

10/9/56

Memorandum No. 2

Subject: Study No. 3 - Dead Man Statute.

As you know, the commission's recommendation to the Legislature relating to this study proposes the repeal of Code of Civil Procedure Section 1880(3) (the present Dead Man Statute) and the enactment of Code of Civil Procedure Section 1880.1. The latter section as drafted by the commission, provides:

1880.1. In any action or proceeding by or against the representative or by or against the heirs or by or against the successor in interest of a deceased person or by or against the beneficiary of any life or accident policy insuring a deceased person or in any proceeding for probate of the will of a deceased person, no written or oral statement of such deceased person made upon his personal knowledge shall be excluded as hearsay. In any action or proceeding by or against a person of unsound mind incapable of being a witness under subdivision 1 of Section 1880 of this code or by or against the successor in interest of such person no written or oral statement of such person of unsound mind made upon his personal knowledge and at a time when he would have been a competent witness shall be excluded as hearsay. *

The Chairman has raised a question whether under this language statements of a deceased person would be admissible in an action by or against one of the persons listed even though the person was not involved in the action in his capacity as an heir, representative, successor in interest or insurance beneficiary of the decedent. For example, suppose A, since deceased, had witnessed an automobile accident between B and C. Would A's hearsay statement about the accident while he was alive be admissible in an action between B and C as individuals if it happened that B was the personal representative or the life

* The phrase "or in any proceeding for probate of the will of a deceased person" was inadvertently omitted from the proposed statute in the draft of the Recommendation dated June 5.

insurance beneficiary of A? Reading the language of proposed Section 1880.1 literally, the answer would be yes.

This matter was discussed by the Southern Committee (to which the Dead Man Statute Study originally was assigned) at its meeting of October 6. The Committee has concluded that statements of a deceased person should not be admissible under proposed Section 1880.1 unless the action is by or against the representative, heir, successor in interest or insurance beneficiary of the decedent in his capacity as such. This undoubtedly was the intention of the commission in approving Section 1880.1.

Although it is nowhere explicitly stated, the entire tenor of the recommendation, arguably, makes this intention clear. Moreover, the South Dakota statute (see p. 52 of the research consultant's study) and the Connecticut statute (see note 128 of the research consultant's study), upon which proposed Section 1880.1 is modelled, both use this language and there is no indication in either the research consultant's report or in the letters we have received from these states about their experience under these statutes, that they have been otherwise construed.

The Southern Committee tentatively decided, however, that proposed Section 1880.1 should be revised to eliminate this ambiguity and requested this office to draft a modification of proposed Section 1880.1 to make it clear that hearsay statements of a deceased person are admissible in actions by or against a person only in his capacity as representative, heir, beneficiary, etc. Accordingly, the following is submitted:

1880.1. No written or oral statement of a person of unsound mind incapable of being a witness under subdivision 1 of Section 1880 of this code made upon his personal knowledge

and at a time when he would have been a competent witness shall be excluded as hearsay in any action or proceeding by or against such person or by or against any person in his capacity as the successor in interest of such person of unsound mind.

No written or oral statement of a deceased person made upon his personal knowledge shall be excluded as hearsay in any action or proceeding:

(a) For the probate of the will of such deceased person;

(b) By or against the beneficiary of a life or accident policy insuring such deceased person, arising out of or relating to such policy;

(c) By or against any person in his capacity as representative, heir, or successor in interest of such deceased person.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary