STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

The Dead Man Statute

February 21, 1957

LETTER OF TRANSMITTAL

To His Excellency Goodwin J. Knight
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 207 of the Statutes of 1955 to make a study to determine whether subdivision 3 of Section 1880 of the Code of Civil Procedure (the "Dead Man Statute") should be revised or repealed. The commission herewith submits its recommendation relating to this subject and the study prepared by its research consultant, Professor James H. Chadbourn of the School of Law, University of California at Los Angeles.

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February 21, 1957

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to the Dead Man Statute

At common law any person having an interest in the outcome of an action was disqualified as a witness on the theory that his interest might induce him to testify falsely. This disqualification has long since been universally abolished by statute in the belief that the testimony of interested persons is often of great importance in establishing facts in litigation and that the trier of fact will be able to evaluate such testimony with due allowance for the conscious or unconscious bias of the witness.

In the United States, however, there has long existed an apparent exception to the rule that interested parties may testify embodied in the so-called Dead Man Statutes which provide generally that one engaged in litigation with a decedent's estate cannot be a witness as to any matter or fact occurring before the decedent's death. On its face the statute might seem to have the same basis as the old common law disqualification for interest, *i.e.*, apprehension that the interested party will commit perjury. However, on a more critical analysis, it would appear that the Dead Man Statute rests not on this premise but rather on the belief that if the survivor were permitted to testify the proceeding would be unfair because the other party to the transaction is not available to testify and hence only a part of the whole story can be developed. Because the dead cannot speak, the living are also silenced out of a desire to treat both sides equally.

The Dead Man Statute in California is subdivision 3 of Section 1880 of the Code of Civil Procedure. As is pointed out in the research consultant's report, this statute, as enacted by the Legislature and construed by our courts, does not extend to a number of situations which fall within the logical ambit of the principle underlying Dead Man Statutes. This is because the statute was drafted and has been narrowly construed to apply almost exclusively to creditors' claims against decedents' estates. Thus, for example, the statute does not prohibit the survivor from testifying when the estate makes a claim against him, or from testifying in support of a claim that certain property is not a part of the estate but belongs to him, or from testifying in support of an alleged right to share in the estate as heir or legatee. Nor does the statute apply to proceedings by or against the heirs or successors in interest of a deceased person, or in actions by or against the beneficiary of a life or accident insurance policy insuring a deceased person, or in a proceeding relating to a decedent's will. And it does not apply in actions by or against persons of unsound mind or their successors in interest. Yet, in any of these situations the testimony of the decedent or the incompetent person will often be fully as important and equally as unavailable as in the cases to which the statute is applicable. In

short, California does not have a full-fledged Dead Man Statute but less than half a statute measured in terms of the ambit of supposed evils to which such legislation is presumably directed.

A more serious defect in the Dead Man Statute is that it results in the denial of just claims in a substantial number of cases. While the statute undoubtedly cuts off some fictitious claims, the commission believes that on the whole it balances the scales of justice unfairly in favor of decedents' estates. Moreover, as the copious citations in the research consultant's report demonstrate, the statute has been productive of much litigation; yet many questions as to its meaning and effect are still unanswered. For these reasons, the commission recommends that the Dead Man Statute be repealed by the Legislature.

However, repeal of the Dead Man Statute alone would, it is believed, tip the scales unfairly *against* decedents' estates by subjecting them to claims which could have been defeated, wholly or in part, if the decedent had lived to tell his side of the story. If the living are to be permitted to testify, some steps ought also to be taken to permit the decedent to testify, so to speak, from the grave. This can be done by relaxing the hearsay rule as to declarations of decedents in a limited number of cases. The commission recommends that this be done, as it has been done in several other states, through the enactment of a statute providing that in certain specified types of actions written or oral statements of a deceased person made upon his personal knowledge shall not be excluded as hearsay. Such a statute is set forth below; its scope and effect are as follows:

1. The statute would make hearsay statements of a decedent admissible not only in cases to which our Dead Man Statute now applies—*i.e.*, creditors' claims against decedents' estates—but to all cases to which, as is pointed out above, the Dead Man Statute logically ought to apply. These include actions brought by a decedent's estate, actions by or against a decedent's heirs or successors in interest, actions by or against the beneficiary of a life or accident insurance policy of the decedent, proceedings relating to a decedent's will, and actions by or against persons of unsound mind and their successors in interest. In any of these actions the testimony of the person now deceased or incompetent is often likely to be essential to full development of the facts. Making the hearsay statements of the deceased or incompetent person admissible in the various situations covered by the proposed statute will offset the unfair advantage which the adverse party now enjoys in many of these cases and will balance the advantage created by repealing the Dead Man Statute in the cases to which it presently applies.

2. The statute is restricted in scope. It does not make hearsay statements of deceased persons generally admissible as has been done in Massachusetts and Rhode Island but is confined to a limited number of actions and proceedings. To be admissible the hearsay statement must have been made on the decedent's personal knowledge. Moreover, the statement may be excluded on any proper ground of objection to it other than hearsay, *e.g.*, that it is privileged.

The commission's recommendation would be effectuated by the enactment of the following measure: *

An act to amend Section 1880 and to add Section 1880.1 to the Code of Civil Procedure, relating to evidence.

The people of the State of California do enact as follows:

SECTION 1. Section 1880 of the Code of Civil Procedure is amended to read:

1880. The following persons cannot be witnesses.

1. Those who are of unsound mind at the time of their production for examination.

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

~~3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person.~~

SEC. 2. Section 1880.1 is added to said code, to read:

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) Relating to 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.

* Matter in "strikeout" type would be omitted from the present law.

A STUDY TO DETERMINE WHETHER THE DEAD MAN STATUTE SHOULD BE MODIFIED OR REPEALED *

COMMON LAW BACKGROUND

At common law parties and other persons having a direct pecuniary or proprietary interest in the outcome of any action were excluded from testifying as witnesses in the action.[1] A party could not call himself as a witness nor could he be required to testify if called by his adversary.[2] The justification advanced in support of these drastic disqualifications was that motivations of self-interest would probably lead parties and others directly interested to perjure themselves, and the proper safeguard is, therefore, to silence them altogether. As Baron Gilbert put it, "The law removes them from testimony to prevent their sliding into perjury."[3] Wholly silencing such persons was preferred to the alternative of permitting their testimony and reposing trust in the jury to assess the influence of interest, because (again quoting Gilbert) "the influence of interest is of a nature not to discover itself to the jury."[4]

Gilbert and other defenders of the common law rule of total exclusion conceded, of course, that perjury would not inevitably result from interest and that insofar as the rule silenced truthful persons it deprived the tribunal of reliable testimony and threatened the honest party with injustice. The argument was, however, that on balance the rule did more good than harm. As Starkie put it:

> There are, no doubt, many whom no interests could seduce from a sense of duty, and their exclusion by the operation of this rule may in particular cases shut out the truth. But the law must prescribe general rules; and experience proves, that more mischief would result from the general reception of interested witnesses than is occasioned by their general exclusion.[5]

Evidently the only significant difference respecting disqualification for interest between the practice in chancery and at law was that in equity the party was required to make discovery when called upon so to do by his adversary.[6]

NINETEENTH CENTURY REFORMS

In the nineteenth century in both England and America public and professional opinion changed respecting the basic premises underlying

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* This study was made at the direction of the Law Revision Commission by Professor James H. Chadbourn of the School of Law, University of California at Los Angeles.

[1] 2 WIGMORE, EVIDENCE §§ 575-76 (3d ed. 1940); MCCORMICK, EVIDENCE § 65 (Hornbook Series 1954).

[2] 8 WIGMORE, EVIDENCE § 2217.

[3] GILBERT, EVIDENCE 119 (1727).

[4] *Ibid.*

[5] STARKIE, EVIDENCE *23 (1832).

[6] Easterly v. Bassignano, 20 Cal. 489 (1862); 2 WIGMORE, EVIDENCE § 575; 8 *id.* §§ 2217-18.

the common law rule and a new approach to the problem of interested witnesses evolved. Under the tenets of this new approach the common law rule was assailed on the following grounds: (1) It overestimated the influence of interest and underestimated the ability of the jury to detect perjury; (2) It was inconsistent, since it admitted those interested by reason of affection, dependence or the like while excluding those interested pecuniarily; (3) It created arbitrary and technical decisions promotive of uncertainty and delay regarding when a person's interest was and when it was not sufficient to disqualify him; (4) It created more injustice than it prevented.

These points are tellingly made by the New York Commissioners on Practice and Proceedings in their 1848 report and by the English Common Law Practice Commissioners in their 1853 report. The New York Commissioners stated their objections to the common law rule in the following terms:

> The contrary [common law] rule implies, that, in the majority of instances, men are so corrupted by their interest, that they will perjure themselves for it, and that besides being corrupt, they will be so adroit, as to deceive courts and juries. This is contrary to all experience. In the great majority of instances the witnesses are honest, however much interested, and in most cases of dishonesty the falsehood of the testimony is detected, and deceives none. Absolutely to exclude an interested witness, is therefore as unsound in theory, as it is inconsistent in practice. It is inconsistent, because the law admits witnesses far more likely to be biased in favor of the party, than he who has merely a pecuniary interest * * *. There is not another rule in the law of evidence so prolific of disputes, uncertainties, and delays, as that we are considering. Not a circuit is held, but question after question is raised upon it; nor a term where exceptions growing out of it are not debated * * *.[7]

The English Commissioners spoke in like vein as follows:

> Acting, apparently, on a distrust both of the integrity of witnesses and of the discernment of the tribunals, it [the common law] sought to protect the latter from the possibility of being misled, by carefully excluding from giving testimony not only the parties to the cause, but any one who had any, even the most minute, interest in the result. Every person so circumstanced, however small and insignificant the amount of his interest, was presumed to be incapable of resisting the temptation to perjury; and every judge and juryman was presumed to be incapable of discerning perjury committed under circumstances peculiarly calculated to excite suspicion and watchfulness. It is painful to contemplate the amount of injustice which must have taken place under the exclusive system of the English law, not only in cases actually brought into court and there wrongly decided in consequence of the exclusion of evidence, but in numberless cases in which the parties silently submitted to wrongs from inability to avail themselves of proof which, though morally conclusive, was in law inadmissible.[8]

[7] First Report 247.
[8] Second Report 10.

The movement for the legislative reforms which established the new approach began in England and was greatly influenced by the powerful writings of Bentham calling attention to defects of the common law of evidence.[9] The first stage of the reform came in 1843 when Lord Denman's Act was passed.[10] This provided in part as follows:

> Whereas the Inquiry after Truth in Courts of Justice is often obstructed by Incapacities created by the present Law * * * Now therefore be it enacted * * * That no Person offered as a Witness shall hereafter be excluded by reason of * * * Interest from giving Evidence * * * but that every Person so offered may and shall be admitted to give Evidence * * * notwithstanding that such Person may or shall have an Interest in the Matter in question, or in the Event of the Trial * * * Provided that this Act shall not render competent any Party * * * individually named in the Record * * * or any Person in whose immediate and individual Behalf any Action may be brought or defended * * *.[11]

This statute classified into three groups the persons disqualified at common law and removed the disqualification as to one such group only. The three groups were: (1) parties, (2) nonparties for whose immediate benefit the action is brought or defended, (3) nonparties otherwise interested in the event of the action. The disqualification was removed only so far as the third class is concerned.

Manifestly this reform was of limited scope and required distinguishing between interest as an immediate beneficiary of the action and interest in the event of the action. The exact boundaries of these concepts were, however, never developed, because in 1851 Lord Brougham's Act repealed the restrictive proviso of Lord Denman's Act [12] and thereby emancipated the first and second classes also.

These English statutes established the general model for the liberalizing legislation which soon followed in the United States. Here, as in the mother country, the reform was typically accomplished in two stages, first qualifying the interested nonparty and, after an interval, extending the qualification to the party as well.[13] However, almost all of the United States departed from the English example to this significant extent: A portion of the old disqualification was retained as an exception to the new qualifying legislation and within the limits of this exception the principles of the rule now generally discarded were retained. This exception deals in varying terms with the testimony of an interested survivor offered against the estate of a deceased person. The exception is widely known under the popular name of "The Dead Man Statute." [14]

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[9] "In England, the publication (in 1827) of Bentham's great treatise first furnished the arsenal of arguments for transforming public opinion. The weapons were supplied and the forces marshalled by Mr. (afterwards L.C.J.) Denman and Mr. (afterwards L.C.) Brougham. Mr. Denman had indeed, as early as 1824, in reviewing the French edition of Bentham's work, given voice to the new views * * *." 2 WIGMORE, EVIDENCE § 576 at p. 692.
Passages from Bentham attacking the common law rule of disqualification for interest are: BENTHAM, TREATISE ON JUDICIAL EVIDENCE 248, 255 (Dumont 1825).

[10] 6 & 7 VICT., c. 85, p. 551.

[11] *Ibid.*

[12] 14 & 15 VICT., c. 99, § 1, p. 657.

[13] 2 WIGMORE, EVIDENCE §§ 576-77.

[14] 2 WIGMORE, EVIDENCE § 578; Note, 31 ILL. L. REV. 218 (1936). The divergent provisions of the statutes are summarized and charted in VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 334-341 (1949).

EARLY CALIFORNIA LEGISLATION

At its first session the California Legislature, evidently influenced by Lord Denman's Act, enacted the general proposition that "no person offered as a witness shall be excluded by reason of his interest in the event of the action." [15] This did not apply, however, "to a party to the action, nor to any person for whose immediate benefit it [the action] is prosecuted or defended, nor to any assignor of a thing in action, assigned for the purpose of making him a witness." [16] This enactment was superseded by the Practice Act adopted by the Legislature at its second session in 1851.[17] Section 392 of this act provided that "no person offered as a witness shall be excluded by reason of his interest in the event of the action or proceeding * * *." [18] Section 393 provided:

> The provision of the last section that no person shall be excluded by reason of his interest in the event of an action or proceeding, shall not apply to a party in such a proceeding, nor to any person for whose immediate benefit it is prosecuted or defended. The examination of such party or person shall be taken as provided in chapter third in this Title.[19]

The following sections of the third chapter made provisions for examination by the adverse party of a party or person for whose immediate benefit the action is prosecuted or defended:

> § 418. A party to an action or proceeding may be examined as a witness, at the instance of the adverse party * * *.[20]

> § 421. A party examined by an adverse party * * * may be examined on his own behalf * * *.[21]

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[15] Cal. Stat. 1850, c. 142, § 304, p. 455.
[16] Cal. Stat. 1850, c. 142, § 305, p. 455.
[17] Cal. Stat. 1851, c. 5, p. 51.
[18] Cal. Stat. 1851, c. 5, § 392, p. 113.
[19] Cal. Stat. 1851, c. 5, § 393, pp. 113-14.
[20] Cal. Stat. 1851, c. 5, § 418, p. 117.
[21] Cal. Stat. 1851, c. 5, § 421, p. 117. This section was, however, narrowly construed. Thus, in case of two defendants adversely interested as between themselves plaintiff could not call one of such defendants. Easterly v. Bassignano, 20 Cal. 489 (1862) (two defendants sued for joint liability as partners—one defendant not a competent witness for plaintiff to establish the partnership); Nightingale v. Scannell, 6 Cal. 506 (1856) (one partner sues for injury to partnership property, naming copartner as defendant—latter not a competent witness for plaintiff); Washburn v. Alden, 5 Cal. 463 (1855) (comaker of note could not be called by plaintiff to testify to authority to sign for other alleged comaker). *Cf.* Rosenbaum v. Hernberg, 17 Cal. 602 (1861) (plaintiff could call one of two defendants sued as joint tort-feasors since witness has no interest by way of contribution). In the *Easterly* case the court spoke as follows:

"The general rule at common law is, that parties to the record are not competent to testify; and prior to the statute the only mode of purging the conscience of a party was by a proceeding in equity to obtain a discovery. The statute provides that no action for a discovery in aid of the prosecution or defense of another action shall be allowed, and the provision that 'a party may be examined as a witness at the instance of the adverse party' was intended as a substitute. 'In general,' says Greenleaf, 'the answer of one defendant in chancery cannot be read in evidence against his codefendant;' and this is the rule laid down by all of the authorities upon the subject. * * * The statute abolishes bills of discovery, and substitutes in their place an examination at the trial; * * * [but] the right of examination only extends to matters of which an answer in a suit for a discovery is evidence at common law. As a general rule, no person is allowed to testify in favor of his own interest; and this rule applies with equal force, whether the person is a party to the record or a stranger. It is the interest of the witness, and not merely his position upon the record, that controls, and a party cannot be examined as to any matter in which he is interested in favor of the party calling him." Easterly v. Bassignano, 20 Cal. 489, 496-97 (1862).

In other words, the section as thus narrowly construed is merely declaratory of the common law.

§ 422. A person for whose immediate benefit the action is prosecuted or defended * * * may be examined * * * as if he were named as a party.[22]

§ 423. A party may be examined on the part of his co-plaintiff or a co-defendant; but the examination thus taken shall not be used on behalf of the party examined, except as against the examining party.[23]

The effect of these provisions was to preserve the common law disqualification of the party to call and examine himself as a witness and the disqualification to call and examine the person for whose immediate benefit such party was prosecuting or defending the action. The common law was, however, changed to permit the adversary to call and examine such party or person and either party could call and examine any person whose interest in the event of the action was otherwise than as immediate beneficiary.

As with Lord Denman's Act in England, the scope of the reform instituted by these provisions turned in part upon what distinctions should be drawn between interest as an immediate beneficiary of the action and interest in the event of the action. As we have seen, these distinctions were not developed in England because Parliament soon removed the necessity to do so by further liberalizing legislation. The California Legislature, too, soon removed such necessity, but here the superseding legislation was restrictive and recessive.[24]

In 1854 the Legislature amended Sections 392 and 393 to read as follows:

§ 392. No person offered as a witness shall be * * * excluded on account of his interest in the event of the action or proceedings, except in the following cases:

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[22] Cal. Stat. 1851, c. 5, § 422, p. 117. If the party examined volunteered nonresponsive new matter the examining party could then testify as to such new matter. See Dwinelle v. Henriquez, 1 Cal. 387 (1851).

[23] Cal. Stat. 1851, c. 5, § 423, p. 118. If the testimony of the party witness would enure to his own benefit as well as to that of the coparty calling him the testimony was not allowed. Johnson v. Henderson, 3 Cal. 368 (1853) (one of two defendants sued as joint tort-feasors not competent as witness for the other); Sparks v. Kohler, 3 Cal. 299 (1853) (one of two partners sued on promissory note not competent for codefendant to testify to alteration); Hotaling v. Cronise, 2 Cal. 60 (1852). However, to the extent that the section permitted the coparty to testify it engendered hostility. Thus in the *Hotaling* case the court said:

"Our statute allowing persons to testify in their own cases is in derogation of the common law rule. It opens a wide door to perjury, and cannot be too strictly construed by courts." Hotaling v. Cronise, 2 Cal. 60, 63 (1852).

In Lucas, Turner & Co. v. Payne and Dewey, 7 Cal. 92, 96 (1857) the court said that the section "was a premium upon perjury and fraud." The section was revised in 1854 and the coparty was disqualified to testify for his colleague.

[24] However, we do have a few early cases which tend to impart meaning to the concept of the person for whose immediate benefit the action is brought or defended. These are: Jones v. Post, 4 Cal. 14 (1854) (action by assignee against obligor; assignment was to secure indebtedness of assignor to assignee: judgment for assignee would discharge assignor's indebtedness and any surplus would go to asignor; held, assignor could not testify); Griffin v. Alsop & Co., 4 Cal. 406 (1854) (*Jones* case followed but Heydenfeldt, J., said: "if it were a new question, my mind would not be free from doubt." *Id.* at 408); Landsberger v. Gorham, 5 Cal. 450 (1855) (claimant of attached property sues sheriff; subsequent attaching creditor could not testify since he had given sheriff bond to hold him harmless; witness "must be treated in the light of a person for whose immediate benefit the suit was prosecuted, and excluded under the statute." *Id.* at 452-53); Shaw & Reed v. Davis, 5 Cal. 466 (1855) (broker whose commission depended upon his recovery could not testify for plaintiff).

Cf. cases interpreting the comparable provision of the present Dead Man Statute, cited notes 87-97 *infra*.

First: When he is a party to the action or proceeding, or the action or proceeding is prosecuted or defended for his immediate benefit.

Second: When his interest is a present, certain, and vested interest.

§ 393. The true test of the interest of a person, which shall render him incompetent as a witness, shall be that he will gain or lose by the direct legal operation and effect of the judgment, or that the record of the judgment will be legal evidence for or against him in some other action, but [this shall not] * * * prevent a party calling * * * a person whose interest is adverse * * *.[25]

The effect of this was to return to the common law disqualification on account of interest in the event of the action. "The true test" of Section 393 was the common law test of disqualification. The section was copied verbatim from Greenleaf's treatise and was acknowledged by the court to be merely declaratory of the common law.[26] Thus the combination of the second exception of Section 392 and Section 393 rendered the introductory provision of Section 392 nugatory and restored the general common law disqualification for interest in the event of the action.

Furthermore, at the same session of the Legislature Section 423 was revised to eliminate examination of a co-party when called by his colleague.[27]

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[25] Cal. Stat. 1854, c. 54, §§ 40, 41, p. 66.

[26] Peralta v. Castro, 6 Cal. 354 (1856) ("This test was adopted by our Legislature in the precise language of Mr. Greenleaf." *Id.* at 358); Blackwell v. Atkinson, 14 Cal. 470 (1859) (§§ 392 and 393 of the Practice Act "are merely declaratory of the common law." *Id.* at 471); *Ex parte* Carpenter, 64 Cal. 267, 30 Pac. 816 (1883) (1854 legislation "extended" the disqualification enacted in 1851).

[27] Thus defendant could not call a codefendant though the latter had no interest in the action, Lucas, Turner & Co. v. Payne and Dewey, 7 Cal. 92 (1857), or even though the latter had not been served, Gates v. Nash, 6 Cal. 192 (1856).

As of about 1855, then, the California law of disqualification for interest was tolerably clear.[28] Under Sections 392 and 393 a party [29] was incompetent unless called by his adversary and a person interested in the event of the action was incompetent [30] unless called by the party to whom his interest was adverse.[31] However, the extent to which a party could call his adversary was governed by common law rules as to when an answer in equity discovery proceedings was admissible in actions at law.[32] A co-party could not be called by his colleague.[33] The assignor of an unliquidated demand was incompetent when called by the assignee.[34] Though tolerably clear, this body of law was for the most part unresponsive to the reform movement already brought to fruition in England and rapidly spreading throughout America.

In 1861 the California Legislature took a hesitant and confusing step which proved a crude attempt to align this State with the progressive movement developing elsewhere. Now the Legislature provided in effect as follows: (1) A party or immediate beneficiary of the action may testify in his own behalf provided that ten days written notice be given the adversary specifying the points which the examination is to cover;

[28] During this period (1850-55) there was an interesting development respecting the qualification of the assignor to testify. The 1850 legislation excluded an "assignor of a thing in action assigned for the purpose of making him a witness." In 1851 this was omitted from Section 393 of the Practice Act. However, the Legislature in 1854 gave attention to the problem of the interested assignor and adopted the drastic measure of amending Section 4 of the Practice Act to forbid "the assignment of an account, unliquidated demand or a thing in action not arising out of contract." The next session of the Legislature receded from this position by changing the amendment to Section 4 to read: "in suits brought by the assignee of an account, unliquidated demand or thing in action not arising out of contract assigned subsequently to the first day of July, 1854, the assignor shall not be a witness on behalf of the plaintiff." This development is summarized as follows by counsel in Gray v. Garrison, 9 Cal. 325, 327 (1858):

"The Practice Act of 1851 required every action to be presented in the name of the real party in interest, and did not prohibit the assignor from being a witness. The result was, that a multitude of suits were brought in the name of merely nominal assignees, and the assignors became witnesses, and often the only witnesses to establish the demand.

"This led to perjury and gross frauds, which eventually induced the Legislature to prohibit the assignment of 'an account, unliquidated demand, or of a thing in action, not arising out of contract.' Practice Act, § 4. The Legislature had gone from one extreme to the other; and under this act, the assignee of such demands could not sue in his own name, at all, and without reference to the fact whether or not the assignor was to be a witness to establish the demand. Finding this to be inconvenient in its results, the act of 1855 simply intended to restore to the assignee in all cases the right to sue in his own name; but prohibits the assignor from testifying in support of demands founded on 'an account, unliquidated demand, or thing in action, not arising out of contract;' which is precisely the class of demands which, under the act of 1854, could not be assigned at all. The act of 1855 permits them to be assigned, but prohibits the assignor from testifying as a witness to support them."

See Cravens v. Dewey, 13 Cal. 40 (1859) (assignor of unliquidated demand could not testify for assignee); Allen v. Citizens' Steam Navigation Co., 6 Cal. 400 (1856) (same); *cf.* Rochester v. See Yup Co., 18 Cal. 413 (1861) (assignor of liquidated demand could testify for assignee).

[29] The party could testify, however, to lay the foundation for the admission of secondary evidence of a document by accounting for the original. Bagley v. Eaton, 10 Cal. 126 (1858); Grass Valley Quartz Mining Co. v. Stackhouse, 6 Cal. 413 (1856).

[30] There is little or no point today in amassing the authorities exhaustively or in analyzing them minutely. A few representative cases will show how extensive the disqualification for interest was. A shareholder could not testify for his corporation when the latter was a party. Mokelumne Hill Canal Co. v. Woodbury, 14 Cal. 265 (1859); McAuley v. York Mining Co., 6 Cal. 80 (1856). A vendor with warranty was not a competent witness for his vendee in a controversy concerning the title. Blackwell v. Atkinson, 14 Cal. 470 (1859). Plaintiff's servant was not a competent witness for plaintiff when plaintiff sued for negligent injury to his property and defendant defended upon the ground of the servant's negligence as the cause of injury. Finn v. Vallejo Street Wharf Co., 7 Cal. 253 (1857). In an administrator's action to foreclose a mortgage a witness whose wife was an heir of intestate was not a competent witness for plaintiff. Lisman v. Early, 12 Cal. 282 (1859).

[31] Abrams v. Howard, 23 Cal. 388 (1863); Mayo & Brown v. Avery, 18 Cal. 309 (1861).

[32] See note 21 *supra.*

[33] See note 27 *supra.*

[34] See note 28 *supra.*

(2) Where a party or his beneficiary testifies upon notice, the adversary or his beneficiary may testify without notice; (3) An assignor may testify on behalf of an assignee subject to notice as required in (1) above; (4) None of the foregoing persons may testify when the adverse party is the representative of a deceased person.[35]

This evidently was an attempt to follow the pattern developing in America of abolishing the common law disqualification for interest coupled with the enactment of a Dead Man Statute. However, the Legislature chose to make this attempt by revising Section 422 of the Practice Act, which had been a minor provision bringing the immediate beneficiary within the general statutory scheme of allowing the party to call his adversary. All of the major provisions declaring the common law disqualifications—Sections 392 and 393 as to parties and persons interested in the event and Section 4 as to assignors—were left intact. Thus the 1861 revision of Section 422 created great confusion.[36] It also produced some difficulties as to the requisites of the notice.[37] For example, in *Brodek* v. *Ellis* [38] plaintiff testified upon notice. Defendant then offered as a witness one King, a person for whose immediate benefit the action was defended. Plaintiff's objection was sustained and King was not allowed to testify. Defendant appealed from a judgment for plaintiff and the Supreme Court reversed on the ground that Section 422 as revised qualified King. The confused state of the legislation is indicated in the following excerpt showing plaintiff's argument and the court's answer thereto:

> It is insisted by respondent that King falls within the provisions of each of sections four, three hundred and ninety-two, three hundred and ninety-three and three hundred and ninety-four. Conceding this to be so, the plaintiff also falls within some of those provisions and would be incompetent under them. But section four hundred and twenty-two, subsequently passed, provides that upon certain prescribed conditions he may, at his election, testify on his own behalf, notwithstanding his interest; but the consequence imposed on him by the same section is that, if he does so, the opposite party or person in interest shall also be received as a witness on *his* own behalf. The plaintiff availed himself of the privilege and he must submit to the consequences.[39]

In 1863-64 the Legislature performed the needed job of comprehensively overhauling and modernizing *all* of the sections of the Practice Act theretofore dealing with disqualification for interest. Thus Sections 391 to 393 were revised to qualify the party and all other interested persons, save for the Dead Man Statute (which now appeared as Section 393).[40] Section 422 was repealed, thus wiping away the clumsy and abortive 1861 efforts at liberalizing the statutes.[41] Sec-

[35] Cal. Stat. 1861, c. 467, § 1, p. 521-22.
[36] Thus in Wilkins v. Stidger, 22 Cal. 231 (1863) it was held that the provisions of Section 4 disqualifying the assignor were not repealed by the 1861 amendment of Section 422. The confusion created by amending Section 422 without changing Sections 391 to 393 is illustrated by Peterie v. Bugbey, 24 Cal. 419 (1864).
[37] Bradley v. Kent, 22 Cal. 169 (1863) (notice insufficient); *cf.* Leet v. Wilson, 24 Cal. 398 (1864) and Bond v. Dorn, 22 Cal. 113 (1863) (notice sufficient).
[38] 26 Cal. 145 (1864).
[39] *Id.* at 148.
[40] Cal. Stat. 1863, c. 428, §§ 1-3, p. 701.
[41] Cal. Stat. 1863, c. 428, § 6, p. 702.

tion 4 was amended to remove the disqualification of the assignor to testify.[42] Other sections no longer meaningful were repealed, such as Sections 421 and 423.[43]

Thus, at long last, California had a coherent reformed system in line with the prevailing reformist trend. The cardinal features of this system were embodied in Sections 392 and 393 as follows:

> § 392. No person shall be disqualified as a witness in any action or proceeding * * * by reason of his interest in the event of the action or proceeding as a party thereto, or otherwise; but the party or parties thereto, and the person in whose behalf such action or proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either viva voce, or by deposition, or upon a commission, in the same manner and subject to the same rules of examination as any other witness, on behalf of himself, or either or any of the parties to the action or proceeding.[44]

The exception—the second version of the California Dead Man Statute—was then enacted in the following terms:

> § 393. No person shall be allowed to testify under the provisions of section three hundred and ninety-two, where the adverse party, or the party for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person * * *.[45]

In 1864 in the case of *Davis* v. *Davis*[46] the question arose as to the meaning of the expression "representative of a deceased person" in this Dead Man Statute. The action was ejectment, plaintiff claiming through A (now deceased) and defendant claiming through B. Defendant's claim was that A, knowing defendant contemplated purchasing the land from B, represented to defendant that he (A) had no interest in the property and that defendant might safely purchase the same from B. At the trial defendant proposed to testify to these facts but plaintiff's objection was sustained. Upon appeal this ruling was approved upon the ground that plaintiff, being the grantee of A, was A's "representative" within the meaning of the statute. The word, said the court, comprehends not only "the executor or administrator of a deceased person" but also "the person or party who had succeeded to the right of the deceased, whether by purchase or descent, or operation of law."[47]

In 1867 the question arose of applying the Dead Man Statute, as thus construed, to a case in which both plaintiff and defendant were claiming through deceased persons—plaintiff so claiming by will, defendant by grant. The action was to set aside the deed and the holding was that neither party was a competent witness to facts transpiring before the

[42] Cal. Stat. 1863-64, c. 28, § 1, p. 29.
[43] Cal. Stat. 1863, c. 428, § 6, p. 702.
[44] Cal. Stat. 1863, c. 428, § 2, p. 701.
[45] Cal. Stat. 1863, c. 428, § 3, p. 701.
[46] 26 Cal. 23 (1864).
[47] *Id.* at 37.

death of deceased because each party was "representative" of deceased in the sense of the Dead Man Statute as construed in the *Davis* case.[48] Appellant viewed the consequences of this holding with alarm, warning that "the result will be that in the course of a very few years no one would be a competent witness in his own behalf in an action affecting real estate." [49] The court answered that "it is the province of the Legislature to prescribe the rule and the function of the Court is simply to enforce it." [50] The court, however, did point out several different ways in which the Legislature in its wisdom might feel disposed to alter the statute. Probably this judicial invitation to the Legislature to reconsider the scope of the Dead Man Statute received the attention of the lawmakers. It is likely, too, that professional opinion was divided, some favoring the status quo, others favoring modification and still others favoring outright repeal. At this late date we can be certain only of this: the Legislature did in its eighteenth session in 1870 repeal the Dead Man Statute in toto.[51]

Thus in less than a decade (1861-1870) California shifted from one extreme to the other as respects the competency of a party to testify against the estate of a decedent. Each choice was in terms of clear-cut alternatives, and carried the chosen alternative to its logical conclusion. Protecting the estate by disqualifying the adverse party was to be the rule in *all* cases or it was to be the rule in *none*. Electing initially to try the first alternative, the Legislature soon shifted to the second. Each solution was, of course, rational in its own way. Each involved the choice of a basic premise which, being chosen, dictated the result without compromise or equivocation. This was the era of going all out in one direction or all out in the other, of boldly making a basic decision and accepting *all* of the implications of that decision.

LATER CALIFORNIA LEGISLATION

Now, we come to the era of compromise, the era of half-way legislation and patchwork decisions construing it, from which has evolved the present Dead Man Statute and the gloss of interpretive decisions. This era begins in 1874 when the Legislature revised and re-enacted

[48] Kisling v. Shaw, 33 Cal. 425 (1867). See also Marquart v. Bradford, 43 Cal. 526 (1872); Satterlee v. Bliss, 36 Cal. 489 (1869).
[49] Kisling v. Shaw, 33 Cal. 425, 437 (1867).
[50] *Id.* at 447.
[51] Cal. Stat. 1869-70, c. 455, § 1, p. 662.

the Dead Man Statute [52] in terms which, as amended in 1880,[53] supply the Dead Man Statute which is in force today. The statute is as follows:

> The following persons cannot be witnesses:
>
> * * *
>
> Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person.[54]

That this was a half-way makeshift measure is evident from the limitation of its scope to actions *against* the estate. The living party is to be disqualified only when his position is that of *plaintiff*. As defendant he is to be under no disability. However inappropriate in logic or policy this limitation is, it is a legislative dictate too clearly announced to be altered or annulled by judicial construction. The courts, therefore, were bound by the unmistakable expression of the legislative will that henceforth the Dead Man Statute should apply

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[52] Cal. Code Ams. 1873-74, § 218, p. 381.

[53] Cal. Code Ams. 1880, § 1, p. 112. This amendment added the provision excluding assignors and the provision restricting the application of the statute to matters occurring before death. In 1901 the statute was changed to read as follows:

"Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through, or under whom such party or interested person derives his interest or title, by assignment or otherwise, or the husband or wife of any such party or person, must not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest, or in behalf of his or her husband or wife, against the executor, administrator, or survivor of a deceased person, or the guardian of an incompetent person, or a person deriving his title or interest from, through, or under a deceased or incompetent person by assignment or otherwise, as to any matter of fact occurring during the lifetime of such deceased person, or occurring while such incompetent person was competent * * *." Cal. Stat. 1901, c. 102, § 465, p. 242. However, under the ruling in Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478 (1901), this never became effective. The commissioners' reasons for proposing the 1901 change in Section 1880 were as follows:

"The amendment to subdivision three adopts the substance of section eight hundred and twenty-nine of the Code of Civil Procedure of New York, modifying it, however, so as to conform to the rule declared by our present statute, and also excluding the husband or wife of the incompetent witness. The present statute is defective in many particulars, particularly in not including the case of incompetent persons, and in confining the rule to a 'claim or demand against the estate of a deceased person.' If the rule has merit, it should apply in all controversies where the interests of a deceased or incompetent person are involved. The theory of the rule is, that, as the testimony of the deceased or incompetent person is unattainable, equity requires the silencing of the adverse party or any one joined with him in interest. The reason of this rule, therefore, requires the amendment suggested. As to the exclusion of husband and wife, in the vast majority of cases, the recovery will be community property, and therefore, there is such community of interest between them as to require their inclusion in the prohibition." Report of the Commissioners for the Revision and Reform of the Law, Recommendations Respecting the Code of Civil Procedure, p. 199 (1900), in Appendix to Journals of Senate and Assembly, 34th Sess. (1901).

[54] CAL. CODE CIV. PROC. § 1880.

only in actions against the estate.[55] Many opportunities for construction did arise, however, as we shall now proceed to see.

Claim or Demand Against the Estate

Prima facie it would seem that the Legislature, having chosen (for whatever reason or for none at all) to make the statute applicable only to actions against the estate, must certainly have intended to make it applicable to *all* such actions. The opportunity for the court to say whether or not this was correct was first presented in the case of *Estate of McCausland.*[56] McCausland died intestate in 1874 in San Francisco. Letters of administration were issued. Subsequently a petition was filed alleging petitioner was McCausland's widow and praying for an order allowing a monthly allowance out of the estate for her support during administration. The heirs of deceased denied that petitioner was his widow. Petitioner based her claim upon a valid contract of marriage and the question was whether she could testify. This turned upon whether she was asserting a "claim or demand" against the estate in the sense of the statute. Counsel for the heirs, evidently maintaining that this was the kind of potentially spurious claim against the estate which the Legislature must have had in mind, invited the court to consider the "spirit" of the enactment. The court, however, declined and gave the statute a technical, literal construction as follows:

> An application for a family allowance is not an action or proceeding against an executor or administrator. In this respect it is similar to an application for a partial or final distribution of the estate, or the payment of a legacy. The action or proceeding contemplated by the section referred to is one which is adverse to the estate, by which some relief is sought, which will diminish or impair the estate. The case stands, in this respect, as it would do were it conceded that the petitioner is the widow of the deceased, and were she offered as a witness to prove any other fact respecting the family allowance.
>
> The words "claim or demand against the estate of the deceased" ought to receive the same interpretation as they do when found in the several provisions of the Code of Civil Procedure respecting the settlement of the estates of deceased persons. In that connection the words "claim" and "demand" are used synonymously. (See secs. 1643, 1467, 1448, 1494, 1497, 1510.) In *Fallon* v. *Butler,* * * * Mr. Chief Justice Field, in delivering the opinion of the Court, said: "Whatever signification there may be attached to the word 'claim,' standing by itself, it is evident that in the Probate Act it has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime, by per-

[55] So held in Sedgwick v. Sedgwick, 52 Cal. 336 (1877); Welsh v. Security-First Nat. Bk. of L. A., 61 Cal. App.2d 632, 143 P.2d 770 (1943); Gernon v. Sisson, 21 Cal. App. 123, 131 Pac. 85 (1913). In Bailey v. Moshier, 35 Cal. App. 345, 169 Pac. 913 (1917), it was held that the maker of a note may testify to payment when the administrator of the payee sues the maker. The court said: "It is true that the death of the payee may place his successor in interest at a disadvantage, and it may even happen that the maker of the note may hesitate less to commit perjury, but such possibility cannot operate to change the established rules of evidence." 35 Cal. App. 345, 348-49, 169 Pac. 913, 915 (1917).

[56] Estate of McCausland, 52 Cal. 568 (1878). See also Estate of McKanna, 106 Cal. App.2d 126, 234 P.2d 673 (1951).

> sonal actions, for the recovery of money, and upon which only a money judgment could have been rendered." This definition, which, in our opinion, is correct, will not include a claim for a family allowance.[57]

This was a narrow construction on conceptualistic grounds. Had the court considered the policy of the statute it must have rejected as tortured and indefensible any construction imputing to the Legislature the intention of disqualifying the alleged creditor of decedent and qualifying his *alleged* widow. The dangers of perjury and fraud if present in the one case must be equally so in the other.

Be this as it may, the conceptual grounds advanced by the court as the basis of the decision cannot of course be brushed aside. The pith of the reasoning of the paragraph first quoted seems to be this: Those who seek to share in the estate as heir or legatee cannot be considered to claim adversely to the estate. Such claims do not operate to diminish the total assets of the estate. They have an impact only so far as distribution is concerned. In other words, establishment of heirship involves not a claim against the estate but only the establishment of a right to participate in its proceeds. The second and alternative ground of decision seems to be this: "Claim or demand" means claim or demand for money judgment which might have been procured against decedent in his lifetime and the claim petitioner advances arose only upon the death of the decedent. The first ground has been, as we shall see, of significance in later decisions; the second evidently has been repudiated.[58]

Shortly after this decision the question arose in *Myers* v. *Reinstein*[59] as to the meaning of "claim or demand against the estate" in cases in which plaintiff claims certain property which the administrator or executor contends belongs to the estate. The action was brought against an executor to establish a resulting trust in a parcel of land alleged to have been purchased by testator with funds supplied by plaintiff's assignor. It was held that the assignor was a competent witness as to his transactions with decedent on the following grounds:

> We are of the opinion that the witness was competent. The action was not on a claim or demand against the estate of Reinstein. The plaintiff asserted that the interest in the land sued for constituted no part of M. Reinstein's estate, but was held in trust by Reinstein for Collins or his assigns, and after his death, by the defendants, his devisees, and successors. The defendants asserted that no such trust existed, but that Reinstein, their devisor, held the lands as his own estate, and that they had succeeded to his right. The very question to be determined here was whether the interest sought to be recovered was a part of Reinstein's estate or not. If it was a part of his estate, then no trust existed; if the trust existed, he held it in trust in his lifetime, and the interest passed to his successors to the legal title, clothed with the trust. To hold that the claim or

[57] 52 Cal. 568, 576-77 (1878).
[58] Ruble v. Richardson, 188 Cal. 150, 204 Pac. 572 (1922) (action on a contract of decedent to compensate plaintiff for services by making provision for plaintiff in decedent's will; plaintiff disqualified); *cf.*, however, language in Wadleigh v. Phelps, 149 Cal. 627, 87 Pac. 93 (1906) and Estate of Wahlefeld, 105 Cal. App. 770, 288 Pac. 870 (1930). See also Hale, *A Review of Cases Arising Under the California Dead Man Statute*, 12 So. CALIF. L. REV. 1, 8 (1938).
[59] 67 Cal. 89, 7 Pac. 192 (1885).

> demand here attempted to be enforced was a part of the estate, and thus render the witness incompetent, would be to determine in advance the very question to be determined on the trial of the action. By so holding we would assume the very question to be tried and settled by the contestation between the parties. This we are not allowed to do.[60]

Again the executor apparently invited the court to consider the "spirit" of the statute and again the court felt compelled to look the other way, stating:

> It may be admitted, though we are not now willing to concede it, that it would be, as an abstract question, unjust that Collins should be allowed to testify in the cause while Reinstein's lips are sealed by death. But this was a question for the consideration of the legislature, to be settled by it, and it has not, as we construe the language used by it in framing the section invoked, thought proper to go so far as to apply the rule prescribed by the section to all actions brought against an executor or administrator.[61]

This case, though questioned on one occasion,[62] was the progenitor of a long line of decisions holding that a controversy between plaintiff and administrator does not concern a "claim or demand against the estate" when plaintiff's purpose is to declare and enforce a trust [63] in property claimed by the estate or to quiet title to such property [64] or to set aside a deed [65] or to enforce a mechanic's or mortgage lien [66] or to declare an absolute deed a mortgage and receive a reconveyance upon payment of the amount due [67] or to obtain specific performance of a written contract to devise [68] or otherwise to recover property which plaintiff claims belongs to him rather than to the estate whether such property is real, personal, money or whatnot.[69]

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[60] *Id.* at 91-92, 7 Pac. at 194.
[61] *Id.* at 92, 7 Pac. at 194.
[62] Moore v. Schofield, 96 Cal. 486, 31 Pac. 532 (1892) ("It was an action or proceeding * * * against an executor to recover property which the executor claimed belonged to the estate. It would indeed seem to be a claim or demand against the estate." *Id.* at 488-89, 31 Pac. at 533).
[63] Tyler v. Mayre, 95 Cal. 160, 27 Pac. 160 (1892); Halloran v. Greene, 114 Cal. App. 685, 300 Pac. 469 (1931); Alton v. Haywood, 136 Cal. App. 191, 28 P.2d 385 (1934); Porter v. Van Denburgh, 15 Cal.2d 173, 99 P.2d 265 (1940); Humes v. Humes, 56 Cal. App.2d 126, 133 P.2d 39 (1942); Corley v. Hennessy, 58 Cal. App. 2d 883, 137 P.2d 857 (1943); Alvarez v. Ritter, 67 Cal. App.2d 574, 155 P.2d 83 (1945); Berendsen v. McIver, 126 Cal. App.2d 347, 272 P.2d 76 (1954).
[64] Poulson v. Stanley, 122 Cal. 655, 55 Pac. 605 (1898); Bollinger v. Wright, 143 Cal. 292, 76 Pac. 1108 (1904); Maguire v. Cunningham, 64 Cal. App. 536, 222 Pac. 838 (1923); Murray v. Guarantee Trust etc. Bank, 79 Cal. App. 69, 248 Pac. 1039 (1926); Monnette v. Title Ins. etc. Co., 107 Cal. App. 313, 290 Pac. 668 (1930); *In re* Hill, 13 Cal. App.2d 326, 57 P.2d 155 (1936).
[65] Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486 (1904).
[66] Booth v. Pendola, 88 Cal. 36, 25 Pac. 1101 (1891); Joost v. Sullivan, 111 Cal. 286, 43 Pac. 896 (1896); Silva v. Dias, 46 Cal. App.2d 662, 116 P.2d 496 (1941).
[67] Wadleigh v. Phelps, 149 Cal. 627, 87 Pac. 93 (1906).
[68] Jones v. Clark, 19 Cal.2d 156, 119 P.2d 731 (1941); Furman v. Craine, 18 Cal. App. 41, 121 Pac. 1007 (1912).
[69] Savings Union Bank etc. Co. v. Crowley, 176 Cal. 543, 169 Pac. 67 (1917); Estate of Wieling, 37 Cal.2d 106, 230 P.2d 808 (1951); Lewis v. Reed, 48 Cal. App. 742, 192 Pac. 335 (1920); Maguire v. Cunningham, 64 Cal. App. 536, 222 Pac. 838 (1923); Estate of Wahlefeld, 105 Cal. App. 770, 288 Pac. 870 (1930); Chapman v. Associated Transit Term. Corp., 123 Cal. App. 157, 10 P.2d 1023 (1932); Hector v. Superior Court, 15 Cal. App.2d 552, 59 P.2d 591 (1936). *Cf.* as to a claim against the estate to cancel note when the estate holds against plaintiff, Norgard v. Estate of Norgard, 54 Cal. App.2d 82, 128 P.2d 566 (1942).

Now and again the courts, in deciding that by its terms the statute is inapplicable in these cases, concede that the *reason* of the statute is, however, applicable.[70] A striking instance of the incongruity and irrationality which this development has produced is revealed in *Hector* v. *Superior Court.*[71] In that case a promissory note and statement of indebtedness were found by decedent's executor in his safe deposit box. Plaintiff claimed he and decedent had joint access to the box and that the documents were deposited there by plaintiff and belonged to him. Plaintiff brought two separate actions—one to quiet title to and recover possession of the documents; another to recover upon the promissory note. The court held that plaintiff was a competent witness in the former action but not in the latter. Along much the same lines is the anomaly revealed by *Holland* v. *Bank of Italy Nat. T. & S. Assn.*[72] Plaintiff's complaint against an executor was in separate counts. One count was for $11,500 for money loaned decedent; the other was as follows:

> "[O]n or about September 17, 1927, one Marie Bruton Teeter became indebted to plaintiff in the sum of $11,500 for money deposited with and paid over to said Marie Bruton Teeter by plaintiff to hold in trust for him; that at the times that the aforesaid moneys were deposited with said Marie Bruton Teeter, it was agreed between her and plaintiff that she would hold said money in trust for said plaintiff and pay and redeliver the same unto him upon demand, at his option". It is then alleged that no part of said sum has been repaid; that the defendant has been appointed executor of Mrs. Teeter's estate; and "that subsequent to the death of said Marie Bruton Teeter said trust fund came into the possession of said defendant who now holds and is in possession of same".[73]

Plaintiff was a competent witness as to the second count. Such testimony, however, could not be considered as to the first count.[74]

An Action or Proceeding

What is "an action or proceeding" in the sense of the statute? This question has not been as thoroughly litigated as the companion question of the meaning of "claim or demand against the estate." However, there are two cases which turn upon the construction of the expression "action or proceeding." These are *Lohman* v. *Lohman,*[75] holding that a motion under Code of Civil Procedure Section 685 is not an action or proceeding within the meaning of the Dead Man Statute, and *Estate of*

[70] Wadleigh v. Phelps, 149 Cal. 627, 87 Pac. 93 (1906); Streeter v. Martinelli, 65 Cal. App.2d 65, 149 P.2d 725 (1944).
[71] Hector v. Superior Court, 15 Cal. App.2d 552, 59 P.2d 591 (1936).
[72] Holland v. Bank of Italy Nat. T. & S. Assn., 115 Cal. App. 472, 1 P.2d 1031 (1931).
[73] *Id.* at 474, 1 P.2d at 1032.
[74] *Cf.* Adams v. Herman, 106 Cal. App.2d 92, 234 P.2d 695 (1951) (allegations held insufficient to show trust theory; Dead Man Statute therefore applicable); Roncelli v. Fugazi, 44 Cal. App. 249, 186 Pac. 373 (1919) (allegations held insufficient to show trust theory; Dead Man Statute therefore applicable).
[75] 29 Cal.2d 144, 173 P.2d 657 (1946). See also Elgert v. Howe, 100 Cal. App.2d 652, 224 P.2d 119 (1950).

Scheller,[76] holding that a protest against a claim allowed by an executrix is not an action against the executrix in the sense of the statute.

Parties

Given an "action or proceeding" in the sense of the statute and in the same sense a "claim or demand against the estate" who, then, are disqualified from testifying? The answer in statutory language is "parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted."[77] Manifestly this required construction and manifestly, too, there was the danger that such construction would produce results wholly incompatible with the purpose of the statute. Indeed, the first case construing this branch of the statute suggested that this danger would be realized. The case was *Blood* v. *Fairbanks*,[78] which held that a nominal party could not testify because

> the statute does not merely exclude parties who have or are supposed to have an interest adverse to the estate of the decedent, but, by its terms, renders all the nominal parties to the action incompetent.[79]

Counsel for plaintiff argued without avail that: "Certainly the Legislature never intended by this enactment to deprive the plaintiff of the testimony of a nominal defendant entirely free from interest in the controversy."[80] Carried to its logical conclusion the brief opinion of the court must mean that the administrator could not call himself, nor call the plaintiff, nor be called by plaintiff. Fortunately, the literalist viewpoint of the *Fairbanks* case did not prevail and these consequences did not ensue. In *Chase* v. *Evoy*[81] plaintiff sued the administrator of a maker of a note and a co-maker. The administrator called the co-maker to testify as to payment. The witness was held competent on the following grounds:

> The language of the statute is very broad, and if literally construed, might exclude all parties to the action, whether called to testify for or against the estate. But to give it this construction would defeat the manifest purpose of the act, and we think the language is capable of a different interpretation. Parties to the action, or in whose behalf it is prosecuted, are not allowed to testify against the estate in a suit to establish a demand against it. One of the parties to the transaction out of which the demand originated being no longer *in esse*, it was deemed unwise to permit the other party to it to testify to his version of it, when called by the plaintiff in a proceeding against the estate to establish the

[76] Streeter v. Martinelli, 65 Cal. App.2d 65, 149 P.2d 725 (1944); Estate of Scheller, 64 Cal. App.2d 65, 148 P.2d 393 (1944); *cf:* Estate of Emerson, 175 Cal. 724, 167 Pac. 149 (1917); Estate of Miles, 72 Cal. App.2d 336, 164 P.2d 546 (1945); Norgard v. Estate of Norgard, 54 Cal. App.2d 82, 128 P.2d 566 (1942).

[77] CAL. CODE CIV. PROC. § 1880 (3).

[78] Blood v. Fairbanks, 50 Cal. 420 (1875).

[79] *Id.* at 422.

[80] *Id.* at 421-22.

[81] Chase v. Evoy, 51 Cal. 618 (1877). *Cf.* Moore v. Schofield, 96 Cal. 486, 31 Pac. 532 (1892) (action for damages for breach of contract against one joint obligor and administrator of the other joint obligor. The former defaults. Held, plaintiff may not call him to establish the contract.)

> demand. The statute, it is true, provides in general terms that "the parties to an action or proceeding" against the estate shall not testify; but the obvious meaning of this provision is that a party to the action shall not testify against the executor or administrator. This was the point decided in *Blood* v. *Fairbanks* * * *; and though the language of the opinion in that case is somewhat broad, it must be interpreted with reference to the facts of the case. But in view of the evil to be remedied, the legislature could hardly have intended to prohibit the executor or administrator from calling a party to the action to testify in behalf of the estate. On the opposite theory, the defendant, representing the estate, would not be permitted to call the plaintiff himself to prove that the demand was fraudulent or had been fully paid. Such a construction of the statute is wholly inadmissible, and would be at variance with its manifest intent.[82]

A few years later it was established by *Todd* v. *Martin*[83] that the administrator could call himself on the following grounds:

> We think it could not have been the intention of the legislature to render incompetent as a witness in such cases the executor or administrator who is charged with the duty of protecting the estate against improper or unjust demands, as in many cases it would tie his hands, and operate to prevent his giving efficient protection, and compel him to stand by with lips sealed, and see the estate despoiled, when, if permitted to speak, the fraudulent or unjust character of the claim would be exposed and defeated. Nor do we think the language of the code inconsistent with such construction, but on the contrary, that its manifest intent and purpose require it. We think it is only parties who assert claims against an estate who are rendered incompetent to testify, and that the word "parties" does not refer to the executor or administrator who is the party defendant. If, however, the executor or administrator is the assignor of the claim asserted by the plaintiff, or is a person for whose benefit it is prosecuted, or himself asserts a claim, as he may do, the other language of the section is sufficient either to fix him as the party prosecuting the claim, or as the person for whose benefit it is prosecuted, and upon that ground declare him incompetent, but does not do so simply because he is the party defendant.[84]

The case is also authority for the proposition that plaintiff may call the administrator. This is what was done in the trial court, the administrator's objection being overruled, and the ruling was approved by the Supreme Court.

The reasoning of the *Chase* and *Todd* cases, based as it is on the intent of the statute, is of course wholly incompatible with the literalist rationale of the *Fairbanks* case. Unfortunately, however, the *Fairbanks* case was not expressly overruled. Many years later that case was revived as authority for holding that where plaintiff administrator is

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[82] 51 Cal. 618, 619-20 (1877).
[83] Todd v. Martin, 4 Cal. Unrep. 805 (1894). *Cf.* situation when the administrator has a claim against the estate he represents, Estate of Emerson, 175 Cal. 724, 167 Pac. 149 (1917); Norgard v. Estate of Norgard, 54 Cal. App.2d 82, 128 P.2d 566 (1942).
[84] Todd v. Martin, 4 Cal. Unrep. 805, 810-11 (1894).

suing defendant administrator on a claim or demand against the estate of defendant's intestate, plaintiff is an incompetent witness.[85] Forebearing to consider the purpose of the statute or the motives of the Legislature in enacting it the court spoke as follows:

> While section 1880 of the Code of Civil Procedure has often received the consideration of the appellate courts of this state, the reports do not show it to have been previously involved in an inquiry to determine whether the word "parties," as therein used, is broad enough in meaning to apply to a party to the record suing only in his representative capacity. This question is purely one of interpretation. We can neither abridge nor extend the scope of the terms of the section, nor should we concern ourselves with the philosophy of the rule established by the section, or speculate as to the motives which impelled the legislature to enact it, except it be in aid of the discovery of the real meaning of its terms. The very words of the statute must control. * * * Its inhibitions have been held to apply to the testimony of a person who is merely a nominal party to an action. As stated in *Blood* v. *Fairbanks,* 50 Cal. 420:
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> ". . . the statute does not merely exclude parties who have or are supposed to have any interest adverse to the estate of the decedent, but, by its terms, renders all nominal parties to the action incompetent."
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> * * *
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> In framing the exceptions provided by section 1880, to the general enabling act (Code Civ. Proc., sec. 1879), the legislature must have intended to use the word "parties" in its usual and appropriate meaning in law. (Code Civ. Proc., sec. 16.) If it had been intended to render the testimony of a party to the record, suing in his representative capacity, admissible under the circumstances stated in the statute, it would have been a very simple matter to have so declared in the statute itself, as was done in the Washington statute, where it is provided that the exclusion of the testimony of a party to the record "shall not apply to parties of record who sue or defend in a representative or fiduciary capacity and who have no further interest in the action." Since our statute of exclusion uses the word "parties" in its broad generic sense, we do not deem it proper to restrict its meaning to smaller compass, thus confining its application to parties to the record suing in their individual capacities.[86]

Persons in Whose Behalf an Action or Proceeding Is Prosecuted

What is meant by "persons in whose behalf an action or proceeding is prosecuted?" The first case giving thorough consideration to the meaning of this part of the Dead Man Statute was *Merriman* v. *Wickersham.*[87] The action was to recover commissions allegedly due plaintiff's

[85] Roncelli v. Fugazi, 44 Cal. App. 249, 186 Pac. 373 (1919).
[86] *Id.* at 253-54, 186 Pac. at 375.
[87] Merriman v. Wickersham, 141 Cal. 567, 75 Pac. 180 (1904). There are two earlier cases, City Savings Bank v. Enos, 135 Cal. 167, 67 Pac. 52 (1901); Uhlhorn v. Goodman, 84 Cal. 185, 23 Pac. 1114 (1890). See also Warren v. McGill, 103 Cal. 153, 34 Pac. 144 (1894) and Alvarez v. Ritter, 67 Cal. App.2d 574, 579, 155 P.2d 83, 86 (1945) ("friends, neighbors or other individuals" not named in statute are not disqualified).

assignor (a corporation) upon a sale for defendant's intestate. The question was whether the vice president, who was one of the principal stockholders of the corporation, was a competent witness. Holding him to be competent the court reasoned as follows:

> At common law interest disqualified any person from being a witness. That rule has been modified by statute. In this state interest is no longer a disqualification, and the disqualifications are only such as the law imposes. (Code Civ. Proc., sec. 1879.) [88]
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> * * *
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> Our * * * [Dead Man] Statute * * * neither disqualifies parties to a contract, nor persons in interest, but only parties to the action (Code Civ. Proc., secs. 1879, 1880), and thus it is that in *City Savings Bank* v. *Enos*, 135 Cal. 167, it has been held that one who is cashier and at the same time a stockholder of a bank was not disqualified, it being said: "To hold that the statute disqualifies all persons from testifying who are officers or stockholders of a corporation, would be equivalent to materially amending the statute by judicial interpretation." It is concluded, therefore, that our statute does not exclude from testifying a stockholder of a corporation, whether he be but a stockholder, or whether, in addition thereto, he be a director or other officer thereof.
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> The examination of the witness Page undoubtedly discloses that he had an interest in the outcome of the litigation, but that fact did not bring his testimony within the inhibition of the law. It was not established that he was a person "in whose behalf the action was prosecuted," and his testimony was therefore properly admitted.[89]

This case makes it clear that the mere fact in and of itself that the witness has a pecuniary interest in the litigation does not make him, in the sense of the statute, a person in whose behalf the action is prosecuted. The case leaves open for subsequent development the question of when his interest does reach that substantiality which makes him a beneficiary of the action within the prohibition of the statute. Later cases deal with this aspect of the problem and evolve this test: The witness' interest in the claim must amount to an existing property right. Thus in *Dennis* v. *Brown* [90] plaintiff administrator sued defendant executor upon a claim against the estate of defendant testator. The question was whether one Stewart, an heir of plaintiff's intestate, was competent. The court's holding and remarks were as follows:

> We think Stewart quite clearly came within the excluded class as a person "in whose behalf" the action was being prosecuted. Upon the death of Easter Belle Stewart, intestate, title to all her property, both real and personal, immediately vested in Neil Stewart and James Brown, as her heirs, subject only to the control of the probate court and to the possession of the administrator for purposes of administration. (Civ. Code, sec. 1384.) Letters of administration of the estate of Easter Belle Stewart were issued to William S. Dennis, the original plaintiff herein, as the nominee

[88] 141 Cal. 567, 570, 75 Pac. 180, 181 (1904).
[89] *Id.* at 572, 75 Pac. at 182.
[90] 62 Cal. App. 439, 216 Pac. 977 (1923).

> and at the request of Neil Stewart, the surviving husband of deceased. The test seems to be whether or not the witness' interest in the claim amounts to an existing property right. "An action against an executor or administrator on a claim against a deceased person is one brought 'on behalf of' any person not a party to the action who, nevertheless, has an existing property right in the claim." * * * As before observed, Neil Stewart had a vested interest—an existing property right * * * —and the trial court properly excluded the testimony objected to.[91]

A note executed by defendant's testate is community property of plaintiff husband and his wife. The wife is not named as plaintiff in the action. Is she a competent witness? Is she a person on whose behalf the action is prosecuted? Prior to 1927 the answer was she was a competent witness for reasons given as follows in the leading case of *Badover* v. *Guaranty Trust etc. Bank:*[92]

> Subdivision 3 of section 1880 * * * excludes "parties or assignors of parties" to such an action as this. Obviously Mrs. Badover is neither a party nor the assignor of a party to the action. It also excludes "persons in whose behalf" such an action is prosecuted. It is clear that appellant's claim must stand or fall upon the true meaning of these words as used in this statute * * *.
>
> It was substantially held in *Uhlhorn* v. *Goodman* * * * that one not a party to an action against an executor on a claim against a deceased person was not a competent witness where he was in fact jointly interested with the plaintiff in the contract on which the claim was based. He was the actual owner in part of the claim, and to the extent of his interest the action might well be held to be "on his behalf." We are not disposed to question the correctness of the ruling in this case, and accept it as establishing that an action against an executor or administrator on a claim against a deceased person is one brought "on behalf of" any person not a party to the action who, nevertheless, has an existing property right in the claim. It seems to us manifest, however, that these words cannot fairly be construed as including a person not a party who has no such present property right. We are further of opinion that, in view of the well-settled doctrine in this state with relation to the status of community property, a doctrine, as said in *Spreckels* v. *Spreckels,* * * * "that had become a fixed and well-understood rule of property," it must be held that the wife, during the marriage, has no existing property right in the community property. * * * Any change in this settled rule of property may properly be made only by the legislative department of government.[93]

In 1927 the legislative department enacted Section 161a of the Civil Code. In *Manford* v. *Coats*[94] (an action for services rendered decedent

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[91] *Id.* at 442, 216 Pac. at 979.
[92] 186 Cal. 775, 200 Pac. 638 (1921). To the same effect: Cullen v. Bisbee, 168 Cal. 695, 144 Pac. 968 (1914); Bayless v. Reed, 47 Cal. App. 139, 190 Pac. 211 (1920).
[93] 186 Cal. 775, 780-81, 200 Pac. 638, 640 (1921).
[94] Manford v. Coats, 6 Cal. App.2d 743, 45 P.2d 395 (1935).

by plaintiff's wife) the court noted the terms of Section 161a and its impact in changing the rule of the *Badover* case:

> Prior to the enactment of section 161a of the Civil Code, the wife had no present interest in the community property and therefore in an action by her husband was not prohibited from testifying by section 1880 of the Code of Civil Procedure. (*Badover* v. *Guaranty Trust & Savings Bank* * * *.)
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> In 1927, section 161(a) of the Civil Code was enacted as follows:
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> "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property." [95]

The court held, however, that

> Inasmuch as all that Mrs. Manford testified to regarding the agreement with the deceased occurred prior to 1927, the date of the enactment of section 161 (a) of the Civil Code, we can see no error in admitting the testimony.[96]

The clear implication is that as to claims or demands constituting community property and acquired since the enactment of Section 161a the nonparty spouse will be disqualified as a person with a present property right and therefore a person in whose behalf the action is prosecuted. However, the nonparty spouse may be qualified by executing a document reciting that in consideration of $1.00 paid by the party spouse the nonparty spouse agrees that the claim in question and all proceeds thereof are the separate property of the party spouse. In *Roy* v. *Salisbury* [97] such a document was held to constitute a relinquishment, rather than an assignment, so that the nonparty spouse was not disqualified either as a person for whose benefit the action was prosecuted or as an assignor of the party.

Waiver

It is well established that the defendant administrator or executor may waive the Dead Man Statute. This is illustrated by the striking case of *Kinley* v. *Largent*.[98] Plaintiff offered herself as a witness. Defendant administrator declined to object on the ground that the "technical" objection of the Dead Man Statute would result in "injustice." The trial court held that the incompetency of plaintiff could not be waived. The Supreme Court reversed on the following grounds:

[95] *Id.* at 745-46, 45 P.2d at 396.
[96] *Id.* at 747, 45 P.2d at 397.
[97] 21 Cal.2d 176, 130 P.2d 706 (1942); *cf.* Badover v. Guaranty Trust etc. Bank, 186 Cal. 775, 200 Pac. 633 (1921); Frey v. Vignier, 145 Cal. 251, 78 Pac. 733 (1904); McKee v. Lynch, 40 Cal. App.2d 216, 104 P.2d 675 (1940).
[98] 187 Cal. 71, 200 Pac. 937, 9 CALIF. L. REV. 347 (1921). Wigmore cites the case as illustrating the "honorable man's method of practising law". 2 WIGMORE, EVIDENCE § 578. See also McNeal v. Foreman, 117 Cal. App. 155, 3 P.2d 583 (1931); Booth v. Friedman, 82 Cal. App. 174, 255 Pac. 222 (1927); Estate of Wheeler, 2 Coffey's Probate Decisions 32 (1888).

> In general, the statutes of other jurisdictions only disqualify the claimant to testify *against* the estate. * * * Section 1880, on the other hand, provides that a claimant *cannot be a witness* as to any matter or fact occurring before the death of the deceased person. However, in construing this section it has been held, notwithstanding its broad language, not to mean that the claimant cannot become a witness *under any circumstances.*
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> * * *
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> It is clear that subdivision 3 is to be given no broader effect than if it merely provided that a claimant is incompetent to testify *against* the estate. This interpretation gives to the statute the same meaning as that expressed in those statutes of other jurisdictions wherein it is held, as has been seen, that the personal representatives of the deceased may waive the incompetency. Allowing this waiver will not operate to defeat the object of the statute, for it is always in the power of the administrator or executor by timely objection to bar the witness. It follows that under subdivision 3 of section 1880 the personal representative should be permitted to waive the incompetency. Hence, as the administrator herein expressly declined to object to the witness on the ground of incompetency, the waiver should have been allowed and the witness permitted to testify.[99]

It is also established that the executor or administrator may waive the statute by cross-examination but there is some difference of opinion and uncertainty as to what kind of cross-examination and under what circumstances this result comes about. *Deacon* v. *Bryans*[100] is apparently the first case dealing with this problem. Plaintiff sued defendant executor upon a note allegedly executed by the testator and allegedly lost. Plaintiff called himself and testified on direct examination that subsequent to the testator's death a search was made but the instrument could not be found. On cross-examination the administrator inquired as to when the plaintiff first searched for the note. Plaintiff replied that he first searched for the note several months prior to the death of decedent. The administrator then asked a few questions as to how and where this search was conducted. This cross-examination was held to open the door for redirect examination as to "certain events and conversation" which dealt with "material issues and incidents" prior to the death of decedent.

The court reasoned as follows: The statute, when invoked, means that "the parties prohibited from being witnesses cannot be witnesses—that is, cannot testify at all 'as to any matter or fact occurring before the death of such deceased person,' whether incidental, preliminary, or otherwise"; [101] therefore in inquiring on cross-examination about such matters (though incidental and preliminary) the administrator waived the statute.

In view of the fact that the cross-examination here dealt only with the matter opened up on direct examination (search for the document) and in view of the further fact that this matter was preliminary and foundational only (being preliminary to secondary evidence of the

[99] Kinley v. Largent, 187 Cal. 71, 74-76, 200 Pac. 937, 939 (1921).
[100] 88 Cal. App. 322, 263 Pac. 371 (1928).
[101] *Id.* at 329, 263 Pac. at 374.

contents of the note) and not at all concerned with the merits of the controversy between plaintiff and the estate, it seems rather drastic to hold the administrator has waived plaintiff's incompetency as to the merits of the case.

In *Davis* v. *Mitchell* [102] the soundness of the *Deacon* case was questioned. Plaintiff sued on a book account. The following reveals the facts and holding:

> Ordinarily a claimant against an estate cannot testify as to his transactions with the deceased. However, it is well-settled law in California that this disqualification may be waived by the representatives of the deceased. * * * This may be done in an action to recover the amount claimed by a cross-examination of a claimant by the attorneys for the estate, as to matters connected with, and material to, the cause of action which happened during the lifetime of deceased. In the case before us appellant offered himself as a witness in his own behalf. During his cross-examination by the attorneys for the respondent he was interrogated concerning letters written by him to deceased inclosing statements of accounts for services which formed part of his claim and which letters were written during the lifetime of deceased. * * * Appellant was further interrogated concerning a trip which he made to Los Angeles upon business of the deceased, the expense of and compensation for which were charged against deceased. All of these matters inquired about in this cross-examination pertained to the services rendered by appellant for deceased prior to the death of deceased, compensation for which he was demanding from the estate. Under these circumstances we are forced to the conclusion that this cross-examination was sufficient to waive the bar of section 1880 of the Code of Civil Procedure, and rendered appellant a competent witness in his own behalf.
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> After this cross-examination was concluded appellant's attorneys immediately started to examine him concerning the items set forth in his book account against deceased, and concerning the services rendered by him for deceased. Objections to these questions were made by respondent and sustained by the court. These rulings undoubtedly constituted prejudicial error that will require a reversal of the judgment and a new trial of the case. Had the cross-examination of appellant in this case gone no further than the cross-examination of the claimant in the case of *Deacon* v. *Bryans, supra*, we would not consider the disqualification of the statute waived, as we do not agree with the conclusions reached in the Deacon case under the facts thereof. If the broad language used by the court in the Deacon case is given a literal construction, any question asked of a claimant by the attorney for the estate, concerning an event happening during the lifetime of deceased, no matter how foreign to the controversy, would suffice to let down the bar of the statute and waive disqualification of the claimant as a witness. We believe the testimony elicited on cross-examination

[102] 108 Cal. App. 43, 290 Pac. 887 (1930). To the same effect is Cahill v. Goecke, 10 Cal. App.2d 279, 51 P.2d 905 (1935); *cf.* Warren v. Nair, 102 Cal. App.2d 298, 227 P.2d 515 (1951).

> should relate to the controversy between the claimant and the estate in order to constitute it a waiver of the provisions of this section.[103]

Assuming then that to operate as waiver the cross-examination must elicit some fact relevant to the merits (*i.e.*, assuming the *Deacon* case is wrong) under what circumstances will cross-examination as to the merits effect waiver? If plaintiff takes the stand and testifies to some fact relevant to the merits but not prohibited by the statute (*e.g.*, some fact occurring post mortem) cross-examination, if limited to this fact, is of course no waiver of the statute. If plaintiff testifies on direct to some fact not prohibited and then over defendant's objection is allowed to testify to some further but prohibited fact, cross-examination if limited to these facts would not operate as a waiver of the previous error [104] or of further testimony within the inhibition of the statute.[105] If, however, in either of these situations defendant cross-examines as to new matter material to the controversy and occurring prior to decedent's death, then, it seems, defendant waives the statute altogether. On redirect plaintiff may testify to any and all material matters without restriction so far as the statute is concerned. It is suggested in *Lucy* v. *Lucy* [106] that this is the true rationale of the decisions which are said to reveal "no real conflict." Thus:

> As to any question propounded during the direct examination of the plaintiff it will be conceded that the defendant had a right to cross-examine. However, she did not have the right in cross-examining to elicit new matter. If she did so as to material matters which occurred before the death of the decedent then she waived the privilege provided in the statute. The question is, did she in the cross-examination develop such new matter? [107]

When the statute is waived the waiver carries over to all subsequent proceedings in the case. Thus if there is a retrial following reversal by the appellate court, plaintiff upon proof of the cross-examination in the first trial may then testify without restriction so far as the statute is concerned.[108]

If the administrator calls plaintiff under Code of Civil Procedure Section 2055 to testify "as if under cross-examination" to matters otherwise prohibited by the Dead Man Statute there can be no doubt that this constitutes a waiver of the statute so that plaintiff may thereafter testify fully in his behalf irrespective of the statute.[109] The same consequence ensues when the administrator takes and introduces plaintiff's deposition [110] or introduces a transcript of testimony of plaintiff given in another proceeding.[111] If the administrator takes plaintiff's

[103] Davis v. Mitchell, 108 Cal. App. 43, 46-47, 290 Pac. 887, 888-89 (1930).
[104] Stankey v. Palmer, 6 Cal. App.2d 215, 44 P.2d 382 (1935) (dictum).
[105] Adams v. Herman, 106 Cal. App.2d 92, 234 P.2d 695 (1951).
[106] 22 Cal. App.2d 629, 71 P.2d 949 (1937). Query whether, if the administrator allows plaintiff to testify to one prohibited fact without objection, he thereby waives as to all other prohibited facts.
[107] Lucy v. Lucy, 22 Cal. App.2d 629, 633, 71 P.2d 949, 951 (1937).
[108] Deacon v. Bryans, 212 Cal. 87, 298 Pac. 30 (1931).
[109] By analogy to waiver by cross-examination and dictum in Moul v. McVey, 49 Cal. App.2d 101, 121 P.2d 83 (1942).
[110] *Ibid.* (dictum).
[111] *Ibid.*

deposition, but does not introduce it, it is clear that plantiff may nevertheless introduce the deposition. This was established in *McClenahan* v. *Keyes* [112] in which the court spoke as follows:

> The administrator took the testimony of the plaintiff by a deposition, but upon the trial declined to introduce the deposition and objected to the respondent introducing it on his own behalf. * * * [S]ection 2032 of the Code of Civil Procedure, under which the deposition was taken, expressly provided that although the deposition might be used by either party and thus become the evidence of the party adducing it, its introduction in evidence is "subject to all legal exceptions." If the phrase "all legal exceptions" is broad enough to include the question of the competency of the witness it is evident that upon the tender of the deposition in evidence the objection might be successfully interposed by the executor. * * *
>
> After an investigation of the authorities we are satisfied that the ruling of the district court of appeal was correct. * * * [T]he language of section 2032 of the Code of Civil Procedure, by which the deposition is admissible subject to "all legal exceptions," does not authorize the competency of the witness to be questioned where he has been examined by deposition by the party opposing the introduction of the deposition.[113]

Conceding that under the circumstances specified plaintiff may introduce his own deposition, may he also testify in person either as an alternative to introducing his deposition or in addition thereto? No direct California holdings have been found on this question.[114] Dicta in at least two cases are broad enough to comprehend the proposition that the administrator by taking the plaintiff's deposition waives so far as plaintiff's viva voce testimony at the trial is concerned.[115]

It is clear, however, that the administrator does not waive the statute in any respect by producing a witness to testify to plaintiff's extrajudicial admissions.[116] The distinction between this situation and that in which the administrator waives by introducing plaintiff's prior testimony or deposition is thus expounded in *Moul* v. *McVey*.[117]

> It is not the dignity with which a judicial admission is clothed, nor its competency, nor the weight to be accorded it as evidence, that lifts the bar of sec. 1880, but it is the advantage accruing to the executor or administrator by its use that unseals the lips of the survivor. By virtue of the circumstances under which it is given, an answer to a question propounded in a judicial proceeding is limited to the scope of the question. It is not voluntary in

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[112] 188 Cal. 574, 206 Pac. 454 (1922); Hussey v. Loeb, 60 Cal. App. 469, 213 Pac. 271 (1923). So also if decedent dies *pendente lite* and plaintiff's deposition was taken prior to his death, McKee v. Lynch, 40 Cal. App.2d 216, 104 P.2d 675 (1940); Kay v. Laventhal, 78 Cal. App. 293, 248 Pac. 555 (1926).

[113] McClenahan v. Keyes, 188 Cal. 574, 576-78, 206 Pac. 454, 455 (1922).

[114] In McKee v. Lynch, 40 Cal. App.2d 216, 104 P.2d 675 (1940) plaintiff offered himself and the administrator's objection was sustained. Then plaintiff offered his deposition and the administrator's objection was overruled. The only point decided on appeal was that the deposition was properly admitted.

[115] Kay v. Karas, 87 Cal. App.2d 600, 603, 197 P.2d 396, 398 (1948). Possibly this case is a holding. One cannot tell from the report whether plaintiff's testimony was by deposition or viva voce. See also Moul v. McVey, 49 Cal. App.2d 101, 106, 121 P.2d 83, 86 (1942).

[116] Stuart v. Lord, 138 Cal. 672, 72 Pac. 142 (1903).

[117] 49 Cal. App.2d 101, 121 P.2d 83, 15 So. CALIF. L. REV. 523 (1942).

> the sense that all upon the subject may be said. On the other hand, if a survivor makes a voluntary statement upon the street concerning a transaction had by him with a decedent he has an untrammeled opportunity to add all else that he may see fit by way of explanation. He is under no compulsion to make such a statement in the first place, and, in the second place, there is nothing in the world to hinder him from explaining it to all who may hear. Of his own volition, as is held in *Stuart* v. *Lord,* * * * he assumes the risk of having such a statement proved against him, and, if it is proved, his time for explanation has passed. It would be as manifestly unfair to permit a survivor to open the door against the limitation of his right to testify as it would be to keep it closed in the face of an advantage grasped at by an executor.[118]

The usual situation of waiver of the statute where a deposition is involved is one wherein the estate has taken plaintiff's deposition. One California case involves the problem of waiver in the converse situation; namely, plaintiff sues decedent during his lifetime and takes his deposition; decedent dies *pendente lite*; at the trial plaintiff introduces the deposition and then seeks to testify himself. In the case of *Evans* v. *Gibson* [119] plaintiff was allowed to proceed in this manner in the trial court and obtained judgment against the executrices of decedent. Upon appeal by the latter the court found it unnecessary to pass squarely upon the point. The following pronouncement, however, suggests that a rule of waiver in such a situation may become established in this State:

> Appellant executrices contend that much of the testimony of plaintiff and of certain other party witnesses is inadmissible against them under section 1880, subdivision 3, of the Code of Civil Procedure. * * * Excluding the evidence which may be incompetent, sufficient remains to sustain the judgment against the executrices. The deposition of Gibson taken in the case before trial under section 2055 of the Code of Civil Procedure, was introduced, and the transcript of his testimony taken in the *Leavitt* v. *Gibson* action was introduced herein pursuant to stipulation. Said deposition and transcript in themselves provide damaging evidence against Gibson. Furthermore, there is some authority that the adverse party may render himself competent by introducing the deposition of the decedent taken before his death. (Jones on Evidence, 3d ed., p. 1211.) [120]

Account Books

In *Roche* v. *Ware,*[121] decided in 1886, the question arose whether plaintiff in an action against an administrator for services rendered to decedent could himself testify to make the preliminary proofs requisite as foundation for the admission in evidence of plaintiff's account books. The court quoted with approval the statement in *Greenleaf's Evidence* that the plaintiff may testify "that they are the books in which the accounts of his ordinary business transactions are usually

[118] *Id.* at 106-107, 121 P.2d at 86.
[119] 220 Cal. 476, 31 P.2d 389 (1934).
[120] *Id.* at 489, 31 P.2d at 395.
[121] 71 Cal. 375, 12 Pac. 284 (1886).

kept, * * * that the goods therein charged were actually sold and delivered * * *, and the services actually performed * * * [that] the entries were made at or about the time of the transactions, and are original entries thereof."[122] The court reasoned as follows:

> The evident purpose of the provisions of the code is to render competent (with certain exceptions) persons incompetent at the common law; as parties to the record, and those directly interested in the event of the action. The parties, under certain circumstances, excepted from the general rule established by the code, continue incompetent in the same manner and to the same extent that all parties were formerly incompetent. But before the code, the party offering his books, although incompetent to be a witness with respect to the issues submitted to the jury, was competent to give testimony, addressed to the court, going to establish the facts which rendered the books admissible. This was determined in *Landis* v. *Turner* * * *.[123]

In *Stuart* v. *Lord*[124] the *Roche* case was criticized on the following grounds:

> The case of *Roche* v. *Ware* * * * holds that a plaintiff in a suit on a claim against a decedent's estate may testify as to the correctness of books of account kept by him in the lifetime of the deceased. This is also apparently an encroachment on the statutory rule. But it is explained by reference to the fact, stated in the opinion of the court, that even under the common-law rule, by which any party interested was incompetent as a witness, a party was allowed to testify to matters not embraced in the issues, but incidentally arising during the course of the trial, and which were in the nature of preliminary proof to lay the foundation for other evidence, and addressed solely to the court, such, for instance, as proof of the loss or destruction of a document, to admit secondary evidence of its contents, or the death of a subscribing witness to admit proof of his handwriting. * * * The decision was placed on the ground that the code provision was not intended to be more rigid with respect to the testimony of a plaintiff in a suit against the estate of a deceased person than was the common law with respect to parties in general. It should be observed, however, that *Roche* v. *Ware* may perhaps go too far in saying that a party may testify as to the correctness of books kept by him, and that his testimony should be limited, as in *Landis* v. *Turner,* to the fact that he kept books of original entries made at the time of the transactions, and to the identity of the books produced.[125]

[122] *Id.* at 377, 12 Pac. at 285.
[123] *Id.* at 378-79, 12 Pac. at 286.
[124] 138 Cal. 672, 72 Pac. 142 (1903). See, however, 4 CALIF. L. REV. 64 (1915) and 6 So. CALIF. L. REV. 334 (1933), both supporting the rule of the *Roche* case. The latter questions whether the foundation must include a showing the books are true. See also Note, 13 So. CALIF. L. REV. 260 (1940).
[125] Stuart v. Lord, 138 Cal. 672, 677-78, 72 Pac. 142, 144 (1903).

The *Roche* case, limited as suggested by *Stuart* v. *Lord*, has been followed in a long line of cases.[126] But the rule even in this limited form has not escaped criticism. Thus in *Colburn* v. *Parrett*,[127] Shaw, J., spoke as follows:

> The books of account of a plaintiff containing entries claimed to have been made by him in the lifetime of a deceased person, against whose estate he prosecutes a demand, are, by reason of subdivision 3 of section 1880 of the Code of Civil Procedure, in my opinion, not admissible in evidence. Clearly, such entries relate to matters and facts occurring before the death of such deceased person, and if the claimant here may not testify to the making of professional visits to the deceased and to charges therefor, he should not by entering in his account book the making of such visits, and thus, accompanied by evidence that he had the reputation of keeping fair and honest accounts, be permitted indirectly to testify to facts occurring before the death of the deceased. * * * The contrary, however, appears to have been decided by the supreme court in *Roche* v. *Ware* * * * and *Stuart* v. *Lord* * * *.[128]

Cross-Demands

As indicated above the Dead Man Statute applies only to an action or proceeding against an estate and not to an action or proceeding by the estate. A counterclaim or cross-complaint is an action or proceeding in the sense of the statute and as such presents problems. Let us consider first cross-demands when the principal action has been instituted against the estate.

Here the situation is that plaintiff sues the estate, and the estate asserts a cross-demand. Now as to plaintiff's claim, he is in the position of maintaining an action against the estate and, as such, is an incompetent witness. But as to the cross-demand plaintiff is in the position of defending an action brought against him by the estate and, as such, plaintiff is a competent witness. This presents the problems: (1) When may plaintiff testify? (2) To what may plaintiff testify? The answer to the first question seems to be that plaintiff may testify only in rebuttal after the estate has given evidence making out its cross-demand. The answer to the second question seems to be that plaintiff may testify only to defeat the cross-demand; *i.e.*, if plaintiff's claim and the cross-demand involve common issues, plaintiff's testimony may be considered only to defeat the cross-demand and not as affirmative support for his own claim. The case of *George* v. *McManus* [129] is illustrative. Plaintiff's automobile collided with that of decedent. Plaintiff sued the estate for damages to his car, allegedly inflicted by decedent's negligence. The estate answered denying the allegations of the complaint and counterclaiming for damages to decedent's car allegedly

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[126] Colburn v. Parrett, 27 Cal. App. 541, 150 Pac. 786 (1915); Dyer v. Minturn, 47 Cal. App. 1, 189 Pac. 1046 (1920); Tipps v. Landers, 182 Cal. 771, 190 Pac. 173 (1920); Brown v. Gow, 128 Cal. App. 671, 18 P.2d 377 (1933); Kains v. First Nat. Bank, 30 Cal. App.2d 447, 86 P.2d 935 (1939); Moore v. Spremo, 72 Cal. App.2d 324, 164 P.2d 540 (1945); Warren v. Nair, 102 Cal. App.2d 298, 227 P.2d 515 (1951). *Cf.* as to plaintiff's testimony as foundation for decedent's books, Cowdery v. McChesney, 124 Cal. 363, 57 Pac. 221 (1899).

[127] 27 Cal. App. 541, 150 Pac. 786 (1915).

[128] *Id.* at 545-46, 150 Pac. at 788 (concurring opinion).

[129] 27 Cal. App. 414, 150 Pac. 73 (1915); *cf.* Norgard v. Estate of Norgard, 54 Cal. App.2d 82, 128 P.2d 566 (1942) and Webster v. Freeman, 27 Cal. App.2d 5, 80 P.2d 497 (1938).

inflicted by plaintiff's negligence. The following excerpt reveals the facts and the ruling:

> [W]hen the case was called for trial plaintiff was sworn in his own behalf and after stating his name and place of residence, proceeded to testify further, when defendants interposed their objections to his testifying as to how the collision occurred; * * * the objection was overruled, and * * * "thereafter the plaintiff, * * * was allowed by the court, over the objection of defendants, to testify as to all the facts of the collision * * *." That the cause of action constituted "a claim or demand" against the estate of Joseph McManus, deceased, in our opinion, admits of no controversy. * * *
>
> Respondent [plaintiff] insists, however, that the statute does not apply to a case where the action is brought *by the personal representatives* of a deceased person to recover upon facts which occurred prior to the death of the testator, and that, inasmuch as defendants filed a counterclaim asking for affirmative action, such fact rendered the testimony of plaintiff competent. * * * It is apparent, however, upon an examination of the record presented, that the evidence of plaintiff was offered, received, and considered by the court in support of the allegations of his complaint. Since defendants had offered no evidence in support of their counterclaim when plaintiff was called to testify, it is clear therefore that such evidence was not offered in rebuttal of any testimony given by defendants' witnesses. The purpose of the rule is that where the voice of one party to a transaction is closed by death, the other will not be permitted to testify as to the facts of the transaction in enforcing a money demand against the estate of such deceased person. In our opinion, the case falls within the provision of section 1880 of the Code of Civil Procedure, and it was prejudicial error to permit plaintiff to testify as to the occurrences and facts upon which he based his claim and demand.[130]

As to cross-demands when the main action has been instituted by the estate the rule is that defendant may testify in support of any defense to plaintiff's claim but may not testify in support of any cross-demand. Again, if his evidence tends to support both, it may nevertheless be considered only as maintaining the defense, not the cross-demand.[131]

Matter or Fact Occurring Before Death

The disqualification of the statute is effective only as to "any matter or fact occurring before the death of such deceased person." In 1888 in the case of *Knight* v. *Russ*[132] the occasion for interpreting this language was first presented. Plaintiff attorney sued an estate for professional services rendered to decedent in his lifetime. The following excerpt reveals the facts and the holding:

> The plaintiff was called as a witness in his own behalf, and was asked if he was an attorney at law, how long he had practiced law, how long he had been practicing in San Francisco, whether he had

[130] George v. McManus, 27 Cal. App. 414, 417-19, 150 Pac. 73, 74-75 (1915).
[131] Estate of Emerson, 175 Cal. 724, 167 Pac. 149 (1917); Reveal v. Stell, 56 Cal. App. 463, 205 Pac. 875 (1922).
[132] 77 Cal. 410, 19 Pac. 698 (1888).

devoted considerable time to criminal practice, and what had been the income from his practice for the last two or three years. These questions were all objected to by the defendants, upon the ground that the plaintiff was rendered incompetent to be a witness in the case by the provisions of section 1880 of the Code of Civil Procedure; and the objections were overruled. * * *

The evident purpose of the section was to prevent parties from testifying to matters tending to establish the asserted claim or demand, and not to prevent their testifying in reference to other matters which may arise incidentally. The plaintiff's testimony was wholly as to incidental matters, and they were matters, too, which cannot be said to have occurred before the death of deceased. In our opinion, it did not come within the inhibition of the statute, and the ruling of the court was therefore proper.[133]

A few years later in *Moore* v. *Schofield*[134] the *Knight* case was criticized on the following basis:

It may be said of this case that it is inconsistent with *Blood* v. *Fairbanks*, * * * which very distinctly holds that the letter of the statute must control; and the statute makes the test as to the competency of the testimony of a party to the action, whether it relates to facts which occurred before the death of the deceased party; and further, that in that particular case, if the proposed evidence did not tend to establish the claim, it was immaterial, and should have been excluded on that ground. In fact, I fail to see any reason in the distinction attempted. If the testimony was not material, it should not have been received. If it was, and tended to establish the claim against the estate, no reason can be given for supposing that the statute was not intended to include it. Apparently, the idea of the writer of that opinion was, that the statute could not be understood as excluding testimony of the parties upon subjects which the deceased could have known nothing of, and which did not refer directly to the transactions from which the cause of action arose.[135]

A few years later in *Stuart* v. *Lord*[136] the criticism was repeated in the following terms:

[T]here is nothing in the statute to indicate that its effect was intended to be limited to things which occurred in the presence of the deceased. The language is: "Any matter or fact occurring before the death of the deceased," and this applies as well to things occurring without his presence as to those in which he may have participated. The case of *Knight* v. *Russ* * * * has been criticized in a subsequent decision, and its effect ought not to be extended beyond the precise point therein involved.[137]

Thus the effort of the court in the *Knight* case to give meaning to the statute in the light of its policy and the presumed intent of the Legislature proved abortive. Evidence of all occurrences during decedent's

[133] *Id.* at 413-14, 19 Pac. at 700.
[134] 96 Cal. 486, 31 Pac. 532 (1892).
[135] *Id.* at 489, 31 Pac. at 533.
[136] 138 Cal. 672, 72 Pac. 142 (1903).
[137] *Id.* at 677, 72 Pac. at 144.

lifetime is therefore rigidly excluded but post-mortem occurrences are of course admitted, such as nonpayment,[138] papers seen by plaintiff upon deceased's body [139] and the like.[140]

Against an Executor or Administrator

In terms the statute refers only to actions or proceedings "against an executor or administrator." Two situations have arisen in which the statute has been held to apply albeit the executor or administrator was not, as such, a party to the record. A third situation has arisen in which, although the administrator or executor was party to the record (and the other conditions of the statute seemed prima facie to have been met), the statute was held nevertheless to be inapplicable. The situations referred to are as follows:

1. In the first situation the administrator possessed a claim against the estate. Pursuant to Probate Code Section 703 he filed his claim with the clerk, who presented it to the judge, who disallowed it. Thereupon the administrator sued the estate (in his individual capacity, of course) serving summons on the judge, who appointed an attorney to defend the action. Plaintiff argued that he could testify because the action was not against an executor or administrator. The argument was rejected in the following terms:

> This argument is ingenious, but without substantial merit. * * * The section is clearly intended to prevent any person having a claim against an estate from testifying as to any fact occurring before the death of such deceased person. The fact that the administrator in this case was himself suing the estate upon a claim filed by him, would not permit him to testify. The meaning and intent of the statute of frauds [*sic*] is clear, and it applies to all claimants against the estate of a deceased person.[141]

2. In the second situation an administrator sued on a promissory note held by the estate. Before the action was determined a final order of distribution of the estate was entered and the note was distributed to X and Y. They were substituted as parties plaintiff in the action. Defendant pleaded a set-off on account of work and labor performed for the decedent. The trial court ruled that defendant was incompetent to testify in support of his set-off. The appellate court said that "such testimony was clearly incompetent" under the Dead Man Statute.[142]

3. The third situation involved an action against surviving partners and the administratrix of the estate of the deceased partner for damages arising out of the alleged breach by the partnership of a contract to sell plaintiff a crop of oranges. The court held that plaintiff was competent to testify to facts which took place prior to the death of the decedent. It reasoned as follows:

> Concerning the effect of the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure, it must be borne in

[138] Cowdery v. McChesney, 124 Cal. 363, 57 Pac. 221 (1899) (illustrates careful and ingenious method of questioning witness to avoid infraction of statute).
[139] Black v. Meyer, 204 Cal. 504, 269 Pac. 173 (1928); Reynolds v. Dryer, 112 Cal. App. 712, 297 Pac. 563 (1931).
[140] Dyer v. Minturn, 47 Cal. App. 1, 189 Pac. 1046 (1920); McMurray v. Bodwell, 16 Cal. App. 574, 117 Pac. 627 (1911).
[141] Norgard v. Estate of Norgard, 54 Cal. App.2d 82, 86-87, 128 P.2d 566, 568 (1942).
[142] Reveal v. Stell, 56 Cal. App. 463, 465, 205 Pac. 875 (1922); *cf.* Merriman v. Wickersham, 141 Cal. 567, 75 Pac. 180 (1904).

mind that the claim of respondent was not a claim against the estate of the deceased partner, but a claim against the partnership of which he was a member. That the inhibitions of subdivision 3 of section 1880 of the Code of Civil Procedure are not under the circumstances here present applicable, was the clear and decisive holding in the case of *Cullinan* v. *McColgan* * * * .

* * *

There is no difficulty in holding, under the authorities cited, that in an action against surviving partners a plaintiff may testify to matters occurring prior to the death of a deceased partner, whether such testimony relates to transactions with the deceased partner or with others. However, in the cases called to our attention or found by our own research, either no judgment was sought against the estate or the court held that no such judgment could be rendered. In the present action judgment was sought and obtained jointly against the administratrix (payable "in due course of administration") and the surviving partners.

To us it seems clear that in a situation such as is here presented the claim must be viewed as one against the firm, the partnership entity, rather than against the estate. The testimony of plaintiff established the debt or liability of the firm of which decedent was a member. That the establishment of such debt operated indirectly to diminish the assets of the estate does not justify relieving the estate of liability by invoking the code section in question. Although in the cited cases it was held that the action was not against the estate because no recovery was sought against it and no claim filed, we perceive no reason for a different rule in the two situations—the one where recovery against the partnership may presumably operate to diminish the estate as and when an accounting is had between the estate and the surviving partners, and the other, where, after partnership property is exhausted, resort is had to other assets of the decedent. In either event, the foundation of liability is a claim against the firm of which decedent was a member.[143]

Summary and Evaluation

By way of evaluating and summarizing the foregoing cases interpreting and applying the California Dead Man Statute the following observations may be made:

The Legislature has vaccillated on the question whether to have any Dead Man Statute at all and, if so, how comprehensive to make the terms of the enactment. So also the courts, when called upon to construe the various acts with which the Legislature has experimented, have vaccillated on the question of how to construe the statutes. At times the courts have closed their eyes to considerations of purpose, policy and consequences and have decided in favor of strict construction on the basis of exercises in semantics and logic.[144] At other times the courts have sought guidance from the motives and purposes of the Legislature and have construed the terms of the enactment broadly in the light of

[143] Panno v. Russo, 82 Cal. App.2d 408, 413-15, 186 P.2d 452, 455-56 (1947); *cf.* Frazier v. Murphy, 133 Cal. 91, 65 Pac. 326 (1901).

[144] See notes 56, 59, 78, 85, 134 and 136 *supra.*

these legislative objectives.[145] Sometimes the courts express sympathy for and approval of the statute;[146] sometimes they express disapproval and suggest revision or repeal.[147] In sum there has been and there is no consistent philosophy either in the legislation or in the decisions construing it on the basic question: What, if anything, should be done respecting survivors' testimony in litigation involving estates.

In 1874 the Legislature handed the courts a half-way, makeshift measure containing both actual and potential restrictions indefensible on any ground of logic or policy. Some of these arbitrary restrictions were too clearly incorporated into the enactment to be removed by any acceptable process of judicial construction. Others were, in the beginning, only potentially present. Whether they would evolve depended upon how the courts would construe the statute. Through the years the courts in construing the statute have at times increased its arbitrary features by reading into it more unreasonable limitations than the language (if construed in the light of purpose) would have required.[148] But at other times the courts have declined to accept constructions which would worsen the situation by creating further anomalies and inconsistencies.[149] Whether the one or the other philosophy has predominated it is impossible to say. All that is certain is that each has been and still is recurrent.

Of the many anomalies which have developed from this background the following are noteworthy:

1. In a case where plaintiff administrator sues defendant for damaging the car of the intestate in a collision and defendant, contending that the intestate was wholly to blame for the collision, answers defending on this ground and counterclaiming on the same ground, defendant may testify in support of his defense, but not in support of his counterclaim.[150] Can it be reasonably contended that defendant's testimony may be safely considered for the one purpose and yet must be wholly disregarded and withdrawn from consideration for the other?

2. When one claimant claims to be decedent's common-law wife entitled to an allowance and another claims to be a creditor of the estate for services rendered decedent in attending to his wants and needs during his declining years and last illness, the first may testify but the sec-

[145] See notes 81, 83 and 132 *supra*.

[146] *In re* Kitchen, 192 Cal. 384, 390-91, 220 Pac. 301, 303 (1923) ("the purpose is to prevent a claimant from mulcting an estate by proving by claimant's own testimony that which the decedent might perhaps disprove were his lips not sealed by death. Its declared purpose is to protect the estate from the possibility of fraud, perjury, and injustice."); Davis v. Davis, 26 Cal. 23 (1864); Norgard v. Estate of Norgard, 54 Cal. App.2d 82, 89, 128 P.2d 566, 569 (1942) (a "salutory" rule supported by "sound public policy"); Cole v. Wolfskill, 49 Cal. App. 52, 55-56, 192 Pac. 549, 551 (1920) ("It must be borne in mind that this is an action to recover a debt due from an estate; and the lips of the plaintiff are sealed as effectually by the terms of section 1880 of the Code of Civil Procedure as the voice of the decedent is stilled by the grim reaper. What he knows can never be revealed to an earthly tribunal; and what occurred between the parties must ever remain undisclosed to mortal judge.").

[147] Roy v. Salisbury, 21 Cal.2d 176, 187, 130 P.2d 706, 712 (1942) (Per Traynor, J.—"The wisdom of such a statute has been a matter of controversy for so long that it may well be time for the Legislature to make a re-examination that will freshly evaluate the protection of estates from false claims and the ensuing risk of defeating just claims."); Webster v. Freeman, 27 Cal. App.2d 5, 8, 80 P.2d 497, 498 (1938) ("This statute is to be strictly construed").

[148] See notes 56, 59, 78, 85, 134 and 136 *supra*.

[149] See notes 81, 83 and 132 *supra*.

[150] See note 131 *supra*.

ond may not.[151] If the testimony in the one case is so suspect that it must be excluded, is it not equally so in the other?

3. If one plaintiff claims decedent promised to hold money in trust for him and another that decedent promised to repay money loaned to him, the first may testify but the second may not.[152] Can the two situations be distinguished on the basis of trustworthiness of the evidence?

4. In a case where an administrator, as defendant, introduces plaintiff's deposition, plaintiff may testify in full explanation. However, if administrator has a witness testify that plaintiff was heard to make a statement adverse to his claim, plaintiff may not testify either to deny making the statement or to admit and explain the statement.[153] Is this rational or fair?

5. In a situation where there are two trials of an action and both plaintiff and defendant testified at the first trial but before the second trial defendant died and his administrator was substituted, upon the second trial the administrator may introduce the transcript of the testimony given by defendant at the first trial, yet plaintiff can neither testify in person nor introduce the transcript of his testimony.[154] A shocking result, to be sure, indefensible on any save purely technical grounds.

6. In an action against an administrator for services rendered deceased, plaintiff cannot testify, but in an action against an incompetent person represented by guardian for services rendered to the incompetent, plaintiff may testify. One would be hard pressed to justify this distinction on any rational grounds.

Judge Cardozo once said of the federal rule respecting illegally seized evidence that it is "either too strict or too lax."[155] The same may be said of the California Dead Man Statute in its present form. This thought is expressed as follows by the California Commissioners for the Revision and Reform of the Law in their 1900 report:

> The present statute is defective in many particulars, particularly in not including the case of incompetent persons, and in confining the rule to a "claim or demand against the estate of a deceased person." If the rule has merit, it should apply in all controversies where the interests of a deceased or incompetent person are involved. The theory of the rule is, that, as the testimony of the deceased or incompetent person is unattainable, equity requires the silencing of the adverse party or any one joined with him in interest. The reason of this rule, therefore, requires the amendment suggested.[156]

The amendment suggested was to broaden the statute in the attempt to bring within its terms all situations within its basic purpose.[157]

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[151] See note 56 *supra*.
[152] See note 72 *supra*.
[153] See notes 110, 116 and 117 *supra*.
[154] Rose v. Southern Trust Co., 178 Cal. 580, 174 Pac. 28 (1918).
[155] People v. Defore, 242 N.Y. 13, 22, 150 N.E. 585, 588 (1926).
[156] Report of the Commissioners for the Revision and Reform of the Law, Recommendations Respecting the Code of Civil Procedure, p. 199 (1900) in Appendix to Journals of Senate and Assembly, 34th Sess. (1901).
[157] See note 53 *supra*.

Whether this is the wise course to follow must depend, as the commissioners say, upon whether "the rule has merit." We now turn to this basic question.

THE POLICY OF THE DEAD MAN STATUTE

If the interest of a party or other witness is no longer to disqualify him in general—if, that is, the philosophy of the common law disqualification is to be abandoned as a general proposition—why should an exception be made of those situations covered by the Dead Man Statute? When plaintiff sues defendant for services allegedly rendered to defendant, the common law idea—and the early California idea—was that plaintiff cannot call himself and testify to the rendition of the services, nor can defendant call himself and testify to nonrendition. The thought was that because of his interest each might lie and therefore neither should be heard. However crude and unenlightened the device of disqualification might be thought, it must be confessed that there was a sort of equality of treatment in that both parties were silenced. Now when the liberalizing legislation qualifies the party generally, there is again in the situation the hypothesis—an equality of treatment and position. Now plaintiff can testify to rendition and now defendant in turn may testify refuting plaintiff's contention. Both are treated alike and both occupy positions of equal advantage. However, if we change the hypothesis and suppose plaintiff to be suing defendant for services rendered to defendant's *intestate* we must take account of an important additional factor. True, if we employ the common law technique and exclude both parties there is no material difference in the two situations. But what happens if we now apply the new approach of qualifying both parties? Do we now have the same sort of sauce-for-the-goose-gravy-for-the-gander type of mutuality which the first hypothesis presents? Manifestly, the answer is no, the difference being between a situation wherein both parties to the transaction are alive, available and competent as witnesses and a situation in which one of the parties to the transaction is dead. Taking account of this material difference typical Dead Man legislation proceeds upon the theory that fairness requires equivalence of position and that this is best achieved by disqualifying the survivor.

In actual operation this disqualification works good as well as harm. It works good to the extent that it bars persons who would have testified falsely and by their false testimony would have induced a wrong decision of the case; it works harm to the extent that it bars persons who would have testified truthfully. To determine whether such statutes are good and wise requires an effort to appraise and evaluate these results. Are the detrimental effects of such legislation too high a price to pay for its benefits?

First let us explore the good that a Dead Man Statute does. Such a statute, it seems, accomplishes beneficial results in at least two types of cases. The first type is as follows. A man honestly thinks that he has a good claim against an estate. The facts so far as they are known to him and remembered by him indicate that he does possess such a claim. Yet, because his knowledge is incomplete or his memory is short, his testimony (if allowed) would not cover the transaction in its entirety. The facts necessary to complete the story were known to deceased. Such

facts, if they could be brought to light, would reveal that the claim is really unfounded, but the hearsay rule prevents receiving evidence of relevant statements of deceased. Assuming the estate has no other and admissible evidence of these missing facts and assuming further the claimant has no evidence other than his own testimony, the Dead Man Statute here operates to prevent an injustice to the estate. Without the statute the claimant would testify (honestly according to his lights); the hearsay rule would bar the administrator from completing the story of the transaction; the jury (we are assuming) would be convinced by the claimant's proof; an injustice would be done. With the statute the claimant is silenced and justice is done.

The second type of situation involves the supposition of a dishonest claimant. If such a man is desirous of and willing to perjure himself, but unwilling or unable to suborn perjury, and if a jury would be led to false decision by his perjury, the Dead Man Statute in silencing this would-be perjurer protects the estate from an injustice that would otherwise be visited upon it.

Let it be admitted, then, that in some situations the Dead Man Statute, and that alone, stands between the estate and injustice.

But, conceding that in these cases the statute affords the desired (and needed) protection, is it worth the price? We must now look at the opposite side of the coin and contemplate the injustice which is produced by the operation and application of the statute. It cannot be denied that survivors frequently find themselves unable (because of the Dead Man Statute) to establish their valid claims against estates, for the consequence of the statute is, as McCormick succinctly puts it, "that a survivor who, without an outside witness, has rendered services, furnished goods or lent money to a man whom he trusted, and from whom he took no written agreement, is helpless if the other dies and the representative of his estate declines to pay." [158] This impact of the statute in balking proof of honest claims cannot be overlooked in appraising the worth of the statute and its fitness to survive. It needs to be emphasized that the statute in seeking to avoid the possibility of injustice to one side works manifest, demonstrable injustice to the other. As Dean Hale puts it (with understandable indignation):

> [I]t is difficult for me to understand this wholly one-sided concern over the possible maintenance of an unfounded claim against the deceased and no concern for the actual losses sustained * * * by survivors who find themselves unable to establish their valid claims against an estate. There should be some tears for the living as well as for the dead.[159]

In the opinion of the writer the good which the statute accomplishes covers a relatively small area and is at best conjectural and problematical whereas the injustice it perpetrates is demonstrable and covers a wide area of honest claims defeated for want of a type of proof (the party's testimony) which today no one would think of excluding as a general proposition. Balancing the justice of the statute against its

[158] MCCORMICK, EVIDENCE § 65.
[159] Proceedings, Fourteenth Annual Meeting, State Bar of California 157 (1941).

injustices it must and should be condemned as preponderantly an instrument of injustice and, as such, it should be repealed.[160]

If this suggestion be accepted the question arises whether survivors' testimony should then be subjected to the same treatment as any other testimony or whether, taking into account the factors and fears which originally produced Dead Man legislation, an attempt should be made to devise some alternative, fairer and less drastic protection of the estate. In this connection it will be well to consider various alternatives to the typical Dead Man Statute that have been enacted in other jurisdictions.

ALTERNATIVES TO THE DEAD MAN STATUTE

The Discretion-of-the-Court Alternative

Legislation in two states—Montana and Arizona—after setting up the disqualification of the survivor in more or less typical terms then departs from the usual pattern to the extent of giving the trial judge discretion to permit the survivor to testify when justice so requires. Thus, the interested survivor is permitted to testify in Montana "when it appears to the court that, without the testimony of the witness, injustice will be done"[161] and in Arizona if required by the court.[162] Before 1953 New Hampshire had a similar statute permitting the interested survivor to testify "If the court finds that injustice may be done without the testimony of the party."[163] Is the expedient of

[160] See Cheek, *Testimony as to Transactions with Decedents*, 5 TEXAS L. REV. 149, 172 (1927) indicting the Texas Dead Man Statute on the following three counts:
"(1) It prevents the recovery of just debts from the estates of decedent debtors. If the number of honest men is greater than the dishonest, the number of honest claims against decedents' estates is likely to be greater than the number of dishonest claims. A statute which closes the mouths of honest and dishonest claimants alike does more harm than good, especially in view of the fact that the dishonest claimant, if allowed to testify, is likely to be defeated anyhow. (2) The time consumed in applying and interpreting the statute is out of all proportion to the doubtful good it does. A statute so difficult of definite limitation should be one of *undoubted* desirability before it is justified. The statute cannot meet this test. (3) It has so befogged our decisions that the courts and the bar do not yet know the limitations of the rule."
Note, 9 CALIF. L. REV. 347 (1921) condemns the California statute in the following terms:
"The rule excluding otherwise valid testimony has no sound policy to support it. It is merely a relic of the ancient common law maxim rendering incompetent the testimony of all parties in interest as potential liars, and survived as an exception when California accepted the general principle that 'all persons, without exception . . . may be witnesses.' The provision evidently aims to protect the estates of the dead from the claims of those who may be encouraged to falsify by the inability of the dead person to contradict. But is it any more important to protect the estates of the dead than the estates of the living, who by the instant rule are prevented from offering otherwise perfectly competent evidence in establishing their just claims? Is not cross-examination, not to speak of the oath and other safeguards, a sufficient protection aganst the fabrications of the unscrupulous? Excluding the truth should not be justified by reviving obsolete shibboleths."
For text-writers' views in accord see: MCCORMICK, EVIDENCE § 65; 2 WIGMORE, EVIDENCE §§ 578, 578(a).
For judicial opinions in accord see Mr. Justice Corliss in St. John v. Lofland, 5 N.D. 140, 143, 64 N.W. 930, 931 (1895) and Mr. Justice Traynor in Roy v. Salisbury, 21 Cal.2d 176, 187, 130 P.2d 706, 712 (1942).
For the views of various judges and practitioners see MORGAN, THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM 23-35 (1927).
For the view of the American Bar Association adverse to Dead Man Statutes, see VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 334 *et seq.* (1949). For the similar view of the American Law Institute, see Young and Jones, *A Code of Evidence for Wisconsin? Rules 9 and 101, Competency of Witnesses, Interested Survivor*, 1947 WIS. L. REV. 155. For the similar view of the National Conference of Commissioners on Uniform State Laws, see Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. OF PA. L. REV. 1 (1954); Gard, *Kansas Law and the New Uniform Rules of Evidence*, 2 KAN. L. REV. 333 (1954).

[161] MONT. REV. CODE § 93-701-3 (1947).

[162] ARIZ. CODE § 23-105 (1939).

[163] N.H. REV. LAWS c. 392, §§ 25-26 (1942).

giving discretion to the trial judge a desirable means of alleviating the harshness of Dead Man Statutes and avoiding unjust results in their application? A negative answer is suggested by a study in the *Harvard Law Review* which reports as follows:

> At the earliest opportunity appellate tribunals formulated rules for the guidance of trial courts which practically abrogated their discretion. In New Hampshire the requisite injustice must be shown by evidence other than that of the survivor. And usually the interested person is not permitted to testify to matters within the knowledge of the decedent; the judge's "discretion" can therefore be exercised only to receive evidence which the ordinary dead-man statutes admit as of right. In Montana, on the other hand, the decisions suggest the curious restriction that interested testimony is admissible only when needed to make a case for the jury. Lack of corroboration can hardly be supposed to make the survivor more credible, and if this rule is based on necessity, the mere existence of a *prima facie* case should not exclude evidence which may be essential to secure a verdict. The unique Arizona statute also permits the trial judge to allow interested testimony. In the three reported cases under this provision admission of the survivor has been upheld where his statements were substantiated by other proof and where the testimony of the deceased had already been received.[164]

The Corroboration Alternative

In New Mexico no rule of incompetency is retained. However, a measure of protection is afforded the estate by the following statutory provision:

> In a suit by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.[165]

Is this expedient of qualifying the survivor but requiring corroboration an improvement over the typical Dead Man Statute? Possibly so, but it possesses serious flaws. The underlying philosophy is akin to that inspiring the typical rule of exclusion. The requirement of corroboration presupposes that uncorroborated claims are of such questionable verity that all must be denied, just as the rule of exclusion presupposes that survivors' credibility is so questionable that all must be excluded from testifying.[166] There must be many honest but uncorroborated claims which are defeated by the New Mexico requirement. There is striking

[164] Legis., 46 HARV. L. REV. 834, 836 (1933). Consider also the following estimate in MORGAN, THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM 29 (1927): "The New Hampshire statute seems not to have worked for liberality. The Supreme Court has been called upon to interpret it in some forty cases, from which it appears to be settled that *prima facie* the survivor is incompetent to testify to any matter which might have been equally within the knowledge of the decedent, and a showing that the claim will fail without the survivor's testimony does not make out a sufficient case of injustice. It is significant that in none of these adjudications has the survivor's testimony been held admissible."

[165] N.M. STAT. ANN. § 20-2-5 (1953).

[166] Legis., 46 HARV. L. REV. 834 (1933); 7 WIGMORE, EVIDENCE § 2065.

evidence of at least one wherein the New Mexico court questions the wisdom of its statute in the following terms:

> [A] claimant against an estate, although the court believes absolutely in his testimony and feels sure that he ought to recover, *as we feel free to say we do in this case,* is nevertheless precluded by an arbitrary rule of law from having what he is justly entitled to. [However, if] the rule is bad in policy, it is for the Legislature, and not the court, to modify it. [Emphasis added.] [167]

Thus the survivor who is hardest hit by the typical Dead Man Statute —he who has no evidence but his own testimony—is likewise frustrated by the corroboration requirement of the New Mexico statute.

Aside from this basic objection to the corroboration requirement, there is a difficulty in administering it which must be taken into account. In the first place there is difficulty in formulating the test to apply to determine corroboration and then there is further difficulty in deciding in each case whether the test is met. Of course, comparable difficulties occur in other areas of law administration.[168] If the policy be sound and wise, no one would suggest abandoning it because the implementing rules are difficult to formulate and to apply and because they breed litigation. Worthwhile litigation—however difficult—is the job of the courts. However, the corroboration requirement is fundamentally unwise and there is no justfication for encumbering the judicial process with the difficulties of administering it.

The Hearsay-Exception Alternative

Recurring to the reasons advanced in behalf of the typical survivors' disqualification it will be remembered that these reasons presuppose that the hearsay rule will have its normal impact of excluding evidence of the decedent's statements and writings unless such evidence is exceptionally admissible under one or more of the traditional exceptions to the hearsay rule. Thus it has been argued that since death and the hearsay rule have sealed the lips of decedent, the Dead Man Statute must seal the lips of the survivor. This suggests, at once, the possible alternative of unsealing the lips of decedent by constructing a new exception to the hearsay rule. This new approach has appeared in several jurisdictions. Variations in the legislation, however, range all the way from a wide-scale abandonment of the hearsay rule on a broad front to a very limited retreat narrowly contained within a small area. Stated in general terms the pattern of these variations is as follows:

1. Declarations of deceased are admissible under the new exception only where the action is by or against an administrator or executor and then only under severe limitations;
2. Such declarations are admissible only in such actions but further limitations are omitted;
3. Declarations of *any* deceased persons are admissible in *any* action.

Massachusetts and Rhode Island represent jurisdictions which have

[167] Bujac v. Wilson, 27 N.M. 105, 196 Pac. 327 (1921).
[168] Hale, *The California "Dead Man's Statute,"* 9 So. CALIF. L. REV. 35 (1935) (an illuminating study of the difficulties of formulating and applying the rule of corroboration).

gone all the way down the road to stage three.[169] Connecticut, New Hampshire and South Dakota are states which call a halt at stage two. Virginia and Oregon go so far only as stage one.

Thus in Virginia [170] and Oregon,[171] although the new exception is applicable in all actions by or against the representative, the exception is operative in Virginia only if the adverse party testifies and in Oregon only if the adverse party "appears as a witness on his own behalf or offers evidence of statements made by deceased against the interest of the deceased." [172] Given these conditions what does the exception thus invoked cover? The answer is in Virginia "all entries, memoranda, and declarations * * * relevant to the matter in issue";[173] whereas the answer in Oregon is "statements of the deceased concerning the same matter" [174] (*i.e.*, the subject matter of the party's testimony against the estate or the subject matter of testimony of another witness concerning deceased's statements against interest).

While both of these enactments progress beyond the discredited technique of disqualifying the surviving party to the more enlightened idea of (so to speak) qualifying the deceased, each of them conditions the new approach so that it depends upon action by the surviving party.[175] Why should this be? If at long last we are to let the dead man tell his tale, why should we do this grudgingly and only when the claim of the survivor is supported by his own testimony? Why not do so irrespective of the source of the opposing testimony? Is it fair or reasonable to adjudicate any claim for or against an estate omitting to consider relevant information once possessed by the deceased and now available in documentary form or in the form of the memory of living witnesses of what deceased once said? The Connecticut, New Hampshire and South Dakota legislatures answer this question "No." The New Hampshire and South Dakota enactments are in the following terms:

> In actions, suits, or proceedings by or against the representatives of deceased persons including proceedings for the probate of wills, any statement of the deceased whether oral or written shall not be

[169] MASS. ANN. LAWS c. 233, § 65 (1956) (quoted note 198 *infra*); R.I. GEN. LAWS c. 538, § 6 (1938); 96 A.L.R. 679 (1935).

[170] VA. CODE ANN. § 8-286 (1950). This section, which also requires corroboration of the testimony of the party adverse to the estate, is as follows:
"In an action or suit by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; and in any such action or suit, if such adverse party testifies, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence."

[171] ORE. REV. STAT. § 41.850 (1955).
§ 116.555 imposes the following corroboration requirement: "some competent, satisfactory evidence other than the testimony of the claimant."

[172] ORE. REV. STAT. § 41.850 (1955).

[173] VA. CODE ANN. § 8-286 (1950).

[174] ORE. REV. STAT. § 41.850 (1955).

[175] See the harsh result in Robertson's Ex'r v. A.C.R. Co., 129 Va. 494, 106 S.E. 521 (1921). Plaintiff sues administrator. Plaintiff makes out his case through testimony of plaintiff's agent. Held, administrator cannot invoke statute to bring in evidence of decedent's declaration because statute applies only when *"adverse party* testifies". [Emphasis added.] *Id.* at 505, 106 S.E. at 524.
See, however, Mace v. Timberman, 120 Ore. 144, 251 Pac. 763 (1926), to the effect that the administrator may call the opponent and thereby invoke the exception.

excluded as hearsay, provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was in good faith and on decedent's personal knowledge.[176]

The Connecticut statute, as originally enacted, is as follows:

In actions by or against the representatives of deceased persons, the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence; * * *[177]

The New Hampshire-South Dakota statute is in the form recommended by the Committee of the Commonwealth Fund[178] and by the Committee on Improvements in the Law of Evidence of the American Bar Association.[179] The basic feature of the three enactments is the same: *viz.* in the specified actions and proceedings evidence of decedent's statements is not to be excluded as hearsay, irrespective of whether the survivor has first testified and irrespective of whether the evidence is offered for or against the estate. That this new exception to the hearsay rule has as much, if not more, to commend it than some of the time-honored, traditional exceptions is thus cogently argued by Dean Ladd:

If this legislation be enacted admitting the hearsay declarations of a decedent in actions involving him and the survivor, it is obvious that the check-up of cross-examination of the deceased personally is not present; but neither is it present in any of the cases in which exceptions to the hearsay rule admit hearsay evidence. Indeed the circumstantial probabilities of trustworthiness which justify the escape of hearsay from the rules of exclusion in the case of the exceptions are in many instances slight. The proposed statute by the Committee of the Commonwealth Fund and the Committee of the American Bar Association simply broadens the admissibility of hearsay under these circumstances, because there is an apparent need of such evidence if this proof is to be available. The whole theory behind the exceptions to the hearsay rule as applied today is the need of the proof plus circumstances which indicate the probability of trustworthiness. The proposed act simply emphasizes the element of the need and realizes that the circumstantial probability has never constituted a true guarantee of truthfulness. Anyone who would criticize this proposed act after a careful study of it, comparatively with the existing

[176] S.D. CODE § 36.0104 (1939); N.H. REV. STAT. ANN. c. 516, § 516.25 (1955). The last phrase of the New Hampshire statute provides: "and that it was *made* in good faith and on decedent's personal knowledge."

[177] CONN. GEN. STAT. 1930, c. 292, § 5608. CONN. GEN. STAT. § 7895 (1949) now reads as follows:

"In actions by or against the representatives of deceased persons, and by or against the beneficiaries of any life or accident insurance policy insuring a person who shall be deceased at the time of the trial, the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence; and in actions by or against the representatives of deceased persons, in which any trustee or receiver is an adverse party, the testimony of the deceased, relevant to the matter in issue, given at his examination, upon the application of such trustee or receiver, shall be received in evidence."

[178] MORGAN, THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM 35 (1927).

[179] 63 A.B.A. REP. 597 (1938). Adoption of the Uniform Rules of Evidence sponsored by the American Bar Association and the Commissioners on Uniform State Laws would bring about a result similar to the New Hampshire-South Dakota-Connecticut legislation. See Levin, *Pennsylvania and the Uniform Rules of Evidence: Presumptions and Dead Man Statutes*, 103 U. OF PA. L. REV. 1, 9, n. 49 (1954). So far only New Jersey has adopted these rules.

exceptions to the hearsay rule, would be forced to seek a repeal of most of the existing commonly recognized exceptions if he were to be consistent. The proposed statute approved by the Committee of the Commonwealth Fund and the Committee of the American Bar Association or those statutes which have been adopted in Connecticut and Rhode Island have great merit and when carefully studied and comprehensively understood should meet the demands of every rational test.[180]

Recommendation

It is recommended that the New Hampshire-South Dakota-Connecticut approach be adopted in California—that the Dead Man Statute be repealed and that, as a substitute therefor, a special exception to the hearsay rule which does not impose a corroboration requirement be enacted. The following draft of a proposed statute is submitted for consideration:

> 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 Code of Civil Procedure Section 1880 (1) 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.

Proceeding By or Against the Representative. There is a problem of fairness in actions involving estates owing to the fact that a vital witness is no longer available. This problem exists irrespective of whether the action is by or against the representative and irrespective of the nature of the action. The present California statute—utilizing the discredited device of disqualification—is arbitrarily limited to only a portion of the situations which involve this basic problem of fairness.[181] In any new approach to this problem we should not perpetuate (in new guise) these arbitrary limitations. Therefore, while the hearsay-exception approach is recommended, it is suggested that the approach should now cover *all* cases and proceedings in which the basic problem is the same. In other words, if the Dead Man Statute was justified at all, it should have been of broader scope and wider sweep. Therefore, in making a substitute we should cover the whole field rather than just the limited area of the present statute.

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[180] Ladd, *The Dead Man Statute: Some Further Observations and a Legislative Proposal*, 26 IOWA L. REV. 207, 238-39 (1941). Consider also the following observation of the commissioners who proposed the present Virginia statute:

> " 'It was believed that this section, together with the great safeguard of cross-examination, would be ample protection for the estates of persons laboring under disability or who are incapable of testifying. In the business affairs of life all evidence bearing upon the question at issue is received and considered by the business world, and it seemed proper that the same rule should obtain in courts of justice which are enforcing rights arising out of such business transactions.' "

Robertson's Ex'r v. A.C.R. Co., 129 Va. 494, 500, 106 S.E. 521, 523 (1921).

[181] See notes 55-74, 129-31 *supra*.

The scope of the changes proposed may be brought to light by the following resume of cases decided under the Connecticut statute (on which the proposed statute is based) and the following comparisons showing how these cases would be decided under present California law.

If plaintiff sues an administrator in Connecticut on a money obligation of decedent, the administrator may introduce a memorandum of decedent to the effect that the obligation has been paid.[182] If plaintiff sues for goods sold decedent, the administrator may prove decedent's declarations tending to show the goods were sold to decedent's tenant.[183] If plaintiff sues for services rendered decedent, the administrator may introduce decedent's diary tending to show no such services were rendered.[184] In all these cases plaintiff himself is fully competent to testify and equality of position between the parties is achieved by letting decedent "speak from the grave."[185] This is, of course, in marked contrast to the California system which rejects such declarations of decedent as self-serving hearsay and achieves equality of position by disqualifying plaintiff from testifying. Equality resulting from disclosure by both sides is, it seems, a much more enlightened method of investigation and adjudication than equality achieved by mutual silence.

In Connecticut if plaintiff sues the administrator to recover property claimed to be part of the estate, the administrator may prove decedent's self-serving declarations germane to the issue of title.[186] Here again plaintiff may testify fully and, in fairness, decedent may also (so to speak) testify. In California in this situation although decedent's declarations are inadmissible plaintiff may nevertheless testify. The Dead Man Statute does not operate to silence plaintiff notwithstanding the fact that the hearsay rule operates to silence decedent.[187] The enactment in this State of a statute like Connecticut's would rectify this inequality by permitting full disclosure from *both* sides.

In Connecticut if the administrator sues to collect a debt due decedent, defendant may, of course, testify and the administrator has the benefit of relevant declarations by decedent.[188] In California in this situation although defendant may testify[189] the administrator may not combat such testimony by evidence of decedent's declarations. Here again is an inequality of position that would be rectified by adoption in California of the Connecticut-type statute. Comparable differences exist between the Connecticut and the California practice in injury and death claims prosecuted by the representatives of decedent.[190]

Successors in Interest. The effect of this phrase in the proposed statute can best be shown by considering a hypothetical situation. Assume, for example, an action of ejectment in which both parties claim

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[182] Norbutas v. Bendler, 116 Conn. 728, 166 Atl. 388 (1933); Olmstead's Appeal from Probate, 43 Conn. 110 (1875). See also Craft's Appeal from Probate, 42 Conn. 146 (1875).

[183] Walter v. Sperry, 86 Conn. 474, 85 Atl. 739 (1913). See also Benedict v. Heirs of Dickens, 119 Conn. 541, 177 Atl. 715 (1938).

[184] Duvall v. Birden, 124 Conn. 43, 198 A.2d 255 (1938).

[185] Graybill v. Plant, 138 Conn. 397, 405, 85 A.2d 238, 242 (1951) ("deceased may speak, as it were, from beyond the grave").

[186] Pixley v. Eddy, 56 Conn. 336, 15 Atl. 758 (1888).

[187] See notes 59-74 *supra*.

[188] Wood v. Connecticut Savings Bank, 87 Conn. 341, 87 Atl. 983 (1913).

[189] See note 55 *supra*.

[190] Joanis v. Engstrom, 135 Conn. 248, 63 A.2d 151 (1948); Furcolo v. Auto Rental Co., Inc., 110 Conn. 540, 148 Atl. 377 (1930); Bulkeley v. Brotherhood Accident Co., 91 Conn. 727, 101 Atl. 92 (1917); Koskoff v. Goldman, 86 Conn. 415, 85 Atl. 588 (1912); Rowland v. Philadelphia, Wilm. & Balt. R.R. Co., 63 Conn. 415, 28 Atl. 102 (1893).

as the grantee of X who is now dead. Defendant's deed is prior in time to plaintiff's but plaintiff claims this deed was never delivered. In both Connecticut and California defendant, of course, may himself testify fully on this issue but there is a resulting inequality of position between the parties unless plaintiff may combat defendant's proofs with evidence of decedent's declaration. The Connecticut solution of this problem is to make "entries and written memoranda" of decedent admissible.[191] In California there is no special exception to the hearsay rule covering this situation. The Connecticut exception tends to do justice to both sides but no reason is apparent to the writer for the limitation of the Connecticut statute to *written* declarations of decedent.[192] Plaintiff, it seems, should have the benefit of both oral and written declarations of decedent.

Proceeding for the Probate of the Will. Let us assume a situation in which there is a contest of a will on the ground of lack of testamentary capacity. The contestants rely in part upon testimony of creditors of testator that testator had capriciously refused to pay them. May propounders introduce memoranda of the testator tending to show payment of these items? The Connecticut statute has been held inapplicable to this situation[193] but would not an ideal statute apply here, as in other proceedings?

Upon His Personal Knowledge. Traditional exceptions to the hearsay rule, such as dying declarations, declarations against interest, etc. require that the declarant have spoken from personal knowledge.[194] The provision quoted requires the same for this new statutory exception. Hence an offer of decedent's declaration should be rejected by the judge if it appears that deceased did not have first-hand knowledge of the matters of which he spoke or wrote. However, we omit the requirements of the New Hampshire and South Dakota statutes that the judge must find that (a) the statement was made, and (b) was made in good faith. This, we believe, may safely be left to the jury in assessing the credibility of the evidence and a finding thereon by the judge should not be a condition precedent to admissibility.[195]

Excluded as Hearsay. The proposal is simply that no statement specified in the enactment shall be excluded *as hearsay*. Such statements may, of course, be excluded on some other appropriate ground such as irrelevancy, privilege,[196] etc. Furthermore, if the evidence of deceased's hearsay statement is itself hearsay, such evidence should be excluded. Thus in an action by P against X's executor, a witness could not testify the witness heard Y (now deceased) say that X said so-and-so. Such *double* hearsay is not made admissible by the proposal, for as the Con-

[191] CONN. GEN. STAT. § 7896 (1949) ("Whenever the entries and written memoranda of a deceased person would be admissible in favor of his representatives, such entries and memoranda may be admitted in favor of any person claiming title under or from the decedent"). See explanation in Pixley v. Eddy, 56 Conn. 336, 15 Atl. 758 (1888).

[192] That this limitation exists, however, see Mooney v. Mooney, 80 Conn. 446, 68 Atl. 985 (1908); Lockwood v. Lockwood, 56 Conn. 106, 14 Atl. 293 (1888); *cf.*, as to devisees, Foote v. Brown, 81 Conn. 218, 70 Atl. 699 (1908).

[193] Mulcahy v. Mulcahy, 84 Conn. 659, 81 Atl. 242 (1911); Barber's Appeal from Probate, 63 Conn. 393, 27 Atl. 973 (1893).

[194] MCCORMICK, EVIDENCE §§ 18, 262, 272, 277, 286.

[195] See Ladd, *The Dead Man Statute: Some Further Observations and a Legislative Proposal*, 26 IOWA L. REV. 207 (1941) arguing against the good faith condition. For cases applying this requirement in Massachusetts, see annotation in 96 A.L.R. 679, 690-92 (1935).

[196] Doyle v. Reeves, 112 Conn. 521, 152 Atl. 882 (1931).

necticut court has said of this problem "the dead cannot thus be made to speak through the dead." [197]

Insurance Cases. The beneficiary of an insurance policy of deceased is in a position of need entirely comparable to that of the administrator or the grantee or other successor in interest and the beneficiary is therefore entitled to the comparable benefits which the proposed enactment (and the Connecticut statute) provide.

Heirs. This is included to make the statute clearly applicable in a wrongful death action prosecuted by the heirs.

The proposed enactment is, of course, of relatively wide scope in changing the traditional law of hearsay. It does not, however, go to the length of legislation in some states as for example in Massachusetts and Rhode Island which makes the declaration of *any* deceased person whatsoever admissible in *any* action or proceeding whatsoever.[198]

[197] Brown, Admr. v. Butler, 71 Conn. 576, 42 Atl. 654 (1899).

[198] MASS. ANN. LAWS c. 233, § 65 (1956) ("a declaration of a deceased person shall not be inadmissible in evidence as hearsay * * * if the court finds that it was made in good faith and upon the personal knowledge of the declarant."); R.I. GEN. LAWS c. 538, § 6 (1938).
In each of these jurisdictions there are also enactments of lesser scope dealing specifically with actions by or against estates. MASS. ANN. LAWS c. 233, § 66 (1956); R.I. GEN. LAWS c. 538, § 4 (1938).
The restrictions of these narrow statutes may, of course, be escaped by invoking the broad enactments. See annotation in 96 A.L.R. 679, 688-89 (1935).

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