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## Waiver of the Missouri Dead Man's Statute

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## WAIVER OF THE MISSOURI DEAD MAN'S STATUTE

## I. INTRODUCTION

The common law excluded as incompetent to testify all parties to a lawsuit or others who were shown to have a direct pecuniary or proprietary interest in the outcome of the litigation.<sup>1</sup> It was believed that testimony given by these persons was likely to be unreliable and that the proper safeguard was a general disqualification of all such interested witnesses.<sup>2</sup> This disqualification often excluded the testimony of the only persons having first-hand knowledge of the relevant facts.

By the middle of the 19th century, dissatisfaction with the common law disqualification had grown to the point that legislative reform began.<sup>3</sup> During this period Missouri abolished its common law disqualification for interest.<sup>4</sup> Missouri's reform statute, however, retained a remnant of the disqualification: No person is disqualified as a witness because of his interest *except* that, where one of the original parties to a transaction is dead or insane, the testimony of the interested, surviving party is excluded.<sup>5</sup> Although several rationales have been advanced to justify this "dead man's" exception,<sup>6</sup> authorities have generally been critical.<sup>7</sup> Despite these criticisms, the Dead Man's Statute has been a feature of Missouri law since 1865.<sup>8</sup>

1. 3 B. JONES, *THE LAW OF EVIDENCE* § 762 (1958). The nature of the disqualifying interest had to be such that the witness would either gain or lose by the direct legal operation and effect of the judgment, or that the record would be legal evidence for or against him in another action. The interest could not be remote or contingent, but had to be a present vested interest. It also had to be a legal interest as distinguished from bias arising from consanguinity or social relationships. See 1 S. GREENLEAF, *EVIDENCE* §§ 386, 390 (14th ed. 1883), *cited with approval* in *Wagner v. Binder*, 187 S.W. 1128, 1152-53 (Mo. 1916). See Comment, *The "Dead Man's Statute" in Missouri*, 23 WASH. U.L.Q. 343 (1938).

2. See 2 J. WIGMORE, *EVIDENCE* § 576 (3rd ed. 1940). There were exceptions to this common law disqualification. See 3 B. JONES, *supra* note 1, § 765. Based on public necessity and convenience, certain persons were allowed to testify regardless of their interest. See 1 S. GREENLEAF, *supra* note 1, §§ 411, 416. Exceptions to the disqualification included: (1) An agent could testify to prove acts done in the scope of his employment; (2) witnesses could testify in criminal cases even though they were entitled to a reward upon conviction of the offender; (3) a party who suffered loss of goods through fraud could testify to the loss when no other evidence of the loss existed; and (4) witnesses could testify to establish the loss of written documents. See Comment, *supra* note 1.

3. See 2 J. WIGMORE, *supra* note 2, § 577.

4. Ch. 144, § 1, RSMo 1866.

5. § 491.010, RSMo 1969.

6. The rationales that have been advanced are: 1) To protect estates from claims created through perjured testimony, 2 J. WIGMORE, *supra* note 2, § 578; 2) to place the parties in substantial equality—if the lips of one of the original parties to a contract or cause of action are sealed by death, the law closes the mouth of the other, *In re Trautmann's Estate*, 300 Mo. 314, 322, 254 S.W. 286, 288 (1923); 3) to eliminate any incentive to delay litigation in hope that one party will die and leave the survivor's testimony uncontradicted, Comment, *The "Dead Man's Statute" in Missouri*, 23 WASH. U.L.Q. 343, 345 (1938).

7. 2 J. WIGMORE, *supra* note 2, § 578.

8. Ch. 144, § 1, RSMo 1866. Many American jurisdictions have similar dead man's provisions. These statutes take various forms and are subject to different

The Missouri Dead Man's Statute has been the subject of much litigation and judicial construction. The statute has not, however, always been construed from the same perspective. Some courts have strictly adhered to the statutory language;<sup>9</sup> others have been more mindful of the purpose underlying the act.<sup>10</sup> The Dead Man's Statute is further complicated by a judicially-created doctrine of waiver. Where the protected party<sup>11</sup> makes a proper objection, the statute will exclude the testimony of a witness who falls within its disqualification. But should the protected party either fail to make a proper objection,<sup>12</sup> or compel the disqualified witness to disclose parts of his testimony during discovery<sup>13</sup> or at trial,<sup>14</sup> the disqualification is waived, and the witness is competent to testify. A waiver does not require that the protected party actually intend to waive the witness' incompetency under the statute; it is enough that the protected party acts or fails to act in a manner to constitute a waiver.<sup>15</sup>

This comment will discuss what constitutes waiver of the Dead Man's Statute.<sup>16</sup> First, however, the basic operation of the statute will be explained.

## II. OPERATION OF THE DEAD MAN'S STATUTE

### A. Text of the Statute

To aid analysis, the statute may be divided into three functional parts:

#### COMMON LAW

#### DISQUALIFICATION-FOR-INTEREST RULE CHANGED

No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility,

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constructions. For this reason they have limited value as precedent in Missouri cases.

9. See, e.g., *Poague v. Mallory*, 208 Mo. App. 395, 235 S.W. 491 (K.C. Ct. App. 1921).

10. The purpose of the statute is to place the parties, as nearly as possible, on an equality in producing testimony. *Ess v. Griffith*, 139 Mo. 322, 329, 40 S.W. 930, 931 (1897). See also *Freeman v. Berberich*, 322 Mo. 831, 60 S.W.2d 393 (1933).

11. The protected party is one with standing to object to a witness' competency under the statute. In contract cases, the protected party is the decedent's estate, the party claiming under him, or the principal of a deceased agent. In tort cases, the protected party is the decedent's estate. Successors in interest to the decedent may be protected parties. Thus, the assignee of a contract can invoke the same protection that would have been afforded his assignor's executor or administrator. *Lambert v. Rodier*, 194 S.W.2d 934 (K.C. Mo. App. 1946). See Mo. BAR C.L.E., *Sources of Proof*, at 169-70 (1961).

12. See pt. III, § E(1) of this comment.

13. See pt. III, § C of this comment.

14. See pt. III, § E of this comment.

15. See, e.g., *Prentzler v. Schneider*, 411 S.W.2d 135 (Mo. En Banc 1966).

16. § 491.010, RSMo 1969.

## TRANSACTIONS PROVISIO

provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided,

## ADMINISTRATION PROVISIO

and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator; provided further, that in actions for the recovery of any sum or balance due on account, and when the matter at issue and on trial is proper matter of book, the party living may be a witness in his own favor so far as to prove in whose handwriting his charges are, and when made, and no farther.

The first section abolishes the common law disqualification for interest.<sup>17</sup> The transactions proviso contains the dead man's exception. The administration proviso is the dead man's exception applied to the special case where an executor or administrator is a party to the lawsuit.

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17. See notes 1, 2 and accompanying text *supra*.

B. *Transactions Proviso*

The transactions proviso applies where one of the original parties to a contract or cause of action "in issue and on trial"<sup>18</sup> is dead or insane.<sup>19</sup> By its own terms, the proviso applies to tort as well as contract causes of action.<sup>20</sup>

In contract actions, the statutory term "party to the contract" has been interpreted to mean the negotiator of the contract, not the person in whose name and interest the contract is made.<sup>21</sup> If the contract was negotiated through an agent, the death of the agent bars the testimony of the opposing negotiating party, even though the principal for whose benefit the contract was made is still living.<sup>22</sup> The death of the other negotiating party, on the other hand, does not bar the testimony of the agent.<sup>23</sup> In *Bernblum v. Travelers Insurance Co.*,<sup>24</sup> the defendant's agent was permitted to testify concerning the sale of an insurance policy even though the purchaser who had negotiated the insurance contract had died prior to trial. The court held that the purpose of the statute was to make competent certain witnesses who would have been incompetent at common law, not to add further disqualifications.<sup>25</sup> Thus, the agent, competent to testify under an exception

18. A contract or cause of action is in issue and on trial at any occasion it is called into question. *See, e.g.,* *Chapman v. Dougherty*, 87 Mo. 617 (1885), where, in an ejectment action, plaintiff claimed title to certain land as the devisee of defendant's grantee. The defense was nondelivery of the deed. The plaintiff contended that defendant-grantor was barred under the transactions proviso from testifying concerning his dealing with his deceased grantee. The defendant argued that for the purposes of the statute, the only cause of action in issue and on trial was defendant's alleged unlawful withholding of possession; the delivery of the deed was therefore not the basic controversy and, hence, the statutory disqualification was inapplicable. The court held that the defendant was incompetent to testify concerning the delivery of the deed, reasoning that since the validity of the deed was called into question, its delivery was also. *See also* *Timmonds v. Wilbur*, 260 S.W. 1004 (Mo. 1924) (contract assigning cause of action to the plaintiff not in issue and on trial).

19. The statute requires that a party's insanity be shown to the court. Because the aim of the statute is to prevent one party's testimony from being uncontradicted as a result of the death or insanity of the opposing party, it should follow that a party would not be considered insane for the purposes of the statute unless he is incompetent to testify. The trial court must make the determination of incompetency; a prior adjudication of insanity creates only a prima facie presumption of incompetency which may be rebutted by voir dire examination or other means. *Beil v. Gaertner*, 355 Mo. 617, 197 S.W.2d 611 (1946). *See also* *Martin v. Norton*, 497 S.W.2d 164 (Mo. 1973). To be competent as a witness, it is necessary only that the party understand the nature of the oath and possess the mental capacity sufficient to observe, remember, and narrate the things he heard or saw. *State v. Herring*, 268 Mo. 514, 188 S.W. 169 (1916); *Dennis v. Sears, Roebuck & Co.*, 461 S.W.2d 325 (K.C. Mo. App. 1970).

20. *See, e.g.,* *Freeman v. Berberich*, 332 Mo. 831, 60 S.W.2d 393 (1933).

21. *Edmonds v. Scharff*, 279 Mo. 78, 213 S.W. 823 (1919).

22. *Williams v. Edwards*, 94 Mo. 447, 7 S.W. 429 (1888). But where one side of a contract is represented by two or more negotiators, the death of one of them will not disqualify the other party to the contract. *Jones v. DeWitt*, 499 S.W.2d 524 (Mo. 1973).

23. *Bernblum v. Travelers Ins. Co.*, 340 Mo. 1217, 1227, 105 S.W.2d 941, 945 (En Banc 1937).

24. *Id.*

25. *Id.* at 1227, 105 S.W.2d at 945.

at common law,<sup>26</sup> remained competent despite the death of the other contracting party.<sup>27</sup>

The transactions proviso is subject to a different construction in tort actions. As in contract actions, the agent-employee is competent to testify despite the death of the other party to the tortious transaction at issue.<sup>28</sup> Unlike contract actions, however, the death of the agent-employee who caused the plaintiff's injury does not disqualify the plaintiff in his suit against the employer.<sup>29</sup> In *Freeman v. Berberich*,<sup>30</sup> plaintiff sued for damages for personal injuries sustained when the automobile in which he was riding collided with defendant Berberich's truck. Berberich's employee, who had been driving the truck, died prior to trial. Berberich moved to exclude portions of plaintiff's testimony contending that plaintiff was incompetent to testify about the accident because his employee, the actual participant in the transaction at issue, was dead. Had he lived, Berberich argued, the employee could have contradicted plaintiff's testimony concerning the accident.<sup>31</sup> In allowing plaintiff to testify, the court distinguished the master-servant relationship in a tort case from that of principal and agent in a contract case. Based on that distinction, the court found no reason to apply the statute in tort actions for personal injuries except to the actual parties to the cause of action at issue and on trial.<sup>32</sup> Because the deceased employee's estate was not a party to the lawsuit, plaintiff was a competent witness.<sup>33</sup>

One of the original parties to the contract or the cause of action at issue must be dead or insane before the statute operates. In contract cases,

26. See note 2 *supra*.

27. Bernblum v. Travelers Ins. Co., 340 Mo. 1217, 1226-27, 105 S.W.2d 941, 945 (En Banc 1937).

28. Wagner v. Binder, 187 S.W. 1128 (Mo. 1916).

29. Freeman v. Berberich, 332 Mo. 831, 60 S.W.2d 393 (1933).

30. *Id.*

31. This is a necessary requirement for disqualification of the survivor under the transactions proviso. See text accompanying note 43 *infra*.

32. Freeman v. Berberich, 332 Mo. 831, 60 S.W.2d 393 (1933).

The essential distinction is that the agent is employed to establish contractual relations between his principal and third persons, while the servant is not. . . . Moreover, it is apparent that the duties of a contracting agent to bring about contractual relations necessarily involve secrecy, and that therefore no one, except he who conducts the negotiations, will usually be in a position to know anything about the transaction. . . . In the case of an alleged verbal contract, there is nothing visible which will contradict or corroborate. On the other hand, the negligent or wrongful actions of a servant in the scope of his employment, for which a master may be held responsible for personal injuries occasioned to a third party, are usually open for all the world to see.

*Id.* at 847, 60 S.W.2d at 401.

33. Had plaintiff sued the estate of the employee who caused his injury, plaintiff's testimony would have been excludable under the transactions proviso. Had plaintiff sued both the employer and the estate of the employee, plaintiff would have been competent to testify against the employer, but incompetent to give the same testimony against the employee's estate. In this situation, plaintiff would be allowed to give his complete testimony, but the employee's estate would be entitled to a limiting instruction to the effect that plaintiff's testimony could be considered only against the employer. Grimm v. Gargis, 303 S.W.2d 43 (Mo. 1957).

an original party is one who negotiated the contract;<sup>34</sup> in tort cases, he is one who is, or whose estate is, a party to the lawsuit.<sup>35</sup> For example, a wrongful death action does not automatically involve the Dead Man's Statute.<sup>36</sup> Under Missouri law, the spouse or heir does not derive his cause of action from the deceased, and the deceased or his estate is not a party to the cause of action.<sup>37</sup> As a consequence, both parties to the lawsuit may be living, and therefore, the statute is inapplicable.<sup>38</sup> If the defendant in the wrongful death action is dead or insane, however, the statute is applicable. Thus where the action is brought against the tort-feasor's estate, the statute bars the survivor's testimony.<sup>39</sup>

A witness need not be a party of record to be disqualified under the transactions proviso. If the survivor is a real party in interest to the transaction in issue and on trial, he is disqualified even though he is not a named party.<sup>40</sup> Although the survivor totally relinquishes his interest, he remains incompetent to testify in favor of any party claiming under him.<sup>41</sup> To illustrate, assume that A negotiates a contract with B, then assigns his rights under that contract to C. B then dies and C later sues on the contract. A will be incompetent to testify in favor of C concerning his negotiations with B. In addition, C will also be disqualified from testifying concerning A's dealings with B, because the statute excludes the testimony of any party whose right of action or defense is derived to him from one who is, or if living would be, disqualified. Similarly, the heirs of a deceased grantee are incompetent under the statute to testify concerning the delivery of a deed to the grantee if the grantor is dead at the time of trial.<sup>42</sup> Had he lived, the grantee would have been barred, so the persons claiming through him are also barred.

The transactions proviso does not bar all testimony by the survivor. The survivor is incompetent only as to those matters on which the decedent could have testified had he lived.<sup>43</sup> Hence, a plaintiff in a suit for personal injuries against the decedent's estate is incompetent to testify as to how the accident occurred where the decedent would have been able to testify about the accident had he survived. The same plaintiff is competent, how-

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34. *Edmonds v. Scharff*, 279 Mo. 78, 213 S.W. 823 (1919).

35. *Freeman v. Berberich*, 322 Mo. 831, 847, 60 S.W.2d 393, 401 (1933).

36. *See, e.g., Myers v. Griffith*, 495 S.W.2d 447 (Mo. 1973); *State ex rel. Thomas v. Daus*, 314 Mo. 13, 283 S.W. 51 (En Banc 1926).

37. *Myers v. Griffith*, 495 S.W.2d 447, 447 (Mo. 1973).

38. Cases cited note 36 *supra*.

39. *Prentzler v. Schneider*, 411 S.W.2d 135 (Mo. En Banc 1966).

40. In *Meier v. Thieman*, 90 Mo. 433, 2 S.W. 435 (1886), a widow sued defendant for rent. The defense was payment to A. A testified that he was entitled to the rent because he had purchased the rental property from the widow's deceased husband. Held: A was incompetent under the transactions proviso to testify concerning his dealings with the deceased husband because, although not a named party, he was the real party in interest to the cause of action in issue and on trial.

41. *Bussen v. Del Commune*, 239 Mo. App. 859, 199 S.W.2d 13 (St. L. Ct. App. 1947).

42. *Messimer v. McCrary*, 113 Mo. 382, 21 S.W. 17 (1893). *See also Baker v. Baker*, 363 Mo. 318, 251 S.W.2d 31 (1952).

43. *Weiermueller v. Scullen*, 203 Mo. 466, 101 S.W. 1088 (En Banc 1907).

ever, to testify concerning his injuries because the decedent, had he lived, would not have had personal knowledge concerning plaintiff's injuries, and therefore would have been unable to contradict the plaintiff on that subject.

### C. Administration Proviso

The administration proviso applies to lawsuits in which an executor or administrator is a party. This proviso is specifically limited to actions in contract; actions in tort are determined solely by the transactions proviso.<sup>44</sup>

When applicable, the administration proviso excludes *all* testimony by the survivor except as to acts and contracts which occurred subsequent to the probate of the will or the appointment of the administrator.<sup>45</sup> Unlike the transactions proviso, incompetency under the administration proviso is absolute—there is no requirement that the decedent would have been able, had he lived, to contradict the survivor's testimony.<sup>46</sup> In *Kersey v. O'Day*,<sup>47</sup> defendant administrator's witnesses testified to a conversation with the plaintiff that had occurred prior to the appointment of the administrator. Even though the decedent had not been a participant in those conversations, the plaintiff was held incompetent to deny the conversations because they occurred prior to the appointment of the administrator. The administration proviso has been criticized as being arbitrary and unfair,<sup>48</sup> but the courts have considered themselves bound by the express language of the statute which results in this construction.<sup>49</sup>

## III. WAIVER OF THE DEAD MAN'S STATUTE

### A. Introduction

The Dead Man's Statute prevents the survivor of a transaction with a decedent from testifying in his own favor. The statute does not, however, bar the survivor from testifying on behalf of the protected party.<sup>50</sup> The protected party may choose to ignore the disqualification and make the

44. *Fellows v. Farmer*, 379 S.W.2d 842 (Spr. Mo. App. 1964).

45. *Davis v. Robb*, 10 S.W.2d 680 (Spr. Mo. App. 1928).

46. See text accompanying note 43 *supra*.

47. 173 Mo. 560, 73 S.W. 481 (1903).

48. The court in *Kersey v. O'Day*, 173 Mo. 560, 73 S.W. 481 (1903); stated:

[I]t is difficult to see the reason of this strict rule. What difference does it make whether the conversation was before or after the grant of letters of administration? The dead man is no party to the conversations. . . . If he had been living, and was not present at the conversation, he would not be able to say anything about it. It strikes me, as to these conversations, separate and independent from any transaction with the deceased, to permit the living witnesses to give their version of the conversations and then exclude the living party from giving his, is directly in conflict with the spirit of the statute, of placing all parties on an equal footing.

*Id.* at 570, 73 S.W. at 484.

49. See, e.g., *Schwalbert v. Konert*, 230 Mo. App. 811, 75 S.W.2d 445 (St. L. Ct. App. 1934).

50. *Jackson v. Smith*, 139 Mo. App. 691, 123 S.W. 1026 (K.C. Ct. App. 1910).



survivor his own witness, although doing so waives the statute and makes the survivor competent to testify in his own behalf.<sup>51</sup> This waiver option, therefore, gives the protected party the ability to bar the survivor's testimony when it is unfavorable to the protected party, and to compel it if it is favorable.<sup>52</sup> The survivor, on the other hand, cannot affect his competency by his own actions; only the protected party can invoke<sup>53</sup> or waive<sup>54</sup> the statute.

A waiver can occur in various ways. Failure to make a proper objection to the survivor's proffered testimony constitutes a waiver.<sup>55</sup> The survivor is not obliged to inform the court of his incompetency.<sup>56</sup> Waiver can occur during the discovery process,<sup>57</sup> at trial through direct<sup>58</sup> or cross-examination,<sup>59</sup> or through use of the survivor's testimony from a prior trial.<sup>60</sup> A waiver as to one incompetent witness waives the incompetency of other witnesses having similar knowledge who are subject to the same statutory disqualification.<sup>61</sup> These subjects are discussed below.

### B. Testimony Of The Decedent Preserved

Where the testimony of the deceased party has been preserved in a form that can be used at trial, the surviving party is competent to testify in his own behalf on matters covered by the preserved testimony.<sup>62</sup> This rule puts the parties in an equal position and is in accordance with the purposes of the statute.<sup>63</sup> The survivor is competent even though the decedent's representative does not offer the preserved testimony as evidence.<sup>64</sup> The survivor, however, must show that the decedent's testimony has been preserved.<sup>65</sup>

The deceased's testimony may be preserved in the form of a deposition.<sup>66</sup> The deposition can be one taken in a prior suit or in connection with

51. *In re Trautmann's Estate*, 300 Mo. 314, 254 S.W. 286 (1923).

52. *Jackson v. Smith*, 139 Mo. App. 691, 123 S.W. 1026 (K.C. Ct. App. 1910).

53. *Dolan v. Kehr*, 9 Mo. App. 351 (St. L. Ct. App. 1880).

54. *State ex rel. State Highway Comm'n v. Jacobs*, 281 S.W.2d 597 (St. L. Mo. App. 1955). But where a waiver does occur, it is the survivor's responsibility to call it to the court's attention. *Tomlinson v. Ellison*, 104 Mo. 105, 16 S.W. 201 (1891); *Norton v. Lynds*, 24 S.W.2d 183 (K.C. Mo. App. 1930).

55. See notes 118-137 and accompanying text *infra*.

56. *Crutcher v. Kansas City Viaduct & Terminal Ry.*, 181 Mo. App. 368, 168 S.W. 826 (K.C. Ct. App. 1914).

57. See text accompanying notes 78-103 *infra*.

58. See text accompanying notes 144-151 *infra*.

59. See text accompanying notes 138-143 *infra*.

60. See text accompanying notes 152-164 *infra*.

61. *Martin v. Norton*, 497 S.W.2d 164 (Mo. 1973); *Baker v. Baker*, 363 Mo. 318, 251 S.W.2d 31 (1952); *Fowler v. Sone*, 226 S.W. 995 (K.C. Mo. App. 1920).

62. *Allen v. Chouteau*, 102 Mo. 309, 14 S.W. 869 (1890).

63. *Stone v. Hunt*, 114 Mo. 66, 71, 21 S.W. 454, 455 (1893).

64. *Leahy v. Rayburn*, 33 Mo. App. 55 (St. L. Ct. App. 1888).

65. *McCracken v. Schuster*, 179 S.W. 757, 759 (K.C. Mo. App. 1915).

66. In *Allen v. Chouteau*, 102 Mo. 309, 14 S.W. 869 (1890), Allen's executor sued for a debt allegedly owed by Chouteau to the estate of Allen. Allen's deposition, taken in connection with a prior suit between Allen and Chouteau,

the instant controversy.<sup>67</sup> An attorney may insure his own client's competency to testify by taking the deposition of the other party. Once the opposing party's testimony is preserved in the form of a deposition, his death will not result in the Dead Man's Statute disqualification of the survivor. Care should be taken that the deposition is complete, however, as the statutory disqualification applies to matters not covered by the deposition.<sup>68</sup>

Testimony may also be preserved in a record of the proceedings from a prior trial.<sup>69</sup> The statute does not exclude the survivor's testimony on subjects contained within the decedent's recorded testimony.<sup>70</sup> Normally the record preserves the survivor's prior testimony as well as that of the deceased. The survivor, however, is not bound by his prior statements in the record and may correct errors therein.<sup>71</sup> Inconsistent prior testimony is, however, available for impeachment purposes.<sup>72</sup>

Testimony of the deceased was preserved in a letter in *Galvin v. Knights of Father Mathew*.<sup>73</sup> The plaintiff sued to recover death benefits under an insurance policy containing a forfeiture clause which required the insured to abstain from drinking alcoholic beverages. The issue was whether the defendant's agent had waived the forfeiture clause by accepting premiums with full knowledge that the insured drank in violation of the policy. The agent was dead at the time of trial. Over defendant's objection, plaintiff testified to her conversations with the agent which tended to show that the forfeiture clause had been waived.<sup>74</sup> The defendant subsequently introduced in evidence a letter written by the agent in which the agent stated that he had no knowledge that the insured drank. On appeal, the court held that the agent's testimony was preserved in the letter and that the plaintiff was therefore competent to testify concerning her dealings with the agent.<sup>75</sup>

In initially admitting plaintiff's testimony, the lower court in *Galvin* committed reversible error. The plaintiff was incompetent under the transactions proviso to testify as to her conversations with the agent, the deceased agent having been the negotiating party to the insurance contract at issue

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was introduced in evidence. The court held Chouteau competent to testify concerning matters covered by the deposition. As to matters not contained in the deposition, however, the administration proviso was applicable and Chouteau was incompetent.

67. *Drummond Realty & Inv. Co. v. W. H. Thompson Trust Co.*, 178 S.W. 479 (Mo. 1915); *Wolfson v. Chelist*, 278 S.W.2d 39 (St. L. Mo. App. 1955); *Vigeant v. Fidelity Nat. Bank & Trust Co.*, 239 Mo. App. 46, 188 S.W.2d 533 (K.C. Ct. App. 1945); *Knickerbocker v. Athletic Tea Co.*, 285 S.W. 797 (St. L. Mo. App. 1926); *Ferry v. Woody*, 210 Mo. App. 98, 241 S.W. 78 (K.C. Ct. App. 1922); *Carpenter v. Gruendler Mach. Co.*, 162 Mo. App. 296, 141 S.W. 1147 (St. L. Ct. App. 1911); *Leahy v. Rayburn*, 33 Mo. App. 55 (St. L. Mo. App. 1888).

68. Cases cited note 67 *supra*.

69. *Stone v. Hunt*, 114 Mo. 66, 21 S.W. 454 (1893); *Coughlin v. Haeussler*, 50 Mo. 126 (1872); *McCracken v. Schuster*, 179 S.W. 757 (K.C. Mo. App. 1915).

70. Cases cited note 69 *supra*.

71. *Stone v. Hunt*, 114 Mo. 66, 21 S.W. 454 (1893).

72. *Id.*

73. 169 Mo. App. 496, 155 S.W. 45 (K.C. Mo. App. 1913).

74. *Id.* at 502, 155 S.W. at 47.

75. *Id.* at 513, 155 S.W. at 51.

and on trial. The subsequently admitted letter, however, embodied the testimony the agent could have given had he lived, thus placing the parties in substantially the same position as if the agent had survived. Because the objective of the statute had been achieved, the "spirit of the statute did not require that the lower court be reversed over the admission of the plaintiff's testimony".<sup>76</sup> *Galvin* may stand for the proposition that whenever the protected party offers the decedent's out-of-court statement in evidence, the survivor is competent to testify concerning the subject matter of that statement. *Galvin's* import, however, is uncertain.<sup>77</sup>

### C. Waiver During Discovery<sup>78</sup>

#### 1. Depositions and Interrogatories

The protected party waives the statutory incompetency of the survivor by taking his deposition on subjects on which the survivor is incompetent to testify.<sup>79</sup> This waiver makes the survivor a competent witness for all purposes;<sup>80</sup> he may testify as to all facts within his knowledge.<sup>81</sup> Furthermore, the waiver extends to all other witnesses having like knowledge whose testimony is subject to the same disqualification.<sup>82</sup> The rationale for this waiver is that, after permitting discovery of the survivor's testimony, it would not be equitable to allow the protected party to invoke the statute to exclude it if it is unfavorable.<sup>83</sup> In accordance with this rationale, the statute is waived even though the deposition is not filed<sup>84</sup> or used at trial.<sup>85</sup> The statute treats interrogatories in the same manner as depositions.<sup>86</sup> Where the service of interrogatories is a mandatory step in a procedure required by law,<sup>87</sup> however, their service does not waive the statute.<sup>88</sup>

76. *Id.* at 513, 155 S.W. at 51.

77. See also *Hodge v. St. Louis Union Trust Co.*, 261 S.W. 67 (Mo. 1924) (survivor was not made competent by the admission into evidence of decedent's checks and stubs from contract at issue).

78. The subject matter of this section should be distinguished from that of the previous section. Pt. III, § B was concerned with situations in which the decedent's testimony was preserved by deposition or other means. This section deals with situations where the survivor's deposition is taken by the protected party.

79. *Tomlinson v. Ellison*, 104 Mo. 105, 16 S.W. 201 (1891).

80. *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 44 S.W. 754 (1898).

81. *In re Trautmann's Estate*, 300 Mo. 314, 323, 254 S.W. 286, 289 (1923).

82. *Baker v. Baker*, 363 Mo. 318, 323, 251 S.W.2d 31, 34 (1952).

83. *Ess v. Griffith*, 139 Mo. 322, 40 S.W. 930 (1897).

84. *Rice v. Waddill*, 168 Mo. 99, 67 S.W. 605 (1902).

85. *Ess v. Griffith*, 139 Mo. 322, 40 S.W. 930 (1897).

86. *Watkins v. Watkins*, 397 S.W.2d 603 (Mo. 1965); *Lehr v. Moll*, 247 S.W.2d 686 (Mo. 1952); *Casserly v. Bench*, 458 S.W.2d 893 (Spr. Mo. App. 1970).

87. See, e.g., Mo. Laws 1955, at 385, § 129 (repealed 1973) (probate court discovery of assets provision).

88. *Roger's Estate v. Courier*, 429 S.W.2d 258 (Mo. 1968); *Carmody v. Carmody*, 266 Mo. 556, 181 S.W. 1148 (1916); *Tygar v. Falor*, 163 Mo. 234, 63 S.W. 672 (1901). But direct examination in conjunction with mandatory interrogatories will cause a waiver. *In re Trautmann's Estate*, 330 Mo. 314, 254 S.W. 286 (1923).

It is clear that if the deposition touches subjects on which the survivor is incompetent to testify, the Dead Man's Statute is waived.<sup>89</sup> Case law is uncertain, however, whether a waiver occurs when the deposition touches only subject matters not excludable under the statute.<sup>90</sup> In some decisions, courts have stressed that the deposition causing the waiver did touch matters on which the survivor was incompetent to testify.<sup>91</sup> But many cases, including some recent ones, simply make the unqualified statement that the taking of the survivor's deposition waives his incompetency, and do not discuss the actual contents of the deposition in issue.<sup>92</sup> The recent case of *Saupe v. Kertz*<sup>93</sup> may help resolve this uncertainty. *Saupe* was an action against an administrator for personal injuries sustained when plaintiff's truck collided with an automobile driven by the administrator's decedent. Plaintiff contended that his incompetency under the Dead Man's Statute was waived when the administrator moved for the production of plaintiff's medical records. The court held that there was no waiver because the information contained in the requested records was not excludable under the Dead Man's Statute.<sup>94</sup> Applying this reasoning to discovery depositions,

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89. *Boydston v. Bank of Camden Point*, 141 S.W.2d 86 (K.C. Mo. App. 1940); *Alexander v. Sovereign Camp of Woodmen of the World*, 193 Mo. App. 411, 186 S.W. 2 (K.C. Ct. App. 1916); *P.M. Bruner Granitoid Co. v. Glencoe Lime & Cement Co.*, 187 S.W. 807 (St. L. Mo. App. 1916).

90. *E.g.*, *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 44 S.W. 754 (1898). *Borgess* was a suit to enjoin the foreclosure of a deed of trust. Plaintiff's precessor in title had executed a deed of trust to secure notes owed to F. Plaintiff claimed that the deed of trust had been discharged by the trustee's release. The defendant claimed to be a bona fide purchaser having paid F valuable consideration for the notes without notice of the release. When defendant attempted to testify concerning his purchase of the note from F (who was deceased at the time of trial), the plaintiff objected that the defendant's testimony was barred under the transactions proviso. Defendant contended that the statute had been waived when the plaintiff took his deposition. Plaintiff replied that the deposition did not constitute a waiver, because it did not touch on defendant's purchase of the note. Evidence as to the contents of the deposition was in direct conflict, the defendant claiming that that the deposition did touch on that transaction. Although the court found a waiver, it is difficult to determine whether the waiver was based on the taking of the deposition alone or whether the court determined that the deposition did cover matters excludable under the statute. *Id.* at 570-71, 44 S.W. at 756.

91. See cases note 90 *supra*.

92. *Watkins v. Watkins*, 397 S.W.2d 603 (Mo. 1965); *Edwards v. Durham*, 346 S.W.2d 90 (Mo. 1961); *Baker v. Baker*, 363 Mo. 318, 251 S.W.2d 31 (1952); *Lehr v. Moll*, 247 S.W.2d 686 (Mo. 1952); *In re Soulard's Estate*, 141 Mo. 642, 43 S.W. 617 (1897); *Melton v. Ensley*, 421 S.W.2d 44 (Spr. Mo. App. 1967); *National Life Ins. Co. v. Blair*, 240 Mo. App. 982, 225 S.W.2d 806 (Spr. Ct. App. 1949); *Radke v. Radke*, 221 S.W. 739 (K.C. Mo. App. 1920); *Bush v. Block*, 193 Mo. App. 704, 187 S.W. 153 (K.C. Ct. App. 1916).

93. — S.W.2d — (Mo. App., D. St. L. 1974). A motion has been filed for transfer to the Missouri Supreme Court.

94. *Id.* at —. *Saupe* was a tort action, so the transactions proviso applied. The transactions proviso disqualifies the survivor only as to matters which the deceased could have testified had he lived. In *Saupe*, the decedent had no knowledge of the survivor's medical history; therefore, the medical records were not excludable under the statute. See text accompanying note 43 *supra*.

*Saupe* may indicate that the Dead Man's Statute is not waived by taking the survivor's deposition on matters not excludable under the statute.

The holding in *Saupe* should apply to depositions. If the purpose of the statute is to make the parties substantially equal in their ability to produce evidence,<sup>95</sup> it logically follows that no waiver should occur unless the deposition actually touches matters on which the survivor was incompetent to testify. Because the survivor is permitted to conduct discovery of the protected party's competent witnesses, equality would seem to require that the protected party also have the same privilege relative to the survivor's competent witnesses. If the survivor is competent to testify concerning a subject, the protected party needs to discover this testimony in order to prepare his case. A holding contrary to *Saupe* would force the protected party to choose between either waiving the statute, or not deposing the survivor on testimony admissible at trial. Such a choice is inconsistent with the purpose of the statute. The Dead Man's Statute was intended to protect the representatives of the dead, not put them at a disadvantage.

## 2. Production of Documents for Inspection<sup>96</sup>

In *Saupe v. Kertz*,<sup>97</sup> the court held that the protected party's motion for the production and inspection of the survivor's documents did not waive the Dead Man's Statute where the information contained in those documents was not excludable under the statute.<sup>98</sup> Although the holding in *Saupe* was limited to its facts, *Saupe* might be interpreted to mean that the Dead Man's Statute is waived where the requested documents do contain information excludable under the statute.<sup>99</sup> Such a waiver rule, however, would not be consistent with the purpose of the Dead Man's Statute. A motion to produce documents should not waive the Dead Man's Statute.

In *Saupe*, the survivor argued that the waiver rules applicable to a deposition should also be applied to a motion for the production and inspection of documents.<sup>100</sup> This is not a compelling argument. Although both are forms of discovery, a deposition and a motion to produce documents are distinguishable in that they discover different types of evidence. The Dead Man's Statute does not bar all evidence offered by the survivor, it only bars the survivor's testimony. In taking the survivor's deposition, the protected party discovers his testimony. Because it would be unfair to allow the protected party to discover the survivor's testimony and then exclude it, taking the survivor's deposition waives the statute. A motion to produce

95. See note 6 *supra*.

96. Mo. SUP. CT. R. 58.01 (1974).

97. — S.W.2d — (Mo. App., D. St. L. 1974). See note 93 and accompanying text *supra*. A motion has been filed for transfer to the Missouri Supreme Court.

98. *Id.* at —.

99. Such a waiver would probably make the survivor a competent witness for all purposes. This would be consistent with waivers arising from the taking of depositions. See notes 86 and 87 *supra*. The waiver would also extend to other witnesses having like knowledge whose testimony is subject to the same disqualification. See cases note 61 *supra*.

100. — S.W.2d —, — (Mo. App., D. St. L. 1974).

documents, on the other hand, does not discover the survivor's testimony. It discovers the survivor's documents, a form of evidence the protected party cannot exclude under the statute. It would be anomalous if the Dead Man's Statute could be waived by discovering a type of evidence which is not excludable by the statute.

In addition, the waiver rule suggested by the *Saupe* decision is inconsistent with the purpose of the Dead Man's Statute.<sup>101</sup> Under this waiver rule, if the protected party requests documents containing information excludable under the statute, he waives the survivor's incompetency. In most cases, however, the protected party will not know the exact contents of those documents until the survivor produces them for inspection. The protected party, thus, will be unable to discover the survivor's documents without risking a waiver of the statute. Such a waiver rule would, therefore, severely limit the protected party's discovery of the survivor's documents. The survivor, on the other hand, would still be able to freely discover the deceased's documents. As a result of the waiver rule, he would have an advantage over the protected party in preparing his case for trial.<sup>102</sup>

The purpose of the Dead Man's Statute is to make the parties substantially equal in their ability to produce evidence.<sup>103</sup> Instead of putting the parties on an equality, the waiver rule suggested by *Saupe* would give the survivor a distinct advantage. For this reason, the waiver rule suggested in *Saupe* should not be adopted. A motion to produce documents for inspection should not waive the Dead Man's Statute.

#### D. Waiver By Counterclaim

The recent case of *Saupe v. Kertz*<sup>104</sup> raises a question as to whether the Dead Man's Statute is waived where the protected party counterclaims against the survivor. In *Saupe*, the plaintiff sued an administrator for personal injuries sustained in a collision with an automobile driven by the administrator's decedent. The administrator counterclaimed for the wrongful death of his decedent, but the counterclaim was dismissed prior to trial because the administrator was not the proper party to bring the wrongful death action.<sup>105</sup> On appeal, the plaintiff argued that the administrator had waived his incompetency by filing the counterclaim. Plaintiff relied upon a California decision, *Bruce v. Ullery*,<sup>106</sup> which held that, where an admin-

101. See note 6 *supra*.

102. In addition, if the discovered documents are admissible in evidence and preserve the deceased's testimony, the survivor is competent to testify on the matters covered in the preserved testimony. See pt. III, § B of this comment.

103. See note 6 *supra*.

104. — S.W.2d —, (Mo. App., D. St. L. 1974). A motion has been filed for transfer to the Missouri Supreme Court.

105. *Id.* at —. The deceased was a childless, unmarried minor. Section 537.080, RSMo 1969, grants the right of recovery for wrongful death of a childless, unmarried minor to the deceased parents.

106. *Bruce v. Ullery*, 375 P.2d 833, 25 Cal. Rptr. 841 (1962). In dictum, the court stated that it was not essential that the estate produced evidence; merely filing the counterclaim waived the statute. *Id.* at 836, 25 Cal. Rptr. at 844.

istrator introduces evidence to support his counterclaim against the survivor, he waives the incompetency of all witnesses defending against the counterclaim. The *Saupe* court, however, distinguished *Ullery* on its facts and cited *Norgard v. Norgard*,<sup>107</sup> a case holding that an administrator's counterclaim does not waive the California Dead Man's statute if the counterclaim is dismissed prior to trial. The *Saupe* court held that, because the counterclaim was ruled improper and dismissed prior to trial, the filing of the counterclaim did not constitute a waiver of the Missouri statute.<sup>108</sup>

The *Saupe* court's discussion of the California cases might be interpreted to mean that, under the right circumstances, the Missouri Dead Man's Statute can be waived by counterclaim against the surviving party. Because *Ullery* was distinguished in its facts rather than rejected outright, the *Saupe* decision suggests that *Ullery* may be good precedent in situations where the protected party's counterclaim is not dismissed prior to trial. *Ullery*, however, is not compatible with the Missouri Dead Man's Statute. The *Ullery* rule should not be adopted in Missouri. Counterclaims should not waive the Missouri Dead Man's Statute.

The *Ullery* decision was controlled by the express language of the California Dead Man's statute.<sup>109</sup> The California statute (now repealed) applied only to actions brought *against* an estate.<sup>110</sup> In actions brought by an executor or administrator, the survivor was competent to testify in his own defense.<sup>111</sup> The administrator's counterclaim in *Ullery* was an action against the survivor. *Ullery*, therefore, was consistent with the California statute in finding the survivor competent to testify in his defense to the counterclaim.

*Ullery*, however, is not consistent with the Missouri Dead Man's Statute. Unlike the California statute, the Missouri statute is not limited to suits brought against the protected party. In Missouri, the decedent's estate has the protection of the statute whether it be the plaintiff or defendant in a lawsuit. The survivor's testimony can be excluded in a suit brought by the protected party.<sup>112</sup> If the Missouri statute is waived by the protected party's counterclaim, waiver of the survivor's incompetency would depend on which party won the race to the courthouse.<sup>113</sup> If the protected party files his action

107. 54 Cal. App.2d 82, 128 P.2d 566 (1942).

108. *Saupe v. Kertz*, — S.W.2d —, — (Mo. App., D. St. L. 1974).

109. Code Am. 1880, c. 99, p. 112, § 1 (repealed 1967) stated that:

The following persons cannot be witnesses:

....

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 on 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.

110. See Chadbourn, *History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization*, 4 U.C.L.A. LAW REV. 175, 186 (1956).

111. *Sedgwick v. Sedgwick*, 52 Cal. 336 (1877).

112. See, e.g., *Davis v. Robb*, 10 S.W.2d 680 (Spr. Mo. App. 1928).

113. This problem could be avoided, of course, by following the California example and limiting the application of the Missouri Dead Man's Statute to actions brought against the protected party. Such a limitation, however, would substantially change the Dead Man's Statute waiver doctrine in Missouri.

first, he would be able to litigate his claim and still exclude the survivor's testimony. Should the survivor file his action first, however, the protected party could not counterclaim without waiving the statute.<sup>114</sup> Where his counterclaim is compulsory,<sup>115</sup> the protected party would have to choose between waiving the statute or losing his cause of action. Clearly, the *Ullery* waiver-by-counterclaim rule would produce bad results. The admissibility of the survivor's testimony should not turn on the order in which the parties' claims are filed.<sup>116</sup>

The *Ullery* waiver-by-counterclaim rule should not be adopted in Missouri. The purpose of the Missouri Dead Man's Statute is to make the parties substantially equal in their ability to produce evidence.<sup>117</sup> The protected party gains no evidentiary advantage over the survivor by litigating a counterclaim. Asserting a counterclaim has nothing to do with producing evidence. A counterclaim should not constitute a waiver of the Missouri Dead Man's Statute.

### E. Waiver at Trial

#### 1. Objections

The Dead Man's Statute does not make the survivor incompetent for all purposes. The transactions proviso excludes only testimony which could have been contradicted by the decedent had he lived,<sup>118</sup> and the administration proviso only excludes testimony on matters occurring prior to probate or the appointment of the administrator.<sup>119</sup> If the survivor testifies on subjects within the scope of his competency, the protected party has no grounds for objection.<sup>120</sup> But where the survivor attempts to testify concerning excluded subjects, the protected party must make a proper and timely objection to preserve his rights under the Dead Man's Statute.<sup>121</sup>

114. Such a waiver rule would, therefore, render Mo. Sup. Cr. R. 55.32(b) (1974), on permissive counterclaims ineffective in cases where the protected party is the defendant.

115. Mo. Sup. Cr. R. 55.32(a) (1974).

116. The scope of this waiver is uncertain. Under the California Dead Man statute, the survivor would be competent only to defend against the counterclaim. *Bruce v. Ullrey*, 375 P.2d 833, 836, 25 Cal. Rptr. 841, 844 (1962). A waiver of the Missouri Dead Man's statute, however, is for all purposes. *See, e.g., Borgess Inv. Co. v. Vette*, 142 Mo. 560, 44 S.W. 754 (1898).

117. *See* note 6 *supra*.

118. *See* text accompanying note 43 *supra*.

119. *See* text accompanying note 45 *supra*.

120. *B.F. Goodrich Rubber Co. v. Bennett*, 222 Mo. App. 510, 281 S.W. 75 (K.C. Ct. App. 1926); *C. E. Donnell Newspaper Co. v. Jung*, 81 Mo. App. 577 (St. L. Ct. App. 1899).

121. *Birmingham v. Smith*, 420 S.W.2d 514 (Mo. 1967); *Carney v. Carney*, 95 Mo. 353, 8 S.W. 729 (1888); *Berry v. Hartzell*, 91 Mo. 132, 3 S.W. 582 (1887); *Oliver v. McFarland*, 282 S.W. 735 (Spr. Mo. App. 1926); *Belch v. Roberts*, 191 Mo. App. 243, 177 S.W. 1062 (K.C. Ct. App. 1915); *Jones v. Prudential Ins. Co.*, 173 Mo. App. 1, 155 S.W. 1106 (St. L. Ct. App. 1913); *In re Imboden's Estate*, 111 Mo. App. 220, 86 S.W. 263 (St. L. Ct. App. 1905). *See also Sprague v. Sea*, 152 Mo. 327, 53 S.W. 1074 (1899).



The objection must be in proper form. It must be specific enough to inform the court of the incompetency of the witness.<sup>122</sup> Objections based on grounds other than the Dead Man's Statute are ineffective.<sup>123</sup> The objection should refer to the Dead Man's Statute<sup>124</sup> and recite the facts necessary to its operation. For example, where the survivor is disqualified under

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Several cases suggest that where the court has made a clear, explicit ruling that the survivor is competent to testify, the protected party can cease his objections without risk of waiver. *Johnson v. Dur-Est, Inc.*, 224 S.W.2d 611 (K.C. Mo. App. 1949); *Poague v. Mallory*, 208 Mo. App. 395, 235 S.W. 491 (K.C. Ct. App. 1921). One case, *Schwalbert v. Konert*, 230 Mo. App. 811, 76 S.W.2d 445 (St. L. Ct. App. 1934), went so far as to hold that, where one defendant was improperly allowed to testify over the protected party's objection, there was no further need to object to the testimony of a similarly disqualified codefendant (his wife), because it was apparent she had the same status under the statute. It would be a safer practice, however, to continue objections and to object to every incompetent witness.

122. *Miller v. Gayman*, 482 S.W.2d 414 (Mo. 1972); *Birdsong v. Estate of Ladwig* 314 S.W.2d 471 (Spr. Mo. App. 1958). In *Saupe v. Kertz*, — S.W.2d — (Mo. App., D. St. L. 1974), an objection that

... the law under the Dead Man's Statute provides that where one party to a transaction has been killed that the other party to that transaction is disqualified from testifying to those events and we would object for that reason to any further testimony. . . .

was held to be sufficient. *Id.* at —.

123. *Elsea v. Smith*, 202 S.W. 1071 (1918) (hearsay); *Gerhardt v. Tucker*, 187 Mo. 46, 85 S.W. 552 (1905) (privileged communication); *Fellows v. Farmer*, 379 S.W.2d 842 (Spr. Mo. App. 1964) (irrelevant & immaterial); *Birdsong v. Estate of Ladwig*, 314 S.W.2d 471 (Spr. Mo. App. 1958) (irrelevant & immaterial).

The objection must be directed to the competency of the witness, not the subject matter of the testimony. An objection "to the offer of any testimony" was properly overruled as going to the competency of the testimony rather than the competency of the witness in *People's Bank of Queen City v. Aetna Cas. & Sur. Co.*, 225 Mo. App. 1113, 1126, 40 S.W.2d 535, 542 (K.C. Ct. App. 1931). The testimony itself may be relevant and competent to the lawsuit. It is the witness who is incompetent to give the testimony. *See also In re McMenemy's Guardianship*, 307 Mo. 98, 270 S.W. 662 (1925).

124. Failure to refer to the statute in the objection by name may result in waiver. In *Mann v. Balfour*, 187 Mo. 290, 86 S.W. 103 (1905), the defendant made the following objection:

May it please the court, we object to this witness being introduced, because she is incompetent, for the reason that she is an interested party. The deceased is dead, and the heir at law—the other heir at law is dead, and she is the only surviving heir, and, they being dead, she can not testify against the interests of the one that is dead, and the will they seek to establish takes from the heirs of the heir at law, that is, it takes the property that belongs to the heir at law; takes it and gives it to this one—this witness—under the will; and for that reason she is incompetent to testify.

*Id.* at 299, 86 S.W. at 105. The court held that this objection was insufficient because it was based merely on the witness' interest instead of her disqualification under the statute. A witness is not disqualified solely for interest. *See text accompanying notes 4, 5 supra.* In *Birdsong v. Estate of Ladwig*, 314 S.W.2d 471 (Spr. Mo. App. 1958), the following objection was held insufficient for the same reason: "We object to the testimony of this witness because of the relation between him and the deceased." *Id.* at 474.

the administration proviso, the objection should state that an executor or administrator is a party to the suit. An objection failing to include this fact may be held insufficient to prevent a waiver.<sup>125</sup>

The objection must be timely. A general objection to the competency of the survivor at the outset of his testimony is ineffective.<sup>126</sup> In *Birdsong v. Estate of Ladwig*,<sup>127</sup> a suit for the value of personal services allegedly rendered to decedent, plaintiff testifying in his own behalf gave his name and address. Defendant then stated: "We object to any further testimony on any matters to the claim or contract or any part of his claim because of the fact that Edmund D. Ladwig is deceased and under the dead man's statute this man can't testify."<sup>128</sup> This objection was properly overruled as premature and overly broad because, although the administration proviso excluded plaintiff's testimony as to events which occurred prior to the probate of the will, plaintiff was competent to testify concerning subsequent events.<sup>129</sup> For similar reasons counsel is not allowed to carry an objection,<sup>130</sup> absent agreement by the opposing party or the court that the objection will be treated as applicable to subsequent testimony.

The protected party has no right to allow what he considers to be incompetent testimony to go without objection and then, upon discovering that it is unfavorable, move for its exclusion.<sup>131</sup> Failure to object to a few specific answers made by an incompetent witness, however, does not necessarily waive the survivor's incompetency. *Thomas v. Fitzgerald's Estate*<sup>132</sup> was a suit to recover for household services performed for the decedent. The plaintiff took the stand in his own behalf and testified to his name, age, and that he had lived with the deceased 10 years. Proper objection was then made to the plaintiff's subsequent testimony on the ground that the administration proviso made the plaintiff incompetent to testify concerning events occurring prior to the probate of the decedent's will. The plaintiff had testified without objection on a matter within his incompetency, namely the length of his residency with the deceased; nevertheless, the court found that the subsequent objections were timely and held that there had been no waiver of the disqualification.<sup>133</sup>

125. *Kneuvén v. Berliner's Estate*, 54 S.W.2d 494 (K.C. Mo. App. 1932). Cf. *Birdsong v. Estate of Ladwig*, 314 S.W.2d 471 (Spr. Mo. App. 1958).

126. *Burgdorf v. Keeven*, 351 Mo. 1072, 174 S.W.2d 816 (1943); *In re McMenamy's Guardianship*, 307 Mo. 98, 270 S.W. 662 (1925); *Gantz v. American National Bank*, 420 S.W.2d 8 (K.C. Mo. App. 1967); *Fellows v. Farmer*, 379 S.W.2d 842 (Spr. Mo. App. 1964); *Deichman v. Aronoff*, 296 S.W.2d 171 (St. L. Mo. App. 1956); *Schwalbert v. Konert*, 230 Mo. App. 811, 76 S.W.2d 445 (St. L. Ct. App. 1934); *B. F. Goodrich Rubber Co. v. Bennett*, 222 Mo. App. 510, 281 S.W. 75 (K.C. Ct. App. 1926); *Burns v. Polar Wave Ice & Fuel Co.*, 187 S.W. 145 (St. L. Mo. App. 1916); *Tremain v. Dyott*, 161 Mo. App. 217, 142 S.W. 760 (Spr. Ct. App. 1912); *Hall v. Smith*, 149 Mo. App. 379, 130 S.W. 449 (Spr. Ct. App. 1910). Cf. *City of St. Joseph ex rel. Forsee v. Baker*, 86 Mo. App. 310 (K.C. Ct. App. 1900).

127. 314 S.W.2d 471 (Spr. Mo. App. 1958).

128. *Id.* at 474.

129. *Id.* at 476.

130. *Id.* at 476.

131. *Mann v. Balfour*, 187 Mo. 290, 304, 86 S.W. 103, 106 (1905).

132. 297 S.W. 425 (Spr. Mo. App. 1927).

133. *Id.* at 428.

Beyond a certain point, however, delay in objecting does constitute a waiver.<sup>134</sup> Most reported cases involving delayed objections have resulted in a waiver of the witness' incompetency.<sup>135</sup> Those cases where the court has declined to find a waiver usually involved situations where the survivor answered only a few questions before a proper objection was made.<sup>136</sup> The trial court has some discretion in this area, but in general, the objection should be made at the earliest possible opportunity.<sup>137</sup>

## 2. Cross Examination

When an incompetent witness is permitted to testify over the protected party's proper and timely objection, the protected party has the right to cross-examine the witness on the matters covered in the direct examination without waiving his earlier objection. This is illustrated by *Johnston v. Johnston*,<sup>138</sup> a suit to establish a resulting trust of real property held by plaintiffs' stepfather. Plaintiffs contended that the stepfather purchased the land with their mother's money; as heirs of the mother, they claimed to have inherited the land. Over the plaintiffs' objections, the trial court allowed the stepfather to testify that the money in question was his money which he had placed in the mother's custody for the purpose of purchasing the land. Plaintiffs then cross-examined the stepfather as to his prior inconsistent statement that the money had been the mother's savings. Judgment was entered for the stepfather. The court of appeals reversed, holding that the stepfather was an incompetent witness under the transactions proviso to testify as to his dealings with the mother.<sup>139</sup> The plaintiffs' cross-examination, limited to matters contained in the examination-in-chief, did not waive the disqualification.

Cross-examination of the survivor on matters not touched on in the direct examination which are excludable under the statute, however, does waive the incompetency of the survivor.<sup>140</sup> In *Moore v. Adams' Estate*,<sup>141</sup> plaintiff

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134. *Upshaw v. Latham*, 486 S.W.2d 656 (St. L. Mo. App. 1972) (20 questions prior to objection); *State ex rel. Community Heat & A. C. Co. v. Schwartz*, 452 S.W.2d 243 (St. L. Mo. App. 1970) (testified in detail); *In re Reichelt's Estate*, 179 S.W.2d 119 (St. L. Mo. App. 1944) (testified at length); *Norvell v. Cooper*, 155 Mo. App. 445, 134 S.W. 1095 (St. L. Ct. App. 1911) (considerable progress in testimony).

135. Cases cited note 134 *supra*, note 137 *infra*.

136. *Kneuen v. Berliner's Estate*, 54 S.W.2d 494 (K.C. Mo. App. 1932) (three questions); *Thomas v. Fitzgerald's Estate*, 297 S.W. 425 (Spr. Mo. App. 1927) (one question). Cf. *Stuyvaert v. Arnold*, 122 Mo. App. 421, 99 S.W. 529 (St. L. Ct. App. 1907).

137. *In re Reichelt's Estate*, 179 S.W.2d 119 (St. L. Mo. App. 1944); *People's Bank of Queen City v. Aetna Cas. & Sur. Co.*, 225 Mo. App. 1113, 40 S.W.2d 535 (K.C. Ct. App. 1931); *Markowitz v. Markowitz*, 290 S.W. 119 (K.C. Mo. App. 1927).

138. 173 Mo. 91, 73 S.W. 202 (1903).

139. *Id.* at 121, 73 S.W. at 211.

140. *Moore v. Adams' Estate*, 303 S.W.2d 936 (Mo. 1957); *Hegger v. Kausler*, 303 S.W.2d 81 (Mo. 1957); *McCune v. Goodwillie*, 204 Mo. 306, 102 S.W. 997 (1907); *Simmon v. Marion*, 227 S.W.2d 127 (K.C. Mo. App. 1950); *Johnson v. Dur-Est, Inc.*, 224 S.W.2d 611 (K.C. Mo. App. 1949); *Bussen v. Del Commune*, 199 S.W.2d 13 (St. L. Mo. App. 1947). Cf. *Lohnes v. Baker*, 156 Mo. App. 397, 137 S.W. 282 (Spr. Ct. App. 1911).

141. 303 S.W.2d 936 (Mo. 1957).

sued to recover the value of labor allegedly performed in repairing the decedent's property pursuant to an oral contract with decedent. Plaintiff took the stand in his own behalf at trial, but defendant's objections under the administration proviso limited plaintiff's direct testimony to identification of himself and certain books of account. On cross-examination, however, the defendant examined the plaintiff as to the type of repairs made and his agreement with the deceased. The court held that the defendant had thereby waived the statutory disqualification.<sup>142</sup>

The waiver arising from cross-examination does not make the survivor competent to testify for all purposes, but extends only to the new matters covered in the cross-examination.<sup>143</sup>

### 3. Direct Examination

If the protected party makes the survivor his own witness and elicits testimony which could have been excluded under the Dead Man's Statute, he waives the survivor's disqualification.<sup>144</sup> This rule serves to prevent the protected party from eliciting only favorable testimony. Once any portion of the survivor's excludable testimony is offered as evidence, fairness requires that he be permitted to tell his whole story.<sup>145</sup> The waiver makes the survivor competent for all purposes.<sup>146</sup>

There is no reported case in Missouri involving a direct examination of the survivor by the protected party which touched only matters on which the survivor was competent to testify. Whether this waives the statute is still an open question. In several cases where direct examination of the survivor did touch matters excludable under the statute, the general waiver rule was stated without any mention of a subject matter requirement.<sup>147</sup> One case stated that the statute was inapplicable where the survivor is called as

142. *Id.* at 939.

143. Cases cited note 140 *supra*. An older line of cases now rejected in Missouri held that cross-examination on new matters made the survivor competent for all purposes. See, e.g., *Rauch v. Metz*, 212 S.W. 357 (Mo. 1919); *Reitz v. O'Neil*, 2 S.W.2d 178 (St. L. Mo. App. 1928).

144. *In re Trautmann's Estate*, 300 Mo. 314, 254 S.W. 286 (1923).

145. *Id.* at 322, 254 S.W. at 288.

146. *In re Trautmann's Estate*, 300 Mo. 314, 254 S.W. 286 (1923); *Strode v. Frommeyer*, 115 Mo. App. 220, 91 S.W. 167 (St. L. Ct. App. 1905). This waiver may also extend to other disqualified witnesses. The taking of one survivor's deposition or use of his prior recorded testimony waives the incompetency of all other similarly situated, disqualified witnesses. *Martin v. Norton*, 497 S.W.2d 164 (Mo. 1973) (prior recorded testimony); *Baker v. Baker*, 363 Mo. 318, 251 S.W.2d 31 (1952) (deposition).

147. *Starks v. Lincoln*, 316 Mo. 483, 291 S.W. 132 (1927); *Strode v. Frommeyer*, 115 Mo. App. 220, 91 S.W. 167 (St. L. Ct. App. 1905); *Tucker v. Gentry*, 93 Mo. App. 655, 67 S.W. 723 (K.C. Ct. App. 1902). Cf. *Ashley v. Williams*, 365 Mo. 286, 281 S.W.2d 875 (1955); *F. Hattersley Brokerage & Comm. Co. v. Hume*, 193 Mo. App. 120, 182 S.W. 93 (St. L. Ct. App. 1916); *Hoehn v. Struttman*, 71 Mo. App. 399 (St. L. Ct. App. 1897).

a witness by the other side.<sup>148</sup> Such a construction of the waiver rule, however, would frequently cause the protected party to forego calling the survivor as a witness for any purpose, rather than waive the survivor's incompetency. As a result, the protected party would be denied the use of a portion of the survivor's testimony, even though it is not excludable by the statute.

The protected party should be allowed to examine the survivor on matters not excludable under the statute without waiving his incompetency.<sup>149</sup> The aim of the statute is to put the parties on an equality.<sup>150</sup> This would be more fully accomplished by allowing both parties an equal opportunity to obtain testimony from all witnesses competent to testify on the matters in issue. The recent case of *Saupe v. Kertz* held that an administrator's motion to produce documents did not waive the statute where the subject matter of the information contained in the requested documents was not excludable under the statute.<sup>151</sup> This principle should carry over to waiver by direct examination. Because Missouri has no definite case on this subject, however, the protected party's direct examination of the survivor may waive the statute regardless of the subject matter of the direct examination.

#### F. Waiver Arising From A Prior Trial

A waiver of incompetency made, in whatever manner, at one stage of the trial is a waiver during the entire proceeding.<sup>152</sup> The waiver extends to another trial of the same cause, a trial de novo, and to subsequent proceedings generally between the parties on the same cause of action.<sup>153</sup> As *Causer*

148. *Conrey v. Pratt*, 248 Mo. 576, 587, 154 S.W. 749, 752 (1913). The court's statement cannot be taken literally. If the statute does not apply at all, the common law disqualification for interest would make the witness incompetent. The court must have meant that the transactions proviso of the statute is inapplicable where the survivor is called as a witness by the protected party.

149. Presumably, if the survivor is reliable for the purposes for which the protected party calls him, he is reliable for all purposes.

150. *Ess v. Giffith*, 139 Mo. 322, 40 S.W. 930 (1897).

151. *Saupe v. Kertz*, — S.W.2d —, — (Mo. App., D. St. L. 1974).

152. *Ess v. Griffith*, 139 Mo. 322, 40 S.W. 930 (1897).

153. *Edwards v. Durham*, 346 S.W.2d 90, 99 (Mo. 1961). Where, for example, the protected party has called the survivor as his witness in probate, the resulting waiver will carry over making the survivor a competent witness in a circuit court trial de novo. *Morley v. Prendiville*, 316 Mo. 1094, 295 S.W. 563 (1927); *Starks v. Lincoln*, 316 Mo. 483, 291 S.W. 132 (1927); *In re McMenemy's Guardianship*, 307 Mo. 98, 270 S.W. 662 (1925); *In re Trautmann's Estate*, 300 Mo. 314, 254 S.W. 286 (1923); *F. Hattersley Brokerage & Comm. Co. v. Hume*, 193 Mo. App. 120, 182 S.W. 93 (St. L. Ct. App. 1916); *Hoehn v. Struttman*, 71 Mo. App. 399 (St. L. Ct. App. 1897). The source of the waiver is irrelevant. It could originate in the taking of the survivor's discovery deposition in connection with lower court proceedings. *Edwards v. Durham*, 346 S.W.2d 90 (Mo. 1961); *In re Imboden's Estate*, 111 Mo. App. 220, 86 S.W. 263 (St. L. Ct. App. 1905). It can also arise from the earlier trial itself through a failure to make proper objection to the survivor's direct testimony. *Oliver v. McFarland*, 282 S.W. 735 (Spr. Mo., App. 1926); *Belch v. Roberts*, 191 Mo. App. 243, 177 S.W. 1062 (K.C. Ct. App. 1915); *Jones v. Prudential Ins. Co.*, 173 Mo. App. 1, 155 S.W. 1106 (St. L. Ct. App. 1913); *Norvell v. Cooper*, 155 Mo. App. 445, 134 S.W. 1095 (St. L. Ct. App. 1911). Cf. *Lang v. Wishart*, 217 Mo. App. 119, 273 S.W.

*v. Wilmoth*<sup>154</sup> indicates, however, the waiver does not extend to a different suit between the same parties. There an executor sued to establish a vendor's lien on certain real property. In an earlier suit to cancel a deed to the same property for reasons of mistake, the executor's decedent had taken the defendant's deposition, and the executor had used parts of it at the trial. The decedent had died before the earlier case went to trial. The defendant contended that the use of the deposition in the prior suit should carry over to waive his incompetency in the current litigation. *Causer* held that there was no waiver because the earlier suit involved a different cause of action and different issues.<sup>155</sup>

For the waiver to carry over there must also be an identity of parties between the two suits, even though both involve the same subject matter. In *Edwards v. Durham*,<sup>156</sup> an executor sued to recover money the decedent allegedly had loaned to defendant. Defendant argued that the executor's conduct in a prior lawsuit waived the defendant's incompetency. The prior lawsuit was brought by the defendant against McDonald, a residuary legatee of the estate, to establish a resulting trust covering property in the estate. The executor had been McDonald's attorney in the prior lawsuit and had taken the defendant's deposition, parts of which were relevant to the transactions at issue in the present suit to recover the loan. The defendant contended that the prior waiver carried over to waive his incompetency in the present litigation. The court, however, held that there was no waiver because, although the executor acted as counsel in the prior suit, he had not been a party either personally or in his representative capacity.<sup>157</sup> Nor was he acting as McDonald's representative in the present suit.<sup>158</sup> The relationship between the residuary legatee of an estate and the executor of that estate was not sufficiently close to make McDonald's taking of the deposition in the prior suit binding on the executor in the later litigation.<sup>159</sup> The defendant remained incompetent under the administration proviso to testify about transactions occurring prior to the probate of the decedent's will.<sup>160</sup> The

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768 (St. L. Ct. App. 1925) (no waiver where protected party not present in probate to object to the survivor's testimony). Or in cross-examination of the survivor. *Moore v. Adams' Estate*, 303 S.W.2d 936 (Mo. 1957); *Markowitz v. Markowitz*, 290 S.W. 119 (K.C. Mo. App. 1927); *Tierney v. Hannon's Ex'r*, 81 Mo. App. 488 (St. L. Ct. App. 1899). Cf. *Meffert v. Lawson*, 315 Mo. 1091, 287 S.W. 610 (1926); *Ables v. Ackley*, 133 Mo. App. 594, 113 S.W. 698 (K.C. Ct. App. 1908).

154. 142 S.W.2d 777 (St. L. Mo. App. 1940).

155. *Id.* at 780. *Causer* involved two suits having different causes of action. Where the same cause of action and issues are involved, it is still an open question whether taking a survivor's deposition while both original parties are alive will, on the death of the other party, be a waiver of the statute binding on the decedent's executor.

156. 346 S.W.2d 90 (Mo. 1961). See also *Crow v. Crow*, 124 Mo. 120, 100 S.W. 1123 (St. L. Ct. App. 1907) (one additional party added).

157. *Edwards v. Durham*, 346 S.W.2d 90, 99 (Mo. 1961).

158. *Id.* at 100.

159. *Id.*

160. *Id.*

waiver did not carry over from the prior suit because there was no identity of parties.

If the protected party actually uses the survivor's recorded testimony from a prior trial in a later trial, there is a waiver.<sup>161</sup> In addition, use of the survivor's prior testimony in connection with a motion for summary judgment can also result in a waiver. The court found such a waiver in *Prentzler v. Schneider*.<sup>162</sup> *Prentzler* was a wrongful death action arising out of a highway collision in which both drivers were killed. Mrs. Prentzler, a passenger in one of the cars, brought the suit to recover for the wrongful death of her husband against the estate of Mr. Schneider, the driver of the other vehicle involved in the accident. Mrs. Prentzler was barred under the transactions proviso from testifying concerning the accident because Mr. Schneider could have contradicted her version of the accident had he lived. The defendant administratrix, Mrs. Schneider, moved for summary judgment. In support of her motion Mrs. Schneider offered the transcript of a prior trial wherein Mrs. Schneider had sued the estate of Mr. Prentzler to recover for the wrongful death of her husband. The transcript contained Mrs. Prentzler's testimony concerning the fatal accident. The court held that this use of Mrs. Prentzler's prior testimony in conjunction with the motion for summary judgment waived the Dead Man's Statute,<sup>163</sup> and Mrs. Prentzler became competent as a general witness in the case.<sup>164</sup>

#### IV. CONCLUSION

The Missouri Dead Man's Statute was enacted to protect estates from false claims based on uncontradicted, perjured testimony.<sup>165</sup> The living and the dead were to be placed in substantial equality by excluding the testimony of the living party.<sup>166</sup> Instead of achieving equality, however, the statute frequently gave an unfair advantage to the decedent's representatives. Exclusion of the survivor's testimony often prevented recovery on

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161. *Martin v. Norton*, 497 S.W.2d 164 (Mo. 1973); *Lampe v. Franklin American Trust Co.*, 339 Mo. 361, 96 S.W.2d 710 (1936). Cf. *Central Bank of Kansas City v. Thayer*, 184 Mo. 61, 82 S.W. 142 (1904); *In re Whitlow's Estate*, 184 Mo. App. 229, 167 S.W. 463 (St. L. Ct. App. 1913) (no waiver where report containing survivor's prior testimony was used to establish *res judicata*.)

The cases seem to imply that the prior recorded testimony must touch on matters within the survivor's incompetency for a waiver to occur. See *Lampe v. Franklin American Trust Co.*, 339 Mo. 361, 96 S.W.2d 710 (1936), where the court stated: "We, therefore hold that, by offering plaintiff's former testimony (about the transaction here at issue) as evidence in this case, at the first trial thereof, defendants have waived his competency herein as a witness as to the whole of the transaction." *Id.* at 373, 96 S.W.2d at 716 (emphasis added).

162. 411 S.W.2d 135 (Mo. En Banc 1966).

163. *Id.* at 142. Judge Finch's dissent criticized the majority opinion for confronting the protected party with a Hobson's choice in deciding whether to utilize summary judgment procedure. See Morgan, *Dead Man's Statute—Waiver of Incompetency*, 32 Mo. L. Rev. 397 (1967).

164. *Id.* at 142. See also *Lampe v. Franklin American Trust Co.*, 339 Mo. 361 at 373, 96 S.W.2d 710 at 716 (1936).

165. See note 6 *supra*.

166. See note 6 *supra*.

legitimate claims. In an attempt to mitigate hardships arising under the statute, the courts developed an extensive doctrine of waiver. This has further complicated the statute and created pitfalls for the unwary litigant.<sup>167</sup>

A judicially imposed doctrine of waiver is not the proper solution to the problems caused by the Missouri Dead Man's Statute. If the Dead Man's Statute produces inequitable results, the statute should itself be modified. Protection of estates does not require an inflexible disqualification of the living. Many jurisdictions have no dead man's statute.<sup>168</sup> If estates do require additional protection, several alternate safeguards are available.<sup>169</sup> Until statutory reform comes, however, it will remain a matter of practical importance to be fully aware of the waiver problems associated with the Dead Man's Statute.

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167. *See, e.g.*, *Prentzler v. Schneider*, 411 S.W.2d 135 (Mo. En Banc 1966).

168. *E.g.*, California.

169. The trial court may be given discretion to admit the survivor's testimony if it is sufficiently credible and important. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2251 (1956). Another alternative permits the survivor to testify, but provides that his testimony will not support a judgment unless corroborated by other evidence. *See, e.g.*, N.M. STAT. ANN. § 20-2-5 (1953). A third variation admits not only the survivor's testimony, but also any writings of the deceased or evidence of the deceased's oral statements bearing on the controversy. *See, e.g.*, N.H. REV. STAT. ANN. § 516:25 (1953). *See also* C. McCORMICK, EVIDENCE § 65 (2nd ed. 1972); Ray, *Dead Man's Statutes*, 24 OHIO ST.L.J. 89 (1963).