

THE OHIO "DEAD MAN" STATUTE

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At common law interest was a basis for disqualification of a witness. Wigmore states the reason for the rule in the form of a syllogism, both premises of which he holds to be false. "Total exclusion from the stand is the proper safeguard against a false decision whenever the persons offered are of a class specially likely to speak falsely; Persons having a pecuniary interest in the event of a cause are specially likely to speak falsely; Therefore, such persons should be totally excluded."¹ In every jurisdiction in the United States interest as a basis for disqualification has been expressly abolished by statute.² However, the principle of the discarded rule has been perpetuated to some extent by a statutory exception excluding the testimony of the survivor of a transaction with a decedent when offered against the latter's estate.³ This exception prevails in all but six states of the United States.⁴

The Ohio Code provides, "A party shall not testify when the adverse party is the guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person except . . ."⁵ (There are eight exceptions, each of which will be treated in order later in the article). Since the statute provides that a *party* shall not testify it is evident that a person who is not a party is competent to testify although the action is against a representative of a protected class.⁶ Persons, not parties to the action, are competent witnesses although interested in the result of the suit as heirs, relatives, or devisees of the decedent⁷ or relatives of the party adverse to decedent.⁸ It has been held

¹ Wigmore on Evidence, 2nd Ed., Sec. 576.

² Wigmore on Evidence, *supra*, Sec. 576.

³ Wigmore on Evidence, *supra*, Sec. 578.

⁴ Arizona, Connecticut, New Hampshire, New Mexico, Oregon, Virginia.

⁵ Ohio Gen. Code, Sec. 11495.

⁶ *Hess v. Clutz*, 8 Ohio App. 57, 29 Ohio C.D. 497, 28 O.C.A. 81 (1917); *Myres v. Walker*, 9 Ohio St. 559 (1859); *Parker v. Mutl. L. Ins. Co.*, 23 Ohio App. 535, 156 N.E. 231 (1925); *Clarkson v. Ruan*, 6 Ohio Dec. Rep. 829 (1879).

⁷ *Rowland Adm. v. Griffiths, Adm.*, 6 Ohio Dec. Rep. 619 (1878); *Keyes v. Gore*, 42 Ohio St. 211 (1884); *Powell, Admx. v. Powell, Admx.*, 78 Ohio St. 331, 85 N.E. 541 (1908).

⁸ *Hess v. Clutz, supra*; *Barnes v. Christy*, 102 Ohio St. 160, 131 N.E. 352 (1921); *Schulte v. Hagemeyer*, 16 Ohio App. 1 (1922), motion to certify overruled, 20 Ohio L. Rep. 147; *Clarkson v. Ruan, supra*, note 6.

that officers and agents of the adverse party are not disqualified by the statute.⁹ The persons disqualified must not only be parties but they must be *real parties*.¹⁰ Persons who are made parties to the suit and are interested in it are still competent witnesses unless they have power to control such suit.¹¹ Thus a witness cannot be excluded from testifying by merely making him a nominal party.¹² Moreover, the party must be *adverse* to the representative party to be barred,¹³ as determined by his actual, legal interests and not by his nominal position as plaintiff or defendant.¹⁴ The question as to whether an adverse interest exists arises in a variety of situations. A party defendant who would be entitled to the benefit of a defense established by his testimony has been held to be a real party having an adverse interest.¹⁵ But the husband of an heir joined with her as party because of her coverture has no adverse interest as he is merely a nominal party.¹⁶ Moreover, in an action against the administrator of an estate to recover specific personal property, the heirs of decedent are not necessary parties and their interests are not adverse.¹⁷ Co-parties may have adverse interests. Thus a person whose interests were joint with the plaintiff's but who refused to join and was made a codefendant was held incompetent to testify against his codefendant.¹⁸ Where co-parties have similar interests neither may testify against the representative party.¹⁹ But if their interests are dissimilar one may testify to a subject in which he has no interest.²⁰ And if a defendant has a valid defense he is not a party and is competent

⁹ *Parker v. Mutl. Life Ins. Co.*, *supra*, note 6; *Milling v. Bunn*, 75 Ohio St. 270, 79 N.E. 478, 116 Am. St. Rep. 741 (1906); *Brocalca Chemical Co. v. Langsenkamp*, 32 Fed. (2d) 725 (1929).

¹⁰ *Wolf v. Powner*, 30 Ohio St. 472 (1876); *Loney v. Walkey, Admr.*, 102 Ohio St. 18, 130 N.E. 158 (1921).

¹¹ *Rozeland, Admr. v. Griffiths, Admr.*, *supra*, note 7; *Heath v. Heath*, 25 Ohio N.P. (N.S.) 123 (1924).

¹² *Mathews v. Markey*, 18 Ohio C.C. (N.S.) 413, 33 Ohio C.D. 127 (1910); *Brocalca Chemical Co. v. Langsenkamp*, 32 Fed. (2d) 725 (1929); *Loney v. Walkey, Admr.*, *supra*.

¹³ *Re Runyan*, 4 Ohio N.P. 335, 7 Ohio Dec. (N.P.) 236 (1897); *Glenn v. Hoffman*, 2 Ohio Dec. Rep. 131 (1859); *Wolf v. Powner, supra*, note 10.

¹⁴ *Glenn v. Hoffman, supra*, note 13; *Wolf v. Powner, supra*, note 10; *Baker v. Kellogg*, 29 Ohio St. 663 (1876); *Brinker v. Schreiber*, 8 Ohio Dec. Rep. 759, 9 Bull. 294 (1883).

¹⁵ *Baker v. Jerome*, 50 Ohio St. 682, 35 N.E. 1113 (1893).

¹⁶ *Wolf v. Powner, supra*, note 10.

¹⁷ *Loney v. Walkey, Admr.*, *supra*, note 10.

¹⁸ *Hubbell v. Hubbell*, 22 Ohio St. 208 (1871).

¹⁹ *Fenton v. Askew*, 119 Ohio St. 603, 165 N.E. 301 (1929).

²⁰ *Glenn v. Hoffman, supra*, note 13.

to testify for his codefendant.²¹ Similarly, a joint defendant who fails to set up a defense is a competent witness for his codefendant.²²

The statute enumerates certain classes of persons who are to be within its protection. The first of these is "the guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person."²³ The evident purpose of this provision is to prevent a party from testifying when the adverse party represents a person incompetent to be a witness because of physical or mental infirmity.²⁴ Many cases have held that an imbecile is included as an insane person.²⁵ In applying this provision the court has held that where the plaintiff in an action on a note is guardian of an insane person, one maker is not a competent witness for his codefendant, the other maker.²⁶ And where an infant brings action by next of friend for damages, for personal injuries, and imbecility on the part of the defendant has intervened, the infant is incompetent as a witness as he is party plaintiff.²⁷ Moreover, a guardian of an imbecile, in an accounting before the probate court, is an incompetent witness to prove an alleged claim for services rendered by him to and for the ward prior to the date of his appointment as guardian.²⁸ But the section does not render incompetent the trustee of an estate and the beneficiaries under such trust in an action between such beneficiaries to determine the interests of each.²⁹

Executors and administrators constitute the second protected class. They are not made incompetent and may waive the privilege of excluding the opposing party.³⁰ But in an action by one executor or administrator against another neither is competent to testify against the other to any matter not within the exceptions without mutual waiver.³¹ And in an action against an executor on an oral contract made by a father with his daugh-

²¹ *Bonte's Admr. v. Hinman*, 6 Ohio Dec. Rep. 1173, 9 Bull. 295 reversed on other grounds, 14 Bull. 369.

²² *Baker v. Kellogg*, *supra*, note 14; *Brinker v. Schreiber*, *supra*, note 14; *Bell v. Wilson*, 17 Ohio St. 640 (1867).

²³ Ohio Gen. Code, 11495.

²⁴ *Ross v. Todd*, 4 Ohio C.C. 1, 2 Ohio C.D. 385 (1889).

²⁵ *Ross v. Todd*, *supra*, note 24; *McNicol v. Johnson*, 29 Ohio St. 85 (1876); *Ransom v. Haberer & Co.*, 13 Ohio C.C. (N.S.) 511; 22 Ohio C.D. 592, *ffad.*, 85 Ohio St. 483, 98 N.E. 1134.

²⁶ *Baker v. Jerome*, 50 Ohio St. 682, 35 N.E. 1113 (1893).

²⁷ *Ransom v. Haberer & Co.*, *supra*, note 25.

²⁸ *In re Estate of Oliver*, 9 Ohio N.P. (N.S.) 178 (1909).

²⁹ *Miller v. Miller*, 13 Ohio N.P. (N.S.) 1, App. 15 Ohio C.C. (N.S.) 481, 24 Ohio C.D. 43, modified 88 O.S. 609, 90 O.S. 28.

³⁰ *Doughman v. Doughman*, 21 Ohio St. 658 (1871).

³¹ *Farley v. Lisey*, 55 Ohio St. 627, 45 N.E. 1103 (1897).

ter, the latter is disqualified to prove the existence of the contract.³² A purchaser of a lot cannot testify to representations made by the vendor and agent, since deceased, regarding such tract.³³ But in an action by a corporation against an executor, the manager may testify to facts occurring before the death.³⁴ And where the representative of a deceased person, party to an action, examines as a witness, the adverse party with reference to any conversation, admission, or transaction with deceased, he thereby waives the incompetency of such adverse party to testify in his own behalf.³⁵ A widow cannot object to a creditor testifying to facts to reduce her year's allowance on the ground that she is an administratrix,³⁶ although probably she could object on the ground that she is an heir.³⁷ Nor can a party who is disqualified from testifying because the opposing party is an executor or administrator by cross-examining such representative as to conversations and transactions, thus make competent his own testimony as to the same.³⁸

The other classes protected are heirs, grantees, assignees, devisees or legatees of a deceased person. A plaintiff in an action to correct a deed brought against the grantor's heirs is incompetent to testify to acts and declarations of grantor at the time of and after execution of the deed.³⁹ The word "grantee" is confined to its ordinary meaning of transferee of real property or such incorporeal rights as properly lie in grant.⁴⁰ It has been held that the statute relates only to cases where the matter in litigation is directly involved as where the title to the thing granted is directly attacked.⁴¹ Previously the statute did not expressly include assignees and the courts then held that an assignee of a chose in action was not included in the word "grantee."⁴² An amendment resulted specifically including "assignee."

There are eight enumerated exceptions to the general rule of exclusion of adverse parties in actions by or against a represen-

³² *Lemunyon v. Newcomb, Extr.*, 120 Ohio St. 55, 165 N.E. 533 (1929). In an action for breach of contract for services to deceased plaintiff cannot testify. *House v. Thompson*, 8 Ohio L. Abs. 271 (1929); *Prince v. Abersold*, 123 Ohio St. 464, 175 N.E. 862 (1931); *Fenton v. Ashew*, 119 Ohio St. 603, 165 N.E. 301.

³³ *Floro v. Wadsworth*, 43 Ohio App. 1, 182 N.E. 331 (1929).

³⁴ *Milling Co. v. Bunn*, 75 Ohio St. 270 (1906); 79 N.E. 478.

³⁵ *Stream v. Barnard*, 120 Ohio St. 206, 165 N.E. 727 (1929).

³⁶ *Re Rahe*, 12 Ohio Dec. (N.P.) 590 (1902).

³⁷ Ohio Jur. Sec. 193.

³⁸ *Hickox v. Rogers*, 33 Ohio App. 97, 168 N.E. 750 (1928).

³⁹ *Kilbourn v. Fury*, 26 Ohio St. 153 (1875).

⁴⁰ *Elliott v. Shaw*, 32 Ohio St. 431 (1877).

⁴¹ *Sternberger v. Hanna*, 42 Ohio St. 305 (1884).

⁴² *Elliott v. Shaw, supra*.

tative party. They are intended to provide for particular situations where the admissibility of the testimony would tend to secure rather than to prevent equality.⁴³ The exceptions are:

(1) "The facts which occurred after the appointment of the guardian or trustee of an insane person, and, in the other cases, after the time the decedent, grantor, assignor, or testator died."⁴⁴ The adverse party is made incompetent only as to facts occurring before death of decedent or appointment of the guardian.⁴⁵ The operation of the statute is not limited merely to transactions with the decedent but applies to facts, circumstances or acts, though independent of human agency.⁴⁶

(2) "When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness, a party may testify on the same subject."⁴⁷ In this situation there is no reason to exclude the testimony, for the agent can testify as fully as to the matter as could the principal if he were living.⁴⁸ Thus a tenant suing his landlord's estate for an injury due to a falling ceiling is a competent witness to testify to conversations had with the agent of the landlord thereto, where all his dealings were with the agent who is alive and testified for the estate.⁴⁹ If the agent has died prior to the trial the adverse party is clearly incompetent.⁵⁰ But the fact that the estate failed to examine the agent is of no importance.⁵¹ These rules apply only when the agent is not a party. When he is a party his testimony is subject to the same tests as that of other parties.⁵²

(3) "If a party, or one having a direct interest, testifies to transactions or conversations with another party, the latter may testify as to the same transactions or conversations."⁵³ Thus if an executor testifies to interviews with the adverse party, the latter may testify fully to the same,⁵⁴ or if an administrator

⁴³ *Rankin v. Hannan*, 38 Ohio St. 438 (1882); *Cochran v. Almack*, 39 Ohio St. 314 (1883).

⁴⁴ Ohio Gen Code, 11495.

⁴⁵ *Glenn v. Hoffman*, *supra*, note 13; *Meier v. Herancourt*, 6 Ohio Dec. Rep. 1164 (1882).

⁴⁶ *Hall v. Crain*, 2 Ohio Dec. Rep. 453, West. L.M. 137 (1860); *Wehrmann v. Beech*, 7 C.C. (N.S.) 367, 18 Ohio C.D. 128 (1906).

⁴⁷ Ohio Gen. Code 11495.

⁴⁸ *Union Trust Co. v. Johnson*, 42 Ohio App. 301, 182 N.E. 137, 35 O.L.R. 646 (1931) motion to certify overruled Jan. 20, 1932; *Hoyt v. Heister*, 7 Ohio Dec. Rep. 420, 2 Bull. Supp. 5 (1877).

⁴⁹ *Union Trust Co. v. Johnson*, *supra*, note 48.

⁵⁰ *Floro v. Wadsworth*, 43 Ohio App. 1, 182 N.E. 594, 12 Ohio L. Abs. 700 (1929).

⁵¹ *Hoyt v. Heister*, *supra*, note 48.

⁵² *Roberts v. Remy*, 56 Ohio St. 249, 46 N.E. 1066 (1897).

⁵³ Ohio Gen. Code 11495.

⁵⁴ *Leonard v. State*, 3 Ohio App. 313, 20 Ohio C.C. (N.S.) 340 (1914).

testifies in his own behalf to a certain conversation and an agreement between his intestate and the adverse party, the other party may testify to the same.⁵⁵ If a person has been improperly made a party, the fact that he has testified will not enable the adverse party to testify.⁵⁶ Nor can the adverse party by calling the representative party and cross-examining him, make his own client's testimony competent.⁵⁷ "As such mere formal or unnecessary parties are not to be excluded from testifying, so a plaintiff who makes such persons parties, or allows them to remain as such, can not, if they are called as witnesses, avail himself of this provision to testify to the same transaction on the mere ground that they are parties to the record."⁵⁸ However, a widow who joined as defendant in an action against her husband's administrators and testified to a transaction, has a direct interest in the suit because of her right to a distributive share and therefore the adverse party is made competent to testify as to the same transaction.⁵⁹

(4) "If a party offers evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions."⁶⁰ The exception applies only to oral conversations and admissions.⁶¹ The word "admission" denotes a statement or declaration made by one person alone while "conversation" designates an oral discourse between two or more persons.⁶² The exception includes the case where the representative party cross-examines the adverse party as a witness, with reference to any conversation or admission.⁶³ Before statements made by a witness can be given in evidence to impeach him he must first be interrogated as to the same and if the witness has since died, they cannot be given.⁶⁴ Declarations against interest of a deceased person, either oral or in writing, binding him or his estate may be given in evidence against his personal representative in an action for services

⁵⁵ *Ranlin v. Hannan*, 38 Ohio St. 438, 8 W.L.B. 244 (1882).

⁵⁶ *Williams v. Longley*, 3 Ohio C.C. 508, 2 Ohio C.D. 292 (1888).

⁵⁷ *Hichox v. Rogers*, 33 Ohio App. 97, 168 N.E. 750 (1928).

⁵⁸ *Williams v. Longley*, *supra*, note 56.

⁵⁹ *Williams v. Longley*, *supra*, note 56.

⁶⁰ Ohio Gen. Code 11495.

⁶¹ *Jackson v. Ely*, 57 Ohio St. 450, 49 N.E. 792 (1898); *Miller v. Faust*, 19 Ohio L. Abs. 42 (1935); *Whithead v. Parsons*, 16 Ohio L. Abs. 274 (1934).

⁶² *Jackson v. Ely*, *supra*, note 61.

⁶³ *Stream v. Barnard*, *supra*, *McNaughton v. Presbyterian Church*, 35 Ohio App. 443, 172 N.E. 561, 33 Ohio L. Rep. 66 (1930).

⁶⁴ *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459 (1864).

⁶⁵ *Latham v. Clark*, 120 Ohio St. 559, 166 N.E. 685 (1929).

rendered such deceased, the same as if he had lived and were a party to the action.⁶⁵

(5) "In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with, or admissions by, a partner or joint contractor since deceased, unless they were made in the presence of the surviving partner or joint contractor. This rule applies without regard to the character in which the parties sue or are sued."⁶⁶ The party is not totally excluded as a witness for he is competent to testify as to acts done or statements made, by the deceased in the presence of the survivor.⁶⁷ This section does not make a co-maker of a note a competent witness in an action thereon by the executor of the payee, to testify to transactions giving rise to the note for the fact situation is not within the exception.⁶⁸ It does not matter whether the action is against the survivor alone or against him and the representative of the deceased partner jointly, for testimony competent or incompetent against one is likewise competent or incompetent against the other.⁶⁹ And it has been held "if the witness be allowed to state admissions made, or acts done, by the decedent, in presence of the surviving partner, there is no reason for excluding his testimony as to acts done, or admissions made, by the surviving partner himself."⁷⁰

(6) "If the claim or defense is founded on a book account, a party may testify that the book is his account book, that it is a book of original entries, that the entries therein were made in the regular course of business by himself, a person since deceased, or a disinterested person. The book shall then be competent evidence in any case, without regard to the parties, upon like proof by any competent witness."⁷¹ Cash items of money paid or loaned are not the proper subject-matter of a book account,⁷² nor are the stubs in a book of promissory notes,⁷³ nor items which have passed into judgment,⁷⁴ nor those entered but

⁶⁶ Ohio Gen. Code 11495.

⁶⁷ *Schlarman v. Heyn*, 19 Ohio App. 64 (1923); See *Baxter v. Leith* for application of the exception, 28 Ohio St. 84 (1875).

⁶⁸ *Crawford v. Jones*, 15 Ohio L. Abs. 719 (1933).

⁶⁹ *Schlarman v. Heyn*, *supra*, note 67.

⁷⁰ *Harrison v. Neely*, 41 Ohio St. 334 (1884).

⁷¹ Ohio Gen. Code 11495.

⁷² *Hough v. Henk*, 8 Ohio C.C. 354, 4 Ohio C.D. 69 (1894); *Page and Ballard v. Zehring*, 8 Ohio Dec. Rep. 211, 6 Bull. 299 (1881); *Kennedy v. Dodge*, 19 Ohio C.C. 425, 10 Ohio C.D. 360 (1899).

⁷³ *Mathias Planing Mill Co. v. Hazen & Co.*, 20 Ohio C.C. 287, 11 C.D. 54 (1900); *Watts v. Shewell*, 31 Ohio St. 331 (1877).

⁷⁴ *Smiley v. Dewey*, 7 Ohio 156 (1848).

once a year.⁷⁵ If the entry is of a large sum of money it is improper as a book account⁷⁶ as also are payments on a note.⁷⁷ The book must be one of original entries.⁷⁸ Thus the cash book of a firm is competent as evidence of the payment by a deceased husband of his deceased wife's debt to the firm or other creditors.⁷⁹ But if the day book is destroyed, the ledger is competent.⁸⁰ Where one party introduces a part of a book account the other may introduce the remainder.⁸¹ A party offering a book of accounts may be questioned as to his habits of making mistakes.⁸² The force and effect of a book of accounts as evidence cannot be determined by the court of appeals where no account book was offered in evidence below.⁸³

(7) "If after testifying orally a party dies, the evidence may be proved by either party on a further trial of the case, whereupon the opposite party may testify as to the same matters."⁸⁴ In such a case there is no reason to make the opposite party incompetent for there is no danger of fraud.⁸⁵ The exception refers to former testimony taken in the same suit and not to testimony given in another proceeding in another court although between the same parties.⁸⁶ "Opposite party" refers to the party opposing the deceased person and his successor in interest, not to the party opposing the one offering the testimony.⁸⁷

(8) "If a party dies and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein."⁸⁸ The deposition of a party taken during the pendency of the suit is not admissible on the trial when the opposite party has since deceased,⁸⁹ even though the witness may have been competent at the time the deposition was taken.⁹⁰ Although the adverse party may introduce such testimony into evidence in

⁷⁵ *Bogert v. Cox*, 4 Ohio C.C. 289, 2 Ohio C.D. 551 (1890).

⁷⁶ *Page and Ballard v. Zehring*, *supra*, note 72.

⁷⁷ *Kennedy v. Dodge*, *supra*, note 72.

⁷⁸ *Baxter v. Leith*, 28 Ohio St. 84 (1875); *Bennett v. Shaw*, 12 Ohio C.C. 574, 5 Ohio C.D. 480 (1896).

⁷⁹ *Miller v. McLean*, 11 Ohio C.C. (N.S.) 424, 21 Ohio C.D. 64 (1908).

⁸⁰ *Burr v. Shute*, 2 Ohio C.C. (N.S.) 343, 14 Ohio C.D. 62 (1902); see also *Kennedy v. Dodge*, *supra*, note 72.

⁸¹ *Stillwater Turnpike Co. v. Coover*, 25 Ohio St. 558 (1874).

⁸² *Sheridan v. Tenner*, 5 Ohio C.C. 19, 3 Ohio C.D. 10 (1890).

⁸³ *Brink v. Berne*, 29 Ohio App. 59, 162 N.E. 779, 6 Ohio L. Abs. 661 (1928).

⁸⁴ Ohio Gen. Code. 11495.

⁸⁵ *Mathews v. Heider*, 22 Ohio Dec. (N.P.) 399 (1912).

⁸⁶ *Conett v. Squair*, 17 Ohio D. (N.P.) 65, 3 Ohio L. Rep. 558 (1906).

⁸⁷ *Mathews v. Heider*, *supra*, note 85.

⁸⁸ Ohio Gen. Code 11495.

⁸⁹ *St. Clair v. Orr*, 16 Ohio St. 220 (1865); *Neville v. Hambo*, 12 Ohio Dec. Rep. 768 (1857).

⁹⁰ *Bettman v. Hunt*, 9 Ohio Dec. Rep. 396 (1883); *Neville v. Hambo*, *supra*.

his own behalf, he cannot do so for the purpose of making his own testimony competent to contradict it.⁹¹ The taking and filing of a deposition of the adverse party which is not offered in evidence at the trial of the case does not waive the statutory inhibition against the testimony of the party whose testimony is so taken and filed.⁹² Prior to the enactment of the statute in its present form it was held that it was not competent for a representative party to prove upon the trial what was testified to by his intestate on a former trial, for, as the code only permitted the adverse party, in such a case, to testify as to facts which transpired during the life of the intestate when the deposition of the deceased party had been taken the evidence of the intestate could only be received by medium of a deposition.⁹³

The statute is concluded by the following statement: "Nothing in this section shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil; and when a case is plainly within the reason and spirit of the next three preceding sections, though not within the strict letter, their principles shall be applied."⁹⁴ The exclusion of wrongful death actions was meant to enable the defendant in such a case to testify where the administrator is the adverse party.⁹⁵ In an interesting case, the plaintiff brought action for personal injuries wherein the defendant administrator by cross-petition sought judgment for the wrongful death of his intestate but during the trial submitted to dismissal of the cross-petition. In a dictum the court observed that had the cause been submitted upon the issues made on the cross-petition, then the testimony of the plaintiff would have been competent on those issues; but even then the court must instruct the jury not to consider the testimony of the plaintiff upon the issues made on the petition.⁹⁶ The exemption does not apply to a personal injury action against the party representing the person causing the injury,⁹⁷ nor does it seem to apply where the injured person died from other causes after the accident.⁹⁸

Actions involving the validity of a deed, will or codicil are also excluded. In such a case the parties are not in privity with the deceased and no evidence is lost.⁹⁹ Such an action must be

⁹¹ *Conett v. Squair*, *supra*, note 86.

⁹² *Prince v. Abersold*, 123 Ohio St. 464, 175 N.E. 862 (1931).

⁹³ *Hoover v. Jennings*, 11 Ohio St. 624 (1860).

⁹⁴ Ohio Gen. Code, 11495.

⁹⁵ *Ransom v. Haberer*, *supra*, note 25.

⁹⁶ *Barber v. Kihlken*, 17 Ohio L. Abs. 599 (1934).

⁹⁷ *Ransom v. Haberer*, *supra*, note 25.

⁹⁸ *Cox v. Waltz*, 13 Ohio L. Abs. 364 (1932).

⁹⁹ *Wolf v. Powner*, *supra*, note 10.

one involving the legal sufficiency of such instrument and a party may testify only as to circumstances directly bearing upon the legal sufficiency of the deed which is attacked.¹⁰⁰ Therefore, an action to construe a will¹⁰¹ or to enforce a trust upon a will or deed would not be an action involving the validity of such deed or will.¹⁰² It does not matter that the action is for money only if the determination of the right to the money involves the validity of a deed.¹⁰³ Of course, an action to set aside a deed is one involving its validity.¹⁰⁴

The final "reason and spirit" clause is somewhat troublesome. It applies not only to this section but to the two preceding ones also and therefore to warrant its application the case must be plainly within the reason and spirit of 11493 which makes all persons competent as a general rule.¹⁰⁵ It can apply only when the case is not provided for by either of these sections¹⁰⁶ for if provision therefor is made in any one of the three sections there can be no occasion for the application of the "reason and spirit" clause.¹⁰⁷ Thus this clause should not exclude the testimony of one who is not a necessary party.¹⁰⁸ The court has refused to use this provision to render incompetent the testimony of the plaintiff in an action for services rendered a corporation although the officer employing plaintiff had died.¹⁰⁹ And in an action by the vendor, an agent is competent although the vendee has died.¹¹⁰ As interpreted in the foregoing cases, the "reason and spirit" clause has been of little practical significance. Since it must be interpreted in the light of section 11493 making all persons competent generally, then all persons not specifically excepted would be competent and provided for by the statute. However, in a more recent case, (although the court disagreed), the writer of the opinion contended that the former view was an erroneous one and the clause was meant to do away with absolute particularity; and so the fact that a

¹⁰⁰*Reiger v. Hotel Reiger Co.*, 124 Ohio St. 152, 177 N.E. 211, 34 Ohio L. Rep. 478 (1931).

¹⁰¹*Miller v. Miller*, *supra*, note 29.

¹⁰²*Paddock v. Adams*, 56 Ohio St. 242, 46 N.E. 1068 (1897).

¹⁰³*Tootle v. Lane*, 12 Ohio L. Abs. 273 (1932).

¹⁰⁴*Murdock v. Neely*, 1 Ohio C.C. 16, 1 Ohio C.D. 9 (1885); *Doney v. Dunnick's Adm'r.*, 8 Ohio C.C. 163, 4 Ohio C.D. 180 (1894).

¹⁰⁵*Sternberger v. Hanna*, 42 Ohio St. 305 (1884); sec. 5240 corresponds to present sec. 11493.

¹⁰⁶*Powell v. Powell*, 78 Ohio St. 331 (1908).

¹⁰⁷*Milling Co. v. Bunn*, 75 Ohio St. 270, 79 N.E. 478 (1906); *Loney v. Walkey*, 102 Ohio St. 18 (1921); *Cochran v. Almack*, 39 Ohio St. 314 (1883).

¹⁰⁸*Ryan v. O'Connor*, 41 Ohio St. 368 (1884); *Hess v. Clutz*, 8 Ohio C.C. (N.S.) 81, 8 Ohio App. 57 (1917).

¹⁰⁹*Vulcan Corp. v. Hanzel*, 37 Ohio App. 75, 174 N.E. 146 (1930).

¹¹⁰*Shaub v. Smith*, 50 Ohio St. 648, 35 N.E. 503 (1893).

husband caused a grant to be made directly to his wife from the original owner did not prevent her from being the "grantee" of her husband in view of this clause.¹¹¹

From a review of the various clauses of this statute and their interpretation by the courts, it is evident that a great deal of litigation has resulted and that certainty of construction has not yet been achieved. The objections that were made to the competency of an interested party at common law can still be made to this statute. It eliminates considerable relevant testimony which would otherwise be admissible. It attempts to strike a rough balance by closing the mouth of one interested party when death has silenced the other. That it does strike such a balance and that it does keep out testimony which often would be biased and occasionally perjured is clear. But justification for such a statute must rest upon the conclusion that more harm would be done by the admissibility of this kind of testimony than by barring what is often the only adequate means of proof. That the framers of the statute were none too sure of this conclusion is evident from the several exceptions that were grafted upon it.

Numerous statements of a deceased party may be used in the trial. These statements would be hearsay because made before this trial and offered to prove the truth of those statements, but on one ground or another would be admissible as exceptions to the hearsay rule. The statute provides that if statements are used such as admissions (Exception 4), account books (Exception 6), testimony in former trial (Exception 7), or depositions (Exception 8), the living party is authorized to testify freely on the subject matter. It is suggested that this approach might well be extended as has been done in some states that all hearsay statements of the deceased¹¹² or perhaps all written hearsay of the deceased,¹¹³ whether otherwise admissible or not, be received in evidence, and on the other hand the surviving party be made competent to testify in all respects.¹¹⁴

¹¹¹ *Newman v. Newman*, 103 Ohio St. 230 (1921).

¹¹² Mass. St. 1889 C. 535, Gen. L. 1920, C. 233 Article 65; See also for a more limited statute, Oregon: St. 1893, p. 134, Laws 1920, Article 732. See Wigmore, *supra*, Sec. 1576.

¹¹³ Conn: Gen. St. 1918, Article 5735.

¹¹⁴ There are three ways now being used to allow the testimony and still have safeguards. (1) Oregon and New Mexico allow no recovery in such cases on the party's sole testimony. (2) Connecticut, Virginia, and Oregon admit as well as the testimony of the surviving party any declarations of the deceased party on the subject in issue. (3) New Hampshire and Arizona exclude the testimony except when it "appears to the court that injustice may be done without the testimony of the party." See Wigmore, *supra*, sec. 578.