§ 601.3 The Dead Man's Rule: History

In the late 19th Century, the Texas Legislature abandoned the traditional common-law rule that disqualified interested persons from testifying.1 But it could not bring itself to abandon tradition completely. It clung to one remnant of the rule, retaining what became commonly known as the Dead Man's Statute. It provided that:

> [i]n actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify by the opposite party; and the provisions of this article shall extend to and include all actions by or against heirs or representatives of a decedent arising out of any transaction with such decedent.2

The Dead Man's Statute aimed at preventing one party from gaining an unfair advantage over an opponent by testifying to conversations and transactions with the deceased, which the deceased was, of course, unable to controvert.3 But as commentators unanimously agreed,4 the Dead Man's Statute was an ill-conceived means of "insuring fairness between litigants."5 To be sure, the statute barred an unscrupulous party from testifying personally about statements by or transactions with a decedent, thereby making it more difficult to prove a fraudulent claim against his estate. But it did not prevent such a person from suborning perjurious testimony by a third person. More important, the Dead Man's Statute applied to honest as well as mendacious claimants. Therefore, it often impeded the prosecution of bona fide claims against an estate by honest claimants unfortunate enough to have entered into an agreement with the decedent without an outside witness or admissible written evidence.6

The serendipitous results occasioned by the Dead Man's Statute generated significant costs. Meanwhile, skepticism grew regarding the benefits produced by the statute. Lawmakers and commentators increasingly took the view that that jurors are capable of assessing the testimony of interested witnesses. This was evidenced by the universal repeal of rules rendering interested persons incompetent to testify. Critics of the Dead Man's Statute argued that it too should be discarded as a vestigial rule from a bygone era of evidence law. In the years leading up to the promulgation of the rules of evidence, the Texas Supreme Court noted these criticisms,7 even going so far as to deride the Dead Man's Statute as "anachronistic."8

In response to these criticisms, and after much debate,9 the Liaison Committee that drafted the original civil rules of evidence recommended abolition of the Dead Man's Statute. Adoption by the Supreme Court of this recommendation would have brought Texas into line with the great majority of states.10 The Supreme Court, however, chose not to follow the Liaison Committee's recommendation. Instead, it opted only to narrow the scope of the Dead Man's Statute. While the statutory version prohibited testimony by a party (unless called by the opposite party) regarding any "transaction" with or "statement" by the decedent, the Supreme Court's version of Rule 601(b) prohibited testimony by a party (unless called by the opposite party) only as to "uncorroborated oral statements" by the decedent.

The decision to delete "transactions" with the decedent from the ambit of Rule 601(b) was still significant. Although the exact meaning of "transactions" was a source of some dispute,11 it clearly encompassed a wide range of conduct.12 For example, in a suit to probate an allegedly lost will, the old Dead Man's Statute rendered inadmissible testimony by its proponent that she was present when the decedent executed the will, and that she saw and read the will at that time.13 Similarly, a man suing an estate to recover his interest in partnership property was precluded from testifying that he had not seen and did not sign an agreement releasing his interest in the property to the deceased.14 In other cases decided under the old Dead Man's Statute, courts excluded a plaintiff's description of the conduct of the deceased driver of the car in which she was riding15 and testimony by a woman as to the fact of her marriage to the deceased.16

Each of these cases would have been decided differently had Rule 601(b) been in effect. Each one involved testimony about a transaction with—but not about an oral statement made by—the deceased. All that remains in Rule 601(b) is a proscription against testimony regarding oral statements17 by the decedent, and then only if the statements are uncorroborated.18

Beyond this change, however, the Supreme Court's version of Rule 601(b) did not alter the contours of the Dead Man's Statute. Therefore, most pre-Rules caselaw retains its precedential value, and the same basic principles that governed the Dead Man's Statute remain applicable to Rule 601(b).

Indeed, a substantial part of the Supreme Court's version of Rule 601(b) was lifted from its statutory predecessor. As a result, had an award ever been given for the most poorly-drafted rule of evidence, Rule 601(b) would have won hands down. The 2015 restyling of the rules produced a very different text. Rule 601(b) now sets forth the Dead Man's Rule in a much clearer fashion, but its substance remains as problematic as ever.

1
Law of May 19, 1871, ch. 105, § 1, 1871 Tex. Gen. Laws 108, 6 H. Gammel, Laws of Texas 1010 (1898).

2
Tex. Rev. Civ. Stat. Ann. art. 3716 (repealed as to civil actions, effective Sept. 1, 1983; repealed as to criminal cases, effective Sept. 1986).

3
In re Estate of Watson, 720 S.W.2d 806, 807 (Tex. 1986); Lewis v. Foster, 621 S.W.2d 400, 402 (Tex. 1981).

4
See, e.g., McCormick on Evidence § 65 (7th ed.); 2 Wigmore, Evidence § 578 (Chadbourn rev. 1979).

5
Adams v. Barry, 560 S.W.2d 935, 937 (Tex. 1978).

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McCormick on Evidence § 65 (7th ed.).

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E.g., Lewis v. Foster, 621 S.W.2d 400, 402 (Tex. 1981); Adams v. Barry, 560 S.W.2d 935, 937 (Tex. 1978).

8
Lewis v. Foster, 621 S.W.2d 400, 402 (Tex. 1981).

9
Senate Interim Study on Rules of Evidence File, vol. 4, transcript of Feb. 26, 1982 mtg., pp. 128–47; transcript of Mar. 19, 1982 mtg., pp. 8–15, 27–33, 237–50.

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Only a small minority of the approximately 45 jurisdictions that have adopted codes of evidence patterned on the Federal Rules of Evidence retain some version of the Dead Man's Statute. See 3 McLaughlin, Weinstein's Federal Evidence § 601.05[1][c], [e]; Wright and Miller's Federal Practice and Procedure, Evidence § 6001.

11
Compare Grant v. Griffin, 390 S.W.2d 746 (Tex. 1965) (trial court properly excluded testimony of automobile passenger describing deceased driver's speeding, drinking, and refusal to let passenger out of car) with Harper v. Johnson, 162 Tex. 117, 345 S.W.2d 277 (1961) (trial court erred in excluding testimony of surviving driver of automobile-truck collision describing physical situation and movements of the vehicles before and at the time of the accident).

12
See, e.g., Wilkinson v. Clark, 558 S.W.2d 490, 492 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.) ("The words 'transaction with' includes [sic] 'Every method by which one person can derive impressions or information from the conduct, condition or language of another.'").

13
Adams v. Barry, 560 S.W.2d 935, 937–38 (Tex. 1978).

14
Bauer v. Riggs, 649 S.W.2d 347, 350 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

15
Grant v. Griffin, 390 S.W.2d 746, 747–48 (Tex. 1965) (conduct included speeding, intoxication, and refusal to let plaintiff out of car).

16
Day v. Day, 421 S.W.2d 703, 706 (Tex. Civ. App.—Austin 1967, no writ); Antonopoulos v. Woolsey, 392 S.W.2d 194, 196 (Tex. Civ. App.—El Paso 1965, no writ).

17
See Tuttle v. Simpson, 735 S.W.2d 539, 542 (Tex. App.—Texarkana 1987, no writ) ([former Civil] Rule 601(b) applies to oral statements accompanied by gestures indicating boundary of property).

18
See § 601.4 infra.

See Sawyer v. Lancaster, 719 S.W.2d 346, 349–50 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.) (affidavit filed by defendant in opposition to motion for summary judgment relating decedent's expressions of intent regarding division of his estate held inadmissible because no corroboration was produced).