealth, and continues to present intricate problems of interpretation.

Since there seems to be more vehemence against retention of this incompetency rule in tort actions<sup>11</sup> than in contract actions, it shall be the purpose of this comment to review the application of the Dead Man's Rule to tort actions in Pennsylvania, and to discuss the extent to which a surviving party or witness is disqualified from testifying when he falls within the letter of the rule.

At common law in Pennsylvania, parties were incompetent to testify in their own suits and witnesses were incompetent whenever it appeared that they had an interest in the subject matter in controversy.<sup>12</sup> *Interest* was the disqualifying feature. The Act of 1869<sup>13</sup> abrogated this common law disqualification for interest. Hence, it was enacted to make witnesses competent to testify, not incompetent. These provisions of the Act of 1869 were incorporated in the Act of 1887,<sup>14</sup> to which the Dead Man's Rule is only one of four exceptions.<sup>15</sup> This exception, interpreted literally, prohibits a surviving party to a thing<sup>16</sup> or contract in action from testifying as to "any matter occurring before the death" of a deceased party.<sup>17</sup> As indicated *supra*, it was reasoned

<sup>10</sup> Braham, *The Uniform Rules of Evidence*, reprinted from the LEGAL INTELLIGENCER (April 27, 1955). Judge Braham states: ". . . The Uniform Rules of Evidence promulgated August 17, 1953 are the result. The Committee of the Pennsylvania Bar on Judicial Administration voted overwhelmingly in favor of the new rules . . . The bench and bar have been increasingly aware of the defects in the dead man's rule. The difficulty is that in protecting one set of parties we have exposed others to unjust loss. In order to protect estates from impecunious and unscrupulous claimants, we have sometimes shut the mouth of the most deserving and meritorious claimants. . . ."

<sup>11</sup> *Id.* at 5. ". . . In tort cases the effect is most obvious. The death of the most reckless, wanton and obnoxious character involved in a wreck of automobiles may result in defeating the just claims of a number of innocent persons whose lives he has ruined by his negligence but against whom they are unable to testify."

<sup>12</sup> *Miller v. Frazier*, 3 Watts 456 (Pa. 1835); *Norris v. Johnson*, 5 Pa. 287 (1847); see 5 U. PITT. L. REV. 125 (1939); *Hendrickson's Estate*, 388 Pa. 39, 44, 130 A.2d 143 (1957).

<sup>13</sup> Act of April 15, 1869, P.L. 30.

<sup>14</sup> Act of May 23, 1887, P.L. 158, 28 P.S. § 314 (1930). Section 4 states: "In any civil proceeding before any tribunal of this Commonwealth, or conducted by virtue of its order or direction, no liability for costs nor the right to compensation possessed by an executor, administrator or other trustee, nor any interest merely in the question on trial, nor any other interest, or policy of law, except as is provided in section five of this act, shall make any person incompetent as a witness."

<sup>15</sup> *Ibid.*, 28 P.S. §§ 315-322 (1930). To this rule, as set forth in note 14 *supra*, section 5 of the statute makes four exceptions: The first concerns convicted perjurers; the second, confidential communications; the third, testimony of husband and wife adverse to one another; and the fourth, the dead man's rule.

<sup>16</sup> Vol. 41, WORDS AND PHRASES, PERM. ED., "Thing". The word "thing" means that which is or may become the object of thought; that which has existence or is concerned or imagined as having existence, any object, substance, attribute, idea, fact, circumstance, event, etc. A thing may be material or ideal, animate or inanimate, actual, possible or imaginary. The word "thing in action" has been held to mean a "cause of action" where the relief sought is the recovery of money or other personal property.

<sup>17</sup> Act of May 23, 1887 P.L. 158 § 5 cl. e, 28 P.S. 322 (1930). "Nor where any party to a thing or contract in action is dead, or has been adjudged a lunatic and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased or lunatic

that death having sealed the lips of one party, even-handed justice required that the survivor's lips also be sealed.<sup>18</sup> It should be noted at this point that this is considered by the writer to be too literal an interpretation of the rule, especially with regard to tort actions. This should not mean that the surviving party or witness cannot take the witness stand, but only that he is disqualified with regard to *certain* matters, as will be more fully explained below. Under the Dead Man's Rule three conditions must exist before the surviving party or witness is disqualified:<sup>19</sup> (1) the deceased must have had an actual right or interest in the matter at issue, *i.e.* an interest in the immediate result of the suit; (2) the *interest* of the witness—not simply his testimony—must be adverse, *i.e.* he must stand to gain or lose as the direct legal operation of the judgment; (3) a right of the deceased must have passed to a party on the record who represents the deceased's interest. For the purposes of this comment, it is assumed that these conditions exist, and that the witness or surviving party is disqualified, *so far as the rule is meant to apply*.

The parent case in Pennsylvania holding that in tort actions death seals the lips of the surviving party or witness is *Irwin v. Nolde*,<sup>20</sup> decided in 1894, in which the court held that the Act of 1887 applied to actions in tort as well as to contract actions. In that case the plaintiff brought an action of trespass q.c.f. against the defendants for taking forcible possession of his fields. Both defendants died before the trial was held, yet the lower court permitted the plaintiff to testify as to matters occurring before the death of the defendants, holding that the Act of 1887 applied only to contract actions. The Supreme Court of Pennsylvania, in an opinion by Mr. Justice Fell, reversed the decision of the lower court, holding that the plaintiff was excluded by Section 5, Clause E of the Act of 1887, (the Dead Man's Rule). The opinion stated that the Act made no distinction between different classes of civil actions.

"Nolde was party to the thing or contract in action, a right connected with the property, and the plaintiff was a surviving party as well as a person

---

party, be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy, unless the proceeding is by or against the surviving or remaining partners, joint promisors or joint promisees, of such deceased or lunatic party, and the matter occurred between such surviving or remaining partners, joint promisors or joint promisees and the other party on record, or between such surviving or remaining partners, promisors or promisees and the person having an interest adverse to them, in which case any person may testify to such matters; or unless the action be ejectment against several defendants, and one or more of said defendants disclaims of record any title to the premises in controversy at the time the suit was brought and also pays into court the costs accrued at the time of his disclaimer, or gives security therefor as the court in its discretion may direct, in which case such disclaiming defendant shall be a fully competent witness; or, unless the issue or inquiry be *devisavit vel non*, or be any other issue or inquiry respecting the property of a deceased owner, and the controversy be between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses."

<sup>18</sup> *Karns v. Tanner*, 66 Pa. 297, 304, 305 (1870).

<sup>19</sup> See note 17 *supra*. See also 5 U. PRRT. L. REV. 125, 132 (1939); *Hendrickson's Estate*, 388 Pa. 39, 45, 130 A.2d 143 (1957).

<sup>20</sup> 164 Pa. 205, 30 Atl. 246 (1894).

whose interest was adverse to the right of the deceased party. He was within the letter and spirit of the excluding clause of the act and *clearly incompetent to testify.*" (Italics added).

Since that decision, our courts have uniformly followed the rule of this case as the law in Pennsylvania.<sup>21</sup> It should be noted that the question as to whether a surviving party or witness, who falls within the rule, is completely disqualified from testifying, has not been directly discussed in these cases. But, the decisions found tend toward a strict interpretation of the Act and appear to prohibit the surviving party or witness from testifying as to any matter occurring before the death of the opposite party.<sup>22</sup> This also seems to be the interpretation of the rule in the few automobile collision cases dealing with it.<sup>23</sup> One of the first applications of the Dead Man's Rule to actions involving automobile accidents was in the 1935 Superior Court case of *Neibauer v. Shultz*.<sup>24</sup> In that case the plaintiff Niebauer was a passenger in an automobile involved in a collision with another automobile operated by the defendant Shultz. Shultz died before the trial was held and the lower court decided, *inter alia*, that as Shultz was dead at the time of bringing suit, the plaintiff was not a competent witness to testify against his administrator *as to anything that occurred during the lifetime of Shultz*. This decision was affirmed by the Supreme Court without comment.<sup>25</sup> Furthermore, the far-reaching consequences of the *Nolde* decision are very evident in more recent years. In the 1946 Circuit Court of Appeals case of *Wright v. Wilson*,<sup>26</sup> the federal court was presented with this same problem. In an opinion by Judge Goodrich, the court held that:

"The Pennsylvania statute is explicit in prohibiting the testimony of the survivor. . . . The Pennsylvania Supreme Court has sharply indicated that the plain language of the statute is not to be circumvented. So far as Pennsylvania Law is concerned, it is clear that the door is tightly closed against admissibility of the proffered testimony . . . the only conclusion we can reach is to say that the testimony offered by the survivor of an accident in this case is not admissible against his opponent. We reach the result without enthusiasm. The rule excluding a survivor's testimony seems to stand in the almost unique situation of being condemned by all the modern writers on the law of evidence. It is said to be as unsound as the rule excluding the testimony of parties, of which the

<sup>21</sup> *Kreps v. Carlisle*, 157 Pa. 358, 27 Atl. 741 (1893); *Lockard v. Vare*, 230 Pa. 591, 79 Atl. 802 (1911); *Keating v. Nolan*, 51 Pa. Super. 320, (1912); *McCaulif v. Griffith*, 110 Pa. Super. 522, 168 Atl. 536 (1933); *Niebauer v. Shultz*, 114 Pa. Super. 538, 174 Atl. 812 (1933); *O'Brien v. Gray*, 121 Pa. Super. 27, 182 Atl. 746 (1936); *Wright v. Wilson*, 154 F.2d 616 (3rd Cir. 1946); *Kuhns v. Brugger*, 390 Pa. 331, 135 A.2d 395 (1957).

<sup>22</sup> *Ibid.*

<sup>23</sup> *Niebauer v. Shultz*, 114 Pa. Super. 538, 174 Atl. 812 (1935); *O'Brien v. Gray*, 121 Pa. Super. 27, 182 Atl. 746 (1936); *Wright v. Wilson*, 154 F.2d 616 (3rd Cir. 1946).

<sup>24</sup> 114 Pa. Super. 538, 174 Atl. 812 (1935).

<sup>25</sup> 318 Pa. 266, 178 Atl. 285 (1935).

<sup>26</sup> 154 F.2d 616 (3rd Cir. 1946).

survivor rule is a part. But we believe this to be a case where a rule so thoroughly established through many generations of judicial history should be removed by legislative action or court rule which applies generally and not by judicial legislation in a particular case."

The question to be considered is whether the plain language of the statute *need be* circumvented in all cases. Should a surviving party or witness to an automobile accident, who falls within the letter of the Dead Man's Rule, be incompetent to testify to "anything that happened during the lifetime of the deceased," *i.e. unable to testify at all?* This could not have been the intention of the legislature in allowing the Dead Man's Rule to remain as an exception to the Act of 1887 which abrogated the common law disqualification for interest! The decisions set forth above do not decide, and should not be construed to mean, that the surviving party or witness is disqualified from taking the witness stand. The disqualification should extend only to those matters surrounding the immediate happening of the accident. The rule should apply only in relation to the "thing" concerned, *i.e.* the *res gestae* of the accident itself. More particularly, the surviving party or witness should be disqualified from testifying only with regard to matters which the deceased party could have contradicted had he lived.

The Dead Man's Rule need only be interpreted in light of the basic reason for its existence in order to justify this result. A careful analysis of the statute reveals that this must be the correct interpretation. Interest is not the true reason for preventing a surviving party or witness from testifying to a thing or contract with the deceased in an action by or against his estate. The basic reason is that such testimony is not subject to the principal safeguard for truth—*contradiction*. As stated at the beginning of this comment, the object of this rule is to place the parties on an equal footing and to prevent one of them, to the detriment of the other, from taking unfair advantage of the fact that the lips of the deceased have been sealed by death. Contradiction is the key word.

This is clearly the interpretation of similar rules in several other jurisdictions.<sup>27</sup> The most recent case concerning this point is that of *Sears, Roe-*

<sup>27</sup> *Yuritch v. Yuritch*, 139 N.J.E. 439, 51 A.2d 901 (1947). "The test laid down for ascertaining what is a transaction with the deceased within the intendment of the statute, is to inquire whether, in case the witness testified falsely, the deceased, if living, could contradict it of his own knowledge."

*McCary v. McMorris*, — Ala. —, 92 So. 2d 319 (1957). "The provisions of the statute exclude a witness from testifying to any transaction between himself and the dead, in all cases . . . where the presumption exists that the dead, if living, could explain, qualify, or contradict."

*Harris v. Berry*, — S.C. —, 98 S.E. 2d 251 (1957). "It is founded on the principle that it is against public policy to allow a witness thus interested to testify to such matters when such testimony, if true, cannot be contradicted."

*Andreades v. McMillan*, — Tex. —, 256 S.W. 2d 477 (1953); *Sears, Roebuck and*

*buck and Co. v. Jones*<sup>28</sup> in the Texas Civil Court of Appeals, May 9, 1957. That case involved a collision between two trucks—one owned and operated by the plaintiff Jones, the other owned by the defendant Sears, Roebuck and Co., and driven by their employee, defendant Truitt. Before the trial, defendant Truitt died, yet the trial court permitted the plaintiff to testify against his estate fully and in detail as to the circumstances surrounding the collision, over the repeated objections of the defendant that such testimony was in direct violation of the Texas Dead Man's Statute.<sup>29</sup> An oral deposition by the defendant Truitt had been taken prior to his death in which he testified that he was intoxicated at the time and could not remember a thing concerning the accident. On appeal, the Civil Court of Appeals affirmed the admission of plaintiff's testimony, holding that the Dead Man's Statute was not applicable:

"The proper test in determining whether testimony violates the provisions of this article of the statutes is whether or not, if the witness testified falsely, the deceased, if living, could have contradicted such false testimony of his own knowledge."<sup>30</sup>

It was clear from the evidence in this case that had Truitt lived to testify, he would not have been able to contradict the testimony of the plaintiff as to any of the circumstances surrounding the collision, for by his own admission, he was intoxicated and could not recall what had happened.

It is important to note at this point that the Pennsylvania Supreme Court has used this analysis of our Dead Man's Rule in *Mozino v. Canuso*,<sup>31</sup> a 1956 partnership case. The plaintiff there sued in assumpsit to recover damages upon an alleged breach of oral contract against the defendant partnership which consisted of a father and son. After the issue had been joined, the defendant father died. The plaintiff, with leave of court, subsequently amended his complaint so as to show the action as being against the surviving partner alone. Over the objections of the defendant based on the Dead Man's Rule, the trial judge permitted the plaintiff to testify generally with regard to the oral contract, being of the opinion that the plaintiff's amended complaint made the rule inapplicable. The jury returned a verdict for the plaintiff, and the

---

Co. v. Jones, — Tex. —, 303 S.W. 2d 432 (1957). "The proper test in determining whether testimony violates the provisions of this article of the statutes is whether or not, if the witness testified falsely, the deceased, if living, could have contradicted such false testimony of his own knowledge."

<sup>28</sup> 303 S.W. 2d 432 (Tex. Civ. App. 1957).

<sup>29</sup> VERNON'S ANN. CIV. ST., art. 3716: "In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent."

<sup>30</sup> Italics added.

<sup>31</sup> 384 Pa. 220, 120 A.2d 300 (1956).

defendant filed motions for judgment n.o.v. and a new trial. The court en banc denied the motion for judgment n.o.v., but awarded a new trial, basing the grant on the ground that the Dead Man's Rule had been violated. For reasons other than the evidence question the Supreme Court affirmed the granting of a new trial but determined to pronounce upon the question of the plaintiff's competency to testify under the Act of 1887. Being of the opinion that it was improperly decided below, the court stated *inter alia*:

"Section 5 (e) of the Evidence Act of 1887 does not warrant an interpretation that would quarantine the surviving partners against the claims of creditors of the partnership simply because one of the partners has died. There must be more than that. The thing or contract in action must be such that the deceased partner, if living, *would have been a material and relevant witness concerning matters relating thereto.*"<sup>32</sup>

In most cases the statute thus interpreted would still eliminate testimony as to the circumstances immediately relevant to the manner in which the accident occurred, except where it is clear that the deceased could not have contradicted anything that happened even if he had lived, in which case, the surviving party or witness would be competent to testify as to everything that happened, as in the *Sears, Roebuck* case *supra*. But certainly the deceased party could not contradict facts concerning which only the surviving party or witness could have any knowledge. Hence, he should be competent to testify to all matters not related to the immediate happening of the accident, particularly with reference to the manner in which he was driving his car prior to the accident, where he was traveling to, where he was coming from, and the speed at which he was traveling before the instant when the conditions arose which brought about the accident. He should also be competent to testify as to the position of his car after the accident, the damage to his property, the injuries he received, loss of wages and earnings, hospital and doctor bills, pain and suffering, and other relevant matters of similar importance. Neither the Act of 1887 nor the decision in *Irwin v. Nolde* should be construed to prevent a surviving party or witness from testifying to "anything that happened during the lifetime of the deceased."

It is apparent that the Dead Man's Rule stands in a very unique position. There appears to be an almost universal distaste for the rule among the modern writers on the law of evidence. It is condemned as illogical and a breeder of injustice, because in seeking to avoid injustice to the estates of a deceased party, the rule is blind to the equal possibility of injustice to the living. Yet, in the face of logical and persuasive attacks upon its soundness, the majority of state legislatures have refused to abolish or alter the rule. Perhaps this

---

<sup>32</sup> Italics added.



conservative attitude is based upon a failure of the reformers to offer a suitable solution. But the important thing to notice is that injustice is recognized as an inherent defect of the Dead Man's Rule. Therefore, it should be narrowly construed in all instances. There must be no possibility of doubt as to the extent of disqualification in *any* case. But, as indicated in this comment, there is clearly a possibility that the statute could be construed to prevent a surviving party or witness from testifying *at all* in a suit by or against the decedent's estate. Such a result would be intolerable. Hence, it is recommended that the test of contradiction, as set forth in the *Sears, Roebuck* case *supra*, be incorporated in the Dead Man's Rule by legislative action or court rule to avoid any possibility of doubt as to the correct interpretation.

GORDON E. STROUP