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the standard will probably enjoy a long and productive career in our country. But realizing the enhancement of the economy by business' reliance and action on anticipated gains, the courts should continue to liberalize the requirements for satisfying the standard. This may be accomplished without invading the principles involved by an increased reliance on available economic data and a more sympathetic attitude towards efforts for progress and achievement.

RICHMOND BERNHARDT, JR.

Evidence—The Dead Man's Statute—Personal Transaction

In the recent case of *Hardison v. Gregory*¹ the North Carolina Supreme Court once again had before it the problem of deciding whether a particular fact situation constituted a "personal transaction or communication" between an interested witness and a deceased person under N. C. G. S. § 8-51, commonly referred to as "the dead man's statute."²

It should be noted that the statute does not disqualify all witnesses or all testimony. A very good analysis of the statute was made by Justice Ervin in the case of *Peek v. Shook*³ as follows:

"This statute does not render the testimony of a witness incompetent unless these four questions require an affirmative answer:

"1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action,⁴ or (c) a person from, through or under whom such a party or interested person derives his interest or title?

¹ 242 N. C. 324, 88 S. E. 2d 96 (1955). See Case Law Survey, 34 N. C. L. REV. 53 (1955).

² N. C. GEN. STAT. § 8-51. "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 a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness in his own behalf or person, or the committee of a lunatic, or the person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication."

Exclusionary statutes of this type are in effect in all but three states: Connecticut, Massachusetts, and Rhode Island. In New Mexico, Oregon and Virginia, the interested party may testify, but his testimony uncorroborated is insufficient to support a recovery. 2 WIGMORE, EVIDENCE § 578 (3rd ed. 1940).

³ 233 N. C. 259, 63 S. E. 2d 542 (1951). See also: *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043 (1890) and STANSBURY, EVIDENCE § 66 (1946).

⁴ "The interest which determines the competency of a witness under the statute is a present direct pecuniary interest." *Sanderson v. Paul*, 235 N. C. 56, 61, 69 S. E. 2d 156, 160 (1952). See also: *Price v. Askins*; 212 N. C. 583, 194 S. E. 284 (1937); *Burton v. Styers*, 210 N. C. 230, 186 S. E. 248 (1936); *In re Gorham*, 177 N. C. 271, 98, S. E. 717 (1919).

"2. Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest?"

"3. Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic?"

"4. Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic?"

"Even in the instances where these four things occur, the testimony of the witness is nevertheless admissible under the exception specified in the statute itself if the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic is examined on his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction or communication."⁵

The basic reason for the rules laid down by the statute seems to be to prevent fraud, the idea being that since the deceased person is no longer able to testify as to what happened or what was said, it would be easy for the living party to give false testimony without fear of contradiction. "Death having closed the mouth of the deceased, the law closed the mouth of the other except only where the personal representative of the deceased opens up the matter by testifying himself or putting in the testimony of the deceased."⁶

It has been stated that "courts are not disposed to extend the disqualification of a witness under the statute to those not included in its express terms."⁷ Testimony as to any matter other than a transaction or communication with the deceased is not prohibited by the statute;⁸ nor is testimony as to transactions or communications with third persons prohibited even though they may involve or throw light upon transactions with deceased persons since the third persons, being disinterested, can be called to contradict any misstatement.⁹ Testimony of an interested witness on behalf or in favor of the deceased person is not pro-

⁵ 233 N. C. at 261, 63 S. E. 2d at 543.

⁶ *Sutton v. Wells*, 175 N. C. 1, 4, 94 S. E. 688, 689 (1917). See also: *Hall v. Holloman*, 136 N. C. 35, 48 S. E. 516 (1904); *McCanless v. Reynolds*, 74 N. C. 301 (1875).

⁷ *Sanderson v. Paul*, 235 N. C. 56, 59, 69 S. E. 2d 156, 158 (1952); *Hardison v. Gregory*, 242 N. C. 324, 327, 88 S. E. 2d 96, 98 (1955).

⁸ *In re the Will of Bowling*, 150 N. C. 507, 64 S. E. 368 (1909); *Whitesides v. Green*, 64 N. C. 307 (1870).

⁹ *Watts v. Warren*, 108 N. C. 514, 13 S. E. 232 (1890); *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043 (1890); *Cary v. Cary*, 104 N. C. 175, 10 S. E. 156 (1889).

hibited;¹⁰ nor does G. S. § 8-51 prevent an interested party who is merely an observer from testifying as to acts of the deceased—i.e., as to independent facts based upon independent knowledge, not derived from any personal transaction or communication with the deceased.¹¹

In the principal case the plaintiff, in an action for criminal conversation and alienation of affections against the co-administrators of the deceased, was allowed to testify, over the objections of the defendants, that he had: (1) walked into his own house at night and found the deceased standing in his living room close to the door of the bedroom in which his wife was dressing; (2) seen the deceased and his wife leave a cabin owned by the deceased and drive off in the deceased's Cadillac car; (3) looked through the window of deceased's office and seen the deceased hugging and kissing his wife; and (4) seen the deceased and his wife come out of a cabin and get into deceased's Cadillac, chased them, knocked out the windows of the car with a hatchet, and struck the deceased with the hatchet.

The court held that the testimony relating to what the witness had seen the deceased do was competent "because he was testifying to independent facts based upon independent knowledge, not derived from any personal transaction or communication with the deceased."¹² This much of the holding is certainly in accord with previous decisions in North Carolina¹³ and in other jurisdictions.¹⁴ However, the court disagreed as to the admissibility of the testimony in regard to the action of the plaintiff in breaking the windows of the car and hitting the deceased in the face with a hatchet. The majority held that this was admissible as testimony of independent acts, while the concurring judges¹⁵ considered this as testimony concerning a "personal transaction" between the plaintiff and the deceased.

Exactly what may or may not constitute a "personal transaction" under any given set of facts is often hard to determine. The courts have been reluctant to formulate any specific criteria which could be followed consistently and apparently have been satisfied to deal with each situation as the problem arose. However, the court has said, "we think a fair test

¹⁰ *Reece v. Woods*, 180 N. C. 631, 105 S. E. 337 (1920); *Seals v. Seals*, 165 N. C. 409, 81 S. E. 613 (1914); *McFarland v. Dept. of Labor and Industries*, 188 Wash. 357, 62 P. 2d 714 (1936).

¹¹ *Wilder v. Medlin*, 215 N. C. 542, 2 S. E. 2d 549 (1939); *Worth v. Wrenn*, 144 N. C. 656, 57 S. E. 388 (1907); *Costen v. McDowell*, 107 N. C. 546, 12 S. E. 432 (1889); *McCall v. Wilson*, 101 N. C. 598, 8 S. E. 225 (1888).

¹² 242 N. C. at 329, 88 S. E. 2d at 99.

¹³ See note 11 *supra*.

¹⁴ *Stiff v. Cobb*, 126 Ala. 381, 28 So. 402 (1900); *First Nat. Bank v. Warner*, 17 N. D. 76, 114 N. W. 1085 (1908); *Hanson v. Fiesler*, 49 S. D. 442, 207 N. W. 449 (1926).

¹⁵ Three judges concurred in the result because the same facts were testified to by a witness for the defendants.

in undertaking to ascertain what is a 'personal transaction or communication' with the deceased about which the other party to it cannot testify is to inquire whether, in case the witness testify falsely as to what transpired between them, the deceased, if living, could contradict it of his own knowledge";¹⁶ and, "the transactions contemplated by the statute and concerning which a party to an action is prohibited from being examined on his own behalf against the administrator of the deceased person are such transactions as are essential and material links in the chain establishing liability against the estate of such deceased person."¹⁷

Specifically, courts have held that testimony concerning "personal transactions" includes testimony as to the following: money due on contract,¹⁸ the existence of a partnership,¹⁹ marriage,²⁰ delivery of written instruments or other objects,²¹ and performance of personal services.²² Also, it has been held that the statute applies to actions in tort as well as on contract.²³ Among the tort situations which have been included within the statute as "personal transactions" are: accidents involving automobiles,²⁴ malpractice,²⁵ and assault.²⁶

¹⁶ *White v. Evans*, 188 N. C. 212, 213, 124 S. E. 194, 194 (1924). See also: *Yuritch v. Yuritch*, 139 N. J. Eq. 439, 51 A. 2d 901 (1947); *Tallman v. First Nat. Bank of Nev.*, 66 Nev. 248, 208 P. 2d 302 (1950); *Wilson v. Ervin*, 227 N. C. 396, 42 S. E. 2d 468 (1948); *Sherrill v. Wilhelm*, 182 N. C. 673, 110 S. E. 95 (1921); *In re Wind's Estate*, 27 Wash. 2d 421, 178 P. 2d 731 (1947).

¹⁷ *Davis v. Pearson*, 220 N. C. 163, 165, 16 S. E. 2d 655, 656 (1941). See also: *Boyd v. Williams*, 207 N. C. 30, 175 S. E. 832 (1934).

¹⁸ *George v. McManus*, 27 Cal. App. 414, 150 Pac. 73 (1915); *Stanton v. Helm*, 87 Miss. 287, 39 So. 457 (1905); *McMichael v. Pegram*, 225 N. C. 400, 35 S. E. 2d 174 (1945).

¹⁹ *Wingler v. Miller*, 223 N. C. 15, 25 S. E. 2d 160 (1943); *Gage v. Phillips*, 21 Nev. 150, 26 Pac. 60 (1891). *Contra*: *Turner v. Huggins*, 130 Tenn. 181, 169 S. W. 754 (1914).

²⁰ "If marriage is not a personal transaction between the contracting parties, what is it?" *Hopkins v. Bowers*, 111 N. C. 175, 179, 16 S. E. 1, 2 (1892). See also: *Smith v. Smith*, 187 Ga. 743, 2 S. E. 2d 417 (1939); *Catlett v. Chestnut*, 107 Fla. 498, 146 So. 241 (1933); *Berger v. Kirby*, 105 Tex. 611, 153 S. W. 1130 (1913).

²¹ *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579 (1903); *Lane v. Rogers*, 113 N. C. 171, 18 S. E. 117 (1893).

²² *Davidson v. Barden*, 139 N. C. 1, 51 S. E. 779 (1905); *Gray v. Cooper*, 65 N. C. 183 (1871); *Pancoast v. Eldridge*, 157 Okla. 195, 11 P. 2d 918 (1932). *Contra*: *Will of Fuller*, 190 Wis. 445, 209 N. W. 683 (1926).

²³ *Leavea v. Southern Ry.*, 266 Mo. 151, 181 S. W. 7, Annot. 1916D L. R. A. 810 (1915); *Boyd v. Williams*, 207 N. C. 30, 175 S. E. 832 (1934), commented on in Note, 13 N. C. L. Rev. 230 (1934). *Contra*: *Warfield Natural Gas Co. v. Clark*, 257 Ky. 724, 79 S. W. 2d 21 (1934).

²⁴ *Chapman v. Bruton, Inc.*, 325 Ill. App. 324, 60 N. E. 2d 125 (1945); *Wells v. Wildin*, 224 Iowa 913, 277 N. W. 308 (1938); *Fick v. Herman*, 159 Neb. 758, 68 N. W. 2d 622 (1955); *Boyd v. Williams*, 207 N. C. 30, 175 S. E. 832 (1934); *Strode v. Dyer*, 115 W. Va. 733, 177 S. E. 878 (1935); *Waters v. Markham*, 204 Wis. 332, 235 N. W. 797 (1937). *Contra*: *Rankin v. Morgan*, 193 Ark. 751, 102 S. W. 2d 552 (1937); *Kinsella v. Meyer's Adm'r*, 267 Ky. 508, 102 S. W. 2d 974 (1937); *Rost v. Kessler*, 49 N. Y. S. 2d 97 (1944). *But see*: *Kilmer v. Gustason*, 211 F. 2d 781 (5th Cir. 1954) (Plaintiff permitted to testify only to his own actions and movements of his own car).

²⁵ *Barnett v. Brand*, 165 Ky. 616, 177 S. W. 461 (1915).

²⁶ *Southern v. Belleau*, 203 Ky. 508, 262 S. W. 619 (1924); *Maciejczak v. Bartell*, 187 Wash. 113, 60 P. 2d 31 (1936).

It is apparent that any sort of action in which the deceased and the witness are involved can be called a "personal transaction" if the court so desires. At best, the distinction between what the court will hold to be a "personal transaction" in one situation and what it will hold not to be a "personal transaction" in another situation is very fine—and ordinarily the scales of justice are balanced very heavily toward the protection of the deceased, thus causing the doubtful case to be resolved against the surviving party.

The North Carolina Supreme Court, in the principal case, held that the act of the plaintiff in chasing the deceased, knocking out his car windows (with the deceased in the car with the doors locked), and hitting the deceased in the head with a hatchet was "an independent act." The court cited the cases of *Boyd v. Williams*²⁷ and *Davis v. Pearson*²⁸ and held that both cases were inapplicable. "It would seem that the ruling in these two cases was based on the fact that each plaintiff was a passenger in the car."²⁹ The essence of the facts in these cases was that the plaintiff was riding in a car with the deceased, and there was an accident in which the plaintiff was injured. In both cases testimony of the plaintiffs was ruled incompetent on the ground that it involved a personal transaction with a deceased person under G. S. § 8-51. The plaintiffs in these cases were not even allowed to testify that the deceaseds were driving at the time of the accident or to testify as to any facts that might indicate that they themselves were not driving.

The court in the principal case is obviously making a distinction between acts done *with* a deceased person and acts done *to* such a person, thereby placing an emphasis upon the "*personal*" relationship of the parties. Acts done *to* a deceased apparently are considered "independent acts," and not within the statutory exclusion. In the automobile cases, the testimony of the survivor relates to facts and circumstances of which he had knowledge because of his "personal" relationship with the deceased; while in the principal case, it could be said that there was no "personal" relationship between the plaintiff and the deceased.

Although there is a distinction with regard to the relationship of the parties in these cases (and thus with regard to the "personal" aspect of the phrase "personal transaction"), there is no such logical distinction as to the facts of each situation which constitutes the "transaction." It would seem that neither situation involves a "transaction." In a case involving a collision between an automobile and a truck, the Supreme Court of Arkansas stated, "Such is not the usual, common, or ordinarily accepted meaning of the word 'transaction.' The word is defined: 'A

²⁷ 207 N. C. 30, 175 S. E. 832 (1934).

²⁸ 220 N. C. 163, 16 S. E. 2d 655 (1941).

²⁹ *Hardison v. Gregory*, 242 N. C. 324, 329, 88 S. E. 2d 96, 99 (1955).

business deal; an act involving buying and selling; as the transactions on the exchange. Its synonym is negotiation.' (Webster's New International Dictionary, Second Edition)."³⁰

It would seem that the *reasoning* used by the North Carolina Court in the principal case, in view of the normally accepted understanding of the wording used in the "dead man's statute," is not in keeping with the better reasoned interpretation of the statute. However, the *holding* of the Court is a good one in view of the modern trend toward the admissibility of evidence. It would seem that this holding is in keeping with the normally accepted understanding of the wording of the statute and that the holdings in the previously cited automobile cases distorted the intent of the statute.

DONALD LEON MOORE.

Flight in General: Its Effect on Procedural Rights, Constitutional Law, and the Grand Jury

The Louisiana code provides that a challenge to the array of a grand jury must be made "before the expiration of the third judicial day of the term for which said grand jury shall have been drawn, or before entering upon the trial of the case if it be sooner. . . ."¹ In the recent case of *Poret v. Louisiana*² this statute was involved. There, one of the defendants, Poret, fled the state after the consummation of the offense and remained outside the jurisdiction until one and one half years after the termination of the term of the grand jury which indicted him. At arraignment on October 27, 1952, assisted by his own counsel, he pleaded not guilty and was granted additional time to file a motion for severance. On November 7, 1952, after denial of his motion for severance, he moved—for the first time—to quash the indictment because of systematic exclusion of Negroes from the grand jury. The trial court denied the motion, after finding that defendant was a fugitive from justice, on the ground that it was filed more than a year and a half too late. The Supreme Courts of Louisiana³ and of the United States⁴ affirmed, the latter on three grounds. First, the court considered the defendant as having forfeited his right to challenge by his own action in voluntarily fleeing. Second, even after having returned to the state he

³⁰ Rankin v. Morgan, 193 Ark. 751, 753, 102 S. W. 552, 553 (1937).

¹ Michel v. Louisiana, 350 U. S. 91, 92 (1955). The phrase "third judicial day of the term" has been interpreted by the Louisiana Supreme Court to mean "the third judicial day following the term." State v. Wilson, 204 La. 24, 14 So. 2d 873 (1943).

² 350 U. S. 91 (1955).

³ Poret v. State, 225 La. 1040, 74 So. 2d 207 (1954).

⁴ Michel v. Louisiana, 350 U. S. 91 (1955).

⁵ Agnew v. United States, 165 U. S. 36 (1896).