The Deadman's Statute: Opportunities and Pitfalls
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I. Introduction

Death changes life for those who survive. Litigants are not spared from this dictate. When death (or incapacity) has claimed a party to a controversy in litigation, lawyers for all parties to the action must focus upon the consequences of the demise. One of the most important new realities of the case brought on by the death is the application of Va. Code §8.01-397-the Deadman's Statute.[1]

The Deadman's Statute imposes a new evidentiary regime in two important respects. The hearsay rule vanishes as an impediment to admitting statements made by the deceased. For surviving parties, a new obstacle has arisen to use of their testimony-corroboration is required before judgment can be founded upon the survivor's testimony.

[1] § 8.01-397. **Corroboration required and evidence receivable when one party incapable of testifying** (subdivision (b)(5) of Supreme Court Rule 2:804 derived from this section).

In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony. In any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings including without limitation those to which a person under a disability is a party. The phrase "from any cause" as used in this section shall not include situations in which the party who is incapable of testifying has rendered himself unable to testify by an intentional self-inflicted injury.
For the purposes of this section, and in addition to corroboration by any other competent evidence, an entry authored by an adverse or interested party contained in a business record may be competent evidence for corroboration of the testimony of an adverse or interested party. If authentication of the business record is not admitted in a request for admission, such business record shall be authenticated by a person other than the author of the entry who is not an adverse or interested party whose conduct is at issue in the allegations of the complaint.

(Code 1950, § 8-286; 1977, c. 617; 1988, c. 426; 2013, cc. 61, 637.).

The latter exclusionary branch of the Deadman's Statute creates a host of special considerations to be contemplated and agonized over by lawyers for both the survivor and the deceased. The time spent and decisions regarding the Deadman's Statute may spell out the difference between a *prima facie* case and no case at all.

The Virginia Deadman's Statute and similar statutes in other states have been the subject of much criticism from commentators and courts. *See Shumate v. Mitchell,* 296 Va. 532, 545-46 (2018). Although this criticism has led to abolition of such laws in other jurisdictions, Virginia's Deadman Statute is very much alive at the present time.[2]

II. History and Purpose of the Deadman's Statute

Decision making about the Deadman's Statute requires an understanding of the history and purpose of the Statute. Let's go back to the beginning.

Prior to 1866, Virginia followed the common law rule excluding the testimony of every witness interested in a case. *Shumate v. Mitchell,* 296 Va. 532, 541 (2018): *Epes Adm'r v. Hardaway,* 135 Va. 80, 84 (1923). This absolute prohibition was lifted in 1866 for most witnesses. However, the legislature continued the exclusion of testimony of a party in his own favor where one of the original parties to the contract or other transaction which is the subject of the investigation, is dead, or insane, or incompetent to testify by reason of insanity or other legal cause, unless the party was first called to testify on behalf of the dead, incompetent or insane party. *Va. Code of 1873* Ch. 172, §22.

Between 1873 and 1919 a number of exceptions and qualifications were adopted to address perceived hardships manifested in judicial opinions. *Epes,* 135 S.E. at 85-91.

[2] 2020 Va. SB 529 which would repeal of Va. Code 8.01-397 if enacted was passed by the Senate Judiciary Committee but recommitted to the Committee by the Senate.

In 1919, this tinkering culminated in adoption of the current Deadman's Statute.[3] The legislative revisions of witness competency rules which included the Deadman's Statute were "highly remedial" in nature. Their purpose was to remove qualifications, not to create them or impose burdens on witnesses already competent. *Robertson's Ex'r v. Atlantic Coast Realty Co.,* 129 Va. 494 (1921). For this reason, no corroboration is required of a witness who was competent before the Code of 1919 Deadman's Statute became operative. *Epes,* 135 Va. at 91-92.

As we will see later, this construction of the Deadman's Statute means simply looking at the language of the statute is not conclusive. The pre-1919 law must be examined to ascertain whether it permitted the witness to testify. If so, the corroboration requirement of the Deadman's Statute will not apply to the witness.

The purpose of the Deadman's Statute is to prevent a litigant from having the benefit of his own testimony when, because of death or incapacity, the personal representative of another litigant has been deprived of the testimony of the deceased/disabled person.[4] It substitutes the corroboration requirement for the harsher common law rule which disqualified the surviving witness for interest. *Willliams v. Condit,* 265 Va. 49, 52 (2003); *Diehl v. Butts,* 255 Va. 482, 488 (1998). According to the Supreme Court of Virginia, the statute "is a wise one, and is designed to prevent fraud, and for that reason should not be whittled away." *Timberlake's Ad'mr v. Pugh,* 158 Va. 397 (1932).

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[3] The original version of the Deadman's Statute has been amended in three respects. Statements of the party incapable of testifying are admissible whether or not the surviving party testifies. Parties whose inability to testify stems from a self inflicted injury are exempted from the Deadman's Statute. Business record entries authored by a surviving party can be corroborating evidence (see Section VII below).

[4] "[T]he statute was designed to prevent…an opportunity for the survivor to prevail by relying on his own unsupported credibility, while his opponent, who alone might have contradicted him, is silenced by death." *Hereford v. Pates,* 226 Va. 605, 608, 610 (1984).

III. Breadth of Application

The Deadman's Statute, on its face, is sweeping in its application to the testimony of a surviving party. However, when the legislative history is considered, it is probably limited to the survivor's testimony about the transaction or event in which both parties were observers or participants.

The 1866 legislation altering the common law rule of excluding interested witness testimony left intact the prohibition for surviving parties regarding "the contract or other transaction" to which both the deceased and surviving parties were parties. *Epes Adm'r v. Hardaway,* 135 Va. 80, 85-86(1923) quoting *Va. Code of 1873* §22. A survivor therefore should only be required to corroborate testimony concerning a transaction or event which the deceased would have had personal knowledge and is possibly disadvantaged because of an inability to testify and contradict the survivor.

For example, a personal injury plaintiff should not have to corroborate testimony about damages or pre-accident activities if these matters would not have been within the personal knowledge of the deceased defendant.

IV. Who Is An Interested Party?

The Deadman's Statute corroboration requirement applies not only to parties to the litigation but to "any adverse or interested party". An interested party need not be a party to the action or suit. Analyzing the impact of the Deadman's Statute requires that you determine whether any witness to the case is an interested party.

An interested party is "one, not a party to the record, who is pecuniarily interested in the result of the suit." *Johnson v. Raviotta,* 264 Va. 27, 34 (2002) quoting *Merchant's Supply Co., Inc. v. Ex'rs of the Estate of John Hughes,* 139 Va. 212, 216 (1924). *Accord*

Shumate v. Mitchell, 296 Va. 532, 547 (2018). Pecuniary interests include: (a) being liable for the debt of the party for whom he testified, (b) being liable to reimburse such a party, (c) having an interest in the property at issue in the action, (d) having an interest in the money being recovered, (e) being liable for the costs of the suit, or (f) being relieved of liability to the party for whom he testified if such party recovered from the incapacitated party. *Jones v. Williams,* 280 Va. 635, 639 (2010). Blood relationship alone will not make a party an interested party. *Johnson,* 264 Va. at 36.

Examples of interested parties are:

- An employee of a defendant alleged to be vicariously liable if the entity would be entitled to indemnification from the employee. *Johnson,* 264 Va. at 37.[5]
- A witness who owns stock in a party to the litigation. *Merchant's Supply Co., Inc.* 139 Va. at 216.
- Beneficiary of a wrongful death claim. *Paul v. Gomez,* 118 F. Supp.2d 694 (W.D. Va. 2000).
- The spouse of a surviving party who represented that she would give her spouse a portion of the proceeds if she was awarded the sought-after monetary relief. *Stephens. Caruthers,* 97 S. Supp. 2d 698 (E.D. Va. 2000).

If the witness is a personal representative of an estate, the answer will vary depending on the estate's posture in the litigation. If the estate will be financially impacted by recovery or assessment of damages, the personal representative will be deemed to be an "interested party" notwithstanding the lack of personal consequences to the representative himself. *Johnson,* 264 Va. at 34-35. Conversely, if the estate itself will not be impacted

[5] Employers will often endeavor to abrogate the "interested party" status of a nonparty employee whose conduct is at issue by releasing the employee from any indemnity obligation. See *Shelton v. Chippenham & Johnston Willis Hosps., Inc*., 68 Va. Cir. 468 (Richmond City 2005); *Richardson v. Maskell,* 64 Va. Cir. 196 (Wise 2004). This tactic will be ineffectual if there is a potential claim for contribution or if the employee is a named party.

financially by the litigation, the personal representative will not be deemed an "interested party". *Coalter's Ex'r v. Bryan,* 42 Va. (1 Gratt.) 18 (1844).

V. What Is Sufficient Evidence of Corroboration?

If the testimony of the adverse or interested party presents an essential element that, if not corroborated, would be fatal to the adverse party's case, corroboration is required. If corroboration is required, such corroboration must be supplied by evidence which tends in some degree to independently support the element essential to the adverse or interested party's case; the testimony, however, need not be corroborated on all material points. *Johnson v. Raviotta,* 264 Va. 27, 32 (2002). Corroboration need not remove all doubt but only give more strength than was had before. *Hereford v. Pates,* 226 Va. 605, 608 (1984).

Determining what is sufficient corroboration can be difficult. What is adequate corroboration depends on the circumstances of each case. *Va. Home for Boys & Girls v. Phillips,* 279 Va. 279, 286 (2010); *Vaughn v. Shank,* 248 Va. 224, 229 (1994). It must not come from the mouth of the surviving witness sought to be corroborated, be wholly dependent upon the credibility of the surviving witness nor dependent upon circumstances under the control of the surviving witness. *Va. Home for Boys & Girls v. Phillips,* 279 Va. 279, 286 (2010); *Johnson v. Raviotta,* 264 Va. 27, 36 (2002). One interested witness cannot corroborate the testimony of another interested witness. *Ratliff v. Jewell,* 153 Va. 315, 326 (1929).

The evidence must add to, strengthen, confirm and corroborate the testimony of the surviving witness. *Varner's Ex'rs v. White,* 149 Va. 177, 185 (1927). A surviving

party's testimony that is inconsistent and contradictory cannot be corroborated. *See Burton's Ex'r. v. Manson,* 142 Va. 500, 510 (1925).

Corroboration can come from any source including documentary or physical evidence or surrounding circumstances. *Williams v. Condit,* 265 Va. 49, 56 (2003) (J. Lacy concurring); *Brooks v. Worthington,* 206 Va. 352, 357 (1965). Corroboration may, and often must, be shown through circumstantial evidence. *Keith v. Lulofs,* 283 Va. 768, 776 (2012).

Corroboration is determined not by looking at any single witness' testimony. Instead, it is determined by examining in the aggregate all of the evidence probative of corroboration. *See Varner's Ex'rs,* 149 Va. at 185 (1927). Expert testimony can be used as corroborative evidence. *See Penn v. Manns,* 221 Va. 88 (1980). Testimony equally consistent with two different inferences will not be deemed corroborative. *See Vaughn,* 248 Va. at 230. Each point need not be corroborated nor must the corroboration rise to the level of confirmation as long as the corroboration strengthens the testimony provided by the surviving witness. *Keith v. Lulofs,* 283 Va. 768, 776 (2012).

In order to determine what must be corroborated, examine the elements of the cause of action or defense. Then, frame the ultimate facts in issue for each element. This analysis should identify facts which are candidates for corroboration. *Rice v. Charles,* 260 Va. 157 (2000), a wrongful death case arising out of a passenger's death in a vehicle operated by a surviving drunk driver, illustrates this approach. The pivotal question for the defense of contributory negligence was should the passenger have known the driver's ability to drive was impaired. Evidence about the passenger's knowledge about plans to purchase beer was insufficient corroboration to create a jury issue. The

corroborating evidence had to show that the passenger was aware of the driver's impaired ability to operate a vehicle.

Similarly, in *Johnson v. Raviotta,* a nurse's testimony that she checked the vital signs and intake and output as ordered by the physician was not corroborated by the documented care that she did provide because none of that care required taking vital signs or measuring urine output. 264 Va. at 38. *Johnson* shows powerfully that uncharted care allegedly given according to a surviving adverse or interested party cannot be a defense to a claim of malpractice unless the allegedly negligent provider can produce evidence *specifically* corroborating that the care at issue was provided.

For an excellent review of Virginia case law concerning the corroboration requirement, see the Report to the Boyd Graves Conference, Appendix accompanying this paper.[6]

VI. Habit As Corroboration.

One of the favorite stratagems employed in defending medical malpractice cases is the use of habit or regular practice testimony to substitute for an avowed lack of memory of the specific transaction at issue or the absence of charted facts necessary to establish compliance with the standard of care. This was the approach of the defendant physician in *Johnson v. Raviotta,* 264 Va. 27, 32 (2002).

If the injured patient is dead or disabled, habit evidence emanating from the mouth of a defendant or interested party is still subject to the corroboration requirement. Accordingly, the defendant physician in *Johnson* could not obtain judgment in his favor

[6] The Report was presented to the 2003 Boyd Graves Conference. The Appendix was prepared by Professor Kent Sinclair with the assistance of Laura A. Williams, University of Virginia law student. I gratefully acknowledge the excellent work product of the Committee, its Reporter Professor Sinclair and Ms. Williams. It is an asset to any practitioner grappling with the nuances of Deadman's Statute jurisprudence.

based upon his own uncorroborated testimony about his habit in rechecking abnormal blood pressures. *Va. Code* §8.01-397.1 permitting introduction of evidence of habit and routine practice to prove conduct on a particular occasion does not dispense with the Deadman's Statute corroboration requirements.

VII. Corroboration with Business Records

In 2013, the Deadman's Statute was amended to make explicit that business records authored by a surviving party can be used to corroborate the testimony of the surviving party. However, the longstanding prohibition of corroboration not emanating from the mouth of the surviving party remains intact. If it is not admitted that the records are business records, the foundational proof establishing the records are business records must come from a person other the author of the entry that is not an adverse or interested party whose conduct is at issue in the allegations of the complaint

In the medical records setting, a transcriptionist or person knowledgeable about the electronic records software and database could supply the necessary proof of authenticity, regularity and trustworthiness necessary to authenticate a business record entry authored by the surviving party.

Post incident medical record entries and incident reports authored by the surviving party may not qualify as business records due to a lack of trustworthiness or contemporaneous preparation. *See Mason v. Devanath,* 2013 Va. Cir. LEXIS 210 (Brunswick 2013); *Shelton v. Chippenham & Johnston Willis Hosps., Inc.,* 68 Va. Cir. LEXIS 468 (Richmond 2005); *Miller v. Warren Mem. Hosp., Inc.,* 7 Va. Cir. 279 (Warren 1986).

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VIII. Confidential Relationships Require Heightened Corroboration.

In cases involving parties between whom a confidential relationship existed at the time of the transaction at issue, a higher degree of corroboration is required. *Diehl v. Butts*, 255 Va. 482, 489 (1998); *Sexton v. Bowser*, 2017 Va. Cir. LEXIS 43 (City Richmond 2017). This rule is particularly significant in medical malpractice litigation because health care providers and patients are in a confidential relationship.

A confidential relationship is

> not confined to any specific association of the parties; it is one wherein a party is bound to act for the benefit of another, and can take no advantage to himself. It appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side, there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible.

Estate of Parfitt v. Parfitt, 277 Va. 333, 341, 672 S.E.2d 827, 830 (2009). *Accord Gelber v. Glock*, 293 Va. 497, 529-30 (2017). A confidential relationship gives rise to a fiduciary duty. *See Grubb v. Grubb*, 272 Va. 45, 53 (2006); *Economopoulos v. Kolatis*, 259 Va. 806, 812, 528 S.E.2d 714, 718 (2000).

Diehl held a patient physician relationship was a confidential relationship. A hospital or nurse should similarly be deemed in a confidential relationship with a patient.[7]

IX. Is Corroboration A Jury Question?

The sufficiency of corroborative evidence is usually, but not always, a question for the jury. *Johnson v. Raviotta*, 264 Va. 27, 31 (2002); *Sexton v. Bowser*, 2017 Va. Cir. LEXIS 43 (City Richmond 2017). When the corroborative evidence is more than a

[7] In *Johnson v. Raviotta*, 264 Va. 27 (2002), the plaintiff argued that a nurse had a confidential relationship with the patient. The Court did not expressly comment upon the issue but did hold no corroboration had been shown to permit the nurse to testify about her uncharted care.

scintilla, the issue is usually for the jury. *Rice v. Charles*, 260 Va. 157, 167 (2000); *Brooks v. Worthington*, 206 Va. 352, 357 (1965).

A review of Virginia Supreme Court cases reveals that the Court is quite vigilant in scrutinizing purported corroboration evidence. In numerous instances, the Court has found the evidence offered by the surviving party was insufficient as a matter of law. Conversely, the Court is quite reluctant to find, as a matter of law, the evidence is sufficient corroboration. As noted in *Taylor v. Mobil Corp.*, 248 Va. 101, 111 (1994) in refusing to find corroboration as a matter of law, credibility of witnesses and inferences to be drawn from the evidence are within the province of the jury. *Accord Harris v. Schirmer*, 2016 Va. Cir. 32, at 69-71 (Roanoke City 2016).

If the trial judge rules the evidence sufficient to create a jury question, the Supreme Court will conduct a sharp eyed review of the alleged corroboration evidence to determine if it was indeed sufficient. See *Jones v. Williams*, 280 Va. 635, 638 (2010); *Estate of Parfitt v. Parfitt*, 277 Va. 333, 342 (2009). If you represent the deceased/disabled party confronting testimony of an adverse party or interested witness, you will almost always be entitled to at least a jury instruction requiring corroboration and in many instances, be in a position to argue lack of sufficient corroboration as a matter of law thus requiring exclusion of the surviving party's testimony. This is especially true if a confidential relationship exists between the deceased/disabled party and the party/witness.

X. If You Call the Adverse Party, You May Waive.

When the deceased/disabled party calls the surviving adverse or interested party as a witness, the Deadman's Statute will no longer apply so as to require corroboration of

the survivor's testimony about the transaction at issue. This rule is based upon the long established principle that, when an adverse party is called and examined by an opposing party, the latter is bound by the all of the adverse party's uncontradicted and not inherently improbable testimony. *Economopoulos v. Kolatis*, 259 Va. 806, 812 (2000).

This rule often forces hard choices upon us when mapping out trial plans. Do we give up our right to corroboration in order to get some important testimony of the adverse party into evidence? Is there any way to have it both ways?

If you do not need the adverse testimony to make a *prima facie* case, your decision making is probably much easier. The adverse party usually will be called during the defense case and the cross examination will elicit the sought after testimony.

Another approach is to address the matter in pretrial discovery. Serve interrogatories or request for admissions calculated to isolate out the substance which you want to introduce and then admit into evidence the interrogatory or request for admission response.

Use of the adverse party's deposition is a dicier proposition.[8] The principle of being bound by an adverse party's testimony does not apply with full force to the introduction of deposition testimony. *Thornton v. Glazer*, 271 Va. 566, 572 (2006); *Brown v. Metz*, 240 Va. 127 (1990); *Horne v. Milgrim*, 226 Va. 133 (1983). However, there is no case law making it clear that the corroboration requirement remains intact when a surviving party's deposition testimony is admitted by the deceased/disabled party. Admitting deposition testimony also has the disadvantage of pouring all of the surviving

[8] Rule 4:5(a)(3) permits use of a party's deposition for any purpose. As discussed above, an interested party for purposes of the Deadman's Statute is a non party to the litigation. A interested non party's deposition may be used if the deponent meets some other criteria of Rule 4:5 such as being a managing agent, being a greater distance than 100 miles from the place of trial or out of the Commonwealth or is a treating physician.

party's version of events into your case in chief because, if you introduce part of the deposition, the opposing parties can introduce other portions of the deposition.[9] Use of an interrogatory or a request for admission is a safer way to get the good, leave out the bad and hopefully preserve the corroboration requirement.

XI. Corroboration Not Required If Interested Party Testifies For Deceased.

The corroboration requirement vanishes if an interested party testifies on behalf of the deceased/disabled party about the transaction at issue.[10] *Johnson v. Raviotta*, 264 Va. 27, 34 (2002).[11] However, mere availability of an interested party to testify to the deceased/disabled party's version of the facts will not eliminate the corroboration requirement. The interested party must actually testify at the behest of the deceased/disabled party. *Williams v. Condit*, 265 Va. 49, 55 (2003) (J. Lacy concurring).

Identify potential witnesses who are "interested parties" possessing knowledge about the transaction at issue. Then a decision needs to be made-should I call the witness and get the benefit of the testimony and lose the corroboration requirement. Factors to consider include: is the interested party's testimony necessary for a *prima facie* case, is the interested party a good witness and is the survivor's testimony likely to be uncorroborated as a matter of law or will it simply be a jury question?

[9] *Va. Sup. Ct. R.* 4:7(a) (5).
[10] For definition of "interested party", see Section IV *supra*.
[11] This exception to a literal application of the Deadman's Statute is because, prior to the 1919 enactment of the Deadman's Statute, a party was a competent witness to testify if an interested witness testified on behalf of himself or the deceased/disabled party. *Paul v. Gomez*, 118 F. Supp.2d 694 (W.D. Va. 2000).

XI. When and How To Raise A Deadman's Challenge.

When you suspect a surviving party's testimony may lack corroboration, you have to decide when and how to assert lack of corroboration. This gives plaintiff's counsel an opportunity to experience the joy usually reserved to defense lawyers of the surprise motion to strike.

The issue of corroboration is one of sufficiency of evidence. For this reason, the question may not be answerable until the close of evidence because only at that point can all evidence be surveyed to determine if sufficient corroboration exists to create a jury issue. *Johnson v. Raviotta,* 264 Va. 27, 33 (2002). Prior to the case being submitted to the jury, the deceased/disabled party will move to strike the testimony of the survivor on the transaction at issue on the grounds it is uncorroborated as a matter of law.

Alternatively, move *in limine* to exclude the testimony of the surviving party about the transaction. If the motion is successful, the court will prohibit any testimony by the surviving party about the transaction at issue from being admitted at trial. *See Diehl v. Butts*, 255 Va. 482, 491 (1998) (on remand, trial court shall not admit into evidence surviving party's testimony absent corroboration). To lay the foundation for a motion *in limine*, serve an interrogatory and request for production calculated to elicit all facts, circumstances and documents which the surviving party contends corroborate the contested testimony.

An attempt to apply the Deadman's Statute pretrial will be met with the objection that sufficiency of corroboration evidence should not be determined until the conclusion of the evidence at trial. The corroboration question is likely to be reserved until the close

of evidence unless the surviving party's counsel concedes no corroboration exists or discovery establishes a very tightly defined claim of corroboration.[12]

Which path to take requires some thought. If raised pretrial, you will certainly spur an intensive search for corroboration evidence. On the other hand, waiting until the close of evidence will mean that the jury has heard the surviving party's testimony and the best result will be an instruction to disregard the testimony.

There is a third way. Raise lack of corroboration as an evidentiary objection at the moment the surviving party endeavors to testify about the transaction. At this point, it is more difficult for the surviving party's counsel to muster corroboration evidence if counsel has not already been considering the matter Deciding what to do depends on the likelihood of surprising the survivor at trial versus the possibility of a clean win pretrial which excludes the survivor's self-exculpating version of the transaction at issue.

The Deadman's Statute challenge to testimony should encompass not only uncorroborated testimony of the surviving party but any expert opinion testimony based upon the testimony. A judgment for a surviving party cannot be grounded upon expert

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[12] Waiting until the close of evidence to determine whether a jury question exists on the issue of corroboration enjoys support in the case law. In discussing whether evidence sufficiently corroborates a surviving party's testimony, the Supreme Court observed the appropriate procedure is to admit the items of alleged corroborating evidence and if "after the evidence is in, it is found not to be of probative value, it should be stricken out and the jury should be clearly and distinctly instructed that it is not to be considered for any purpose." *Varner's Ex'rs v. White*, 149 Va. 177, 185-86 (1927).

Similarly, in a case decided shortly after the enactment of the Deadman's Statute, the Court declared the "proper practice in such cases is for the court not to exclude the testimony of such interested adverse party, but to properly instruct the jury on the subject. If the jury disregard such instructions and return a verdict founded upon the uncorroborated testimony of such interested or adverse party, the remedy of the other party is a motion to set aside the verdict and grant a new trial, or enter a final judgment as shall seem right and proper." *Arwood v. Hill's Adm'r*, 135 Va. 235 (1923).

However, these cases antedate modern discovery practice and routine use of pretrial orders with discovery cutoffs and exchange of witnesses and exhibits. Discovery can be used to flush out all of the facts claimed to constitute corroboration. If the corroboration is based solely on documentary evidence, pretrial judicial review of the documents is especially apt since it simply moves forward the scrutiny that will ultimately transpire to determine if there is sufficient corroboration to submit to the jury.

testimony which relies upon uncorroborated testimony of the surviving party. *Diehl v. Butts*, 255 Va. 482, 490 (1998).

XII. Admissibility of Statements of Deceased/Incapacitated Party

All entries, memoranda and declarations made by a deceased/incapacitated party are admissible if "relevant to the matter in issue." *Gelber v. Glock,* 293 Va. 497, 510 (2017). Not only does this proviso of Va. Code § 8.01-397 create an exception to the hearsay rule but it sweeps away all objections other than relevancy. The statute "allows use of any and all hearsay, regardless of circumstances or whether the declarant had personal knowledge of the topics opined upon…." *Shumate v. Mitchell,* 296 Va. 532, 541 (2018) *quoting* Kent Sinclair, The Law of Evidence in Virginia § 10-7 [d], at 605 (8th ed. 2018).

August, 2003

Report to the Boyd-Graves Conference

FROM: Committee to Study the "Deadman's" Statute

The Conference chair appointed a committee composed of Glenn Pulley (chair), Elaine Bredehoft, Robert Calhoun, Frank Hilton, Charles Sickels, and Kent Sinclair. The Committee was asked to review the current version of the Virginia "deadman's" statute, which is codified as Code § 8.01-397. That statute CURRENTLY reads:

> **§ 8.01-397. Corroboration required and evidence receivable when one party incapable of testifying**
>
> In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony. In any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings including without limitation those to which a person under a disability is a party. The phrase "from any cause" as used in this section shall not include situations in which the party who is incapable of testifying has rendered himself unable to testify by an intentional self-inflicted injury.

The Committee considered numerous recent decisions construing the statute, as well as voluminous background materials, including legislative history materials going back to the late 1800's and other records provided by the Division of Legislative Services. It conducted independent legal research into the law of Virginia, statutory and in case decisions, and the law of a number of other states. National and Virginia law review and treatise discussions were reviewed. The Committee met several times in conference telephone sessions. It had the benefit of prior research by Conference member Bob Calhoun, and work performed on this project by Professor Sinclair and by a law student, Laura A. Williams, under his direction.

Preview. The following report is unanimous in proposing revisions of Code § 8.01-397 to: (1) spell out the fact that the statute does not apply if an interested witness testifies on behalf of the decedent/disabled person; (2) replace the present corroboration requirement with a required assessment of the credibility of all evidence presented (live and hearsay), and (3) clarify that the blanket hearsay exception now in the statute will apply only when the survivor offers testimony about the transactions.

Medieval times – up to the mid-1800's.

As trial by combat gave way to court-based decisions about parties' rights in the late Middle Ages, evidence in the form of sworn testimony by interested parties was forbidden out of fear that an interested witness would necessarily commit perjury. This was true from the 1600's to the early 1800's in Great Britain.

American law prior to 1850 was the same: interested parties were not allowed to testify in their own cases for fear of perjury. In cases involving one deceased or incapacitated party, this meant that the "interested" survivor could not testify at all.

In the mid-1800's reforms in England abolished (by statute) the common law disqualification of interested witnesses.

American jurisdictions started almost immediately to abolish the disqualification of interested witnesses. Virginia first did so in a statute passed in 1866. By an act approved March 2, 1866 (Acts 1865-6, ch. 21, sec. 1, pp. 87-88), the common law disqualification of witnesses for "interest" was abolished.

In the Supreme Court of Virginia's scholarly review of the grand sweep of this history in *Epes' Administrator v. Hardaway*, 135 Va. 80, 115 S.E. 712 (1923) , Judge Burks noted that the overall drift has been consistently over time to allow more and more testimony to be heard by the trier of the facts, and to eliminate disqualifications in whatever format they are found.

> It will be observed that the act, while radically changing the common law rule, contained many qualifications and exceptions. It was far from perfect, and had to be changed or amended from time to time to meet the hardships of different cases as developed by the decisions of this court. It would be impracticable within reasonable limits to discuss all the cases construing the statute and the consequent legislative changes. . . . All of them, however, will be found to be in the extension of the competency of witnesses to testify.

Id. at 85, 115 S.E. at 714 (emphasis added). The goal of the plenary revisions of the Code with respect to deadman's issues in 1919 was to remove "practically all disqualifications," and permit the courts to hear "all evidence bearing on the question at issue" just as is usual "in the business affairs of life." *Id.* at 88, 115 S.E. at 715.

In a prophetic summary of the long flow of case law developments, the Supreme Court of Virginia commented in 1923 that "[n]early all of the difficulties that have arisen in practice have grown out of the exceptions to the rule that interest should not disqualify a witness." *Id.* at 90, 115 S.E. at 715 (emphasis added). In other words, administering the barriers to testimony had already proven to be problematic in Virginia as early as 1923.

First Key Factor in Allowing Testimony: Cross-Examination

All American jurisdictions concluded in the late 1800's and the early 1900's that the availability of cross-examination by trained attorneys was an important factor in reducing the risks of perjury by the survivor in litigations involving dead or incapacitated persons. Judge Burks referred to the key role of cross-examination in *Epes*, writing of "the great safeguard of cross-examination."

In the late 1800's and early 1900's most states considered cross-examination a satisfactory safeguard: they simply passed statutes declaring all witnesses with knowledge to be qualified to testify. Some states made exceptions for cases involving decedents or incapacitated persons, which became known as "deadman's" statutes. These statutes were created in about half of the States during the early years of the 20th Century, but they have proven unnecessary and problematic, and most states that created such laws have abolished them decades ago. By the 1950's deadman's statutes were declared "archaic relic[s] of the past."[1] Today "deadman's acts" are found in only a handful of jurisdictions.[2]

Cross-Examination "Plus." In Virginia, the General Assembly evidently concluded in the late 1800's that cross-examination plus the presence of a live witness who can testify about the events on behalf of the dead or incapacitated party was an adequate balance to safeguard against perjurious claims by the survivor. Thus, in the Virginia Codes of 1887 and 1893 provisions were included that confirmed and continued the 1866 abolition of the former incapacity for interested witnesses. However, the abolition of incapacity was accompanied by a sister section dealing with deadman situations. Under the 1887 and 1893 versions, where one party to a transaction was dead or incapacitated, the interested survivor witness could only testifying if: (1) called by the decedent/incapacitated party's side, (2) some interested witness had testified on behalf of the decedent/incapacitated party, or (3) an agent of the dead or incapacitated person was available to testify.

The availability of an interested witness to testify on behalf of the side of the decedent or incapacitated person remains – in case law – an important exception to the deadman's principles even under the current statute. If such a witness testifies, the ban of the statute is totally inapplicable. *Johnson v. Raviotta*, 264 Va. 27, 563 S.E.2d 727 (2002), approving the holding of the federal district court in *Paul v. Gomez*, 118 F. Supp. 2d 694, 696 (W.D. Va. 2000). See generally *Merchants Supply Co., Inc. v. Ex'rs of the Estate of John Hughes*, 139 Va. 212, 216, 123 S. E. 355, 356 (1924); *Wrenn v. Daniels*, 200 Va. 419 (1958) (contract dispute).

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[1] Mason Ladd, "Witnesses," 10 RUTGERS L. REV. 523, 526 (1956).

[2] Some states still maintain a form of deadman statute (without a corroboration requirement), but the raw numbers and the proportion of states adhering to this form of disqualification of live witnesses declined dramatically during the 20th century, approximately as follows:

1850 – All states and territories (the English model)
1919 – one-half of the states
1953 – one-third of the states
1980 – one-quarter of the states
2003 – fewer than a dozen states

In the 1919 Virginia Code the Legislature again continued and confirmed the abolition of general disqualification for interested party witnesses, stating again that all witnesses are competent. But an adjacent Code section (the "deadman's" section) contained two provisions: (1) that, in cases involving a survivor and a decedent/incapacitated person, *corroboration* is required for a judgment based on the survivor's testimony, and (2) *if the survivor testifies*, out-of-court statements of the decedent/incapacitated person could be received in response. Thus by 1919 the disqualification of the survivor was replaced by a requirement of corroboration coupled with permission for the decedent/disabled person to offer out-of-court statements of the decedent/disabled person to oppose the live testimony of the survivor. *Epes*, 135 Va. at 90, 115 S.E. 715.

Then, about 35 years ago, the deadman's section of the Code was amended to provide that regardless of whether the survivor testifies, in any case by or against a decedent/incapacitated person, the hearsay out-of-court statements of the decedent/incapacitated person are generally admissible. That provision remains in Code § 8.01-397 today. Thus the right to offer out-of-court statements of the decedent/incapacitated person exists under the present version of the statute from the outset of such a case, and is not dependent upon the survivor testifying. No reason for the creation of this sweeping abolition of hearsay principles is apparent in the Revisors' Notes to the Code, and no Supreme Court case has ever commented on any justification for it.

Lopsided and Problematic Provisions

The present "double whammy." Present Virginia law is lopsided: it imposes upon living party witnesses a stringent (and ill-defined) requirement that testimony be "corroborated" and, on the other side, it gives an open-ended permission for the decedent/disabled person's side to offer out-of-court statements by the decedent/disabled person that do not meet any exception to the hearsay rule. The hearsay can be offered – under the current version of the law – whether or not the survivor offers live testimony about the disputed events. So far as the Committee's review of the law of other jurisdictions reveals, this tilting of the tables is more extreme than any other American jurisdiction ever had, and is worse than an anachronism today. No other jurisdiction has such a rule today, and no other jurisdiction ever had a combination of provisions that is as slanted against live testimony as the present Virginia statute.

The "corroboration problem." The 1919 version of the Virginia Code placed lawyers and judges of the Commonwealth in the position of having to assess corroboration for the survivor's testimony, since the incremental relaxation of the medieval limits on the admissibility of party testimony had – as of 1919 – reached the point that the General Assembly thought, in essence:

Cross-Examination + some corroboration = it is safe to allow survivor's testimony[3]

[3] This was the understanding of the General Assembly's calculus given by Judge Burks in *Epes*, 135 Va. at 90, 115 S.E. at 715.

Corroboration for purposes of the dead man's statute requires testimony or other evidence that tends to support some issue or allegation advanced by the party able to testify which is essential to sustain a judgment in such party's favor. Rice v. Charles, 260 Va. 157, 166, 532 S.E.2d 318, 323 (2000). Corroboration can come from any source, need not be presented by the plaintiff, and may be by documentary or physical evidence. See Hereford v. Paytes, 226 Va. 604, 608, 311 S.E.2d 790, 792 (1984). Unfortunately, neither the statute – nor case law – has been able to define the requisite corroboration, other than on a case-by-case basis. The requirement to search the record for corroboration is continued in the present version of Code § 8.01-397. The Supreme Court has often sought to provide generic guidance about the role that corroboration plays,[4] while continuing to recognize that in any individual case the facts will lead to an ad hoc determination whether the requirement is met.

What has happened as a result is an inordinate amount of appellate resources being expended reviewing ad hoc corroboration issues, without any dependable guidance to lawyers, parties and the lower courts because the nature of corroboration inevitably is seen as being different from case to case. Examples of the inconsistent and expressly "ad hoc" or "case-by-case" rulings that have been made are set forth in the Appendix to this report to illustrate the amount of appellate court energies the problem of corroboration has consumed, and the necessarily variable outcomes a case-by-case doctrine produces. See Hereford v. Paytes, 226 Va. at 608, 311 S.E.2d at 792 ("*it is impossible to formulate a fixed rule as to the corroboration necessary in every situation because each case must be decided on its particular facts*").

The expenditure of judicial resources has been enormous. Since the 1920's alone, there have been over 80 (eighty !!) decisions by the Supreme Court construing aspects of the corroboration requirement. The annexed Appendix to this Report is an attempted typology of some of the more prominent of these cases. Suffice it to say that in some two-car traffic accident cases the survivor can testify, and in others he/she cannot; in some doctor-patient circumstances the doctor can testify to what transpired, and in others he/she cannot; in some contract or services claims against an estate the survivor can testify, in others he/she cannot.

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[4] See, e.g., Rice v. Charles, 260 Va. 157, 532 S.E.2d 318 (2000) where the Court said:

[T]he critical inquiry is whether his testimony presented an essential issue that, if not corroborated, would defeat his contributory negligence defense. See Hereford v. Paytes, 226 Va. 604, 608, 311 S.E.2d 790, 792 (1984). . . . [W]e have stated some general principles that are pertinent here. "It is not necessary that the corroborative evidence should of itself be sufficient to support a verdict, for then there would be no need for the adverse or interested party's testimony to be corroborated." Brooks, Adm'r v. Worthington, 206 Va. 352, 357, 143 S.E.2d 841, 845 (1965) (citing Burton's Ex'r v. Manson, 142 Va. 500, 509, 129 S.E. 356, 359 (1925); Davies v. Silvey, Adm'x, 148 Va. 132, 137, 138 S.E. 513, 514 (1927); Clay v. Clay, 196 Va. 997, 1002, 86 S.E.2d 812, 815 (1955)). "Corroborating evidence tends to confirm and strengthen the testimony of the witness[,]" and it may come from other witnesses as well as from circumstantial evidence. Hereford, 226 Va. at 608, 311 S.E.2d at 792. It is not essential that a survivor's testimony be corroborated on all material points. Id.; Brooks, 206 Va. at 357, 143 S.E.2d at 845.

The corroboration, to be sufficient under the statute, however, must at least tend, "in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings [and] testified to by the [surviving] witness . . . which allegation or issue, if unsupported, would be fatal to the case." Hereford, 226 Va. at 608, 311 S.E.2d at 792 (quoting Burton's Ex'r, 142 Va. at 508, 129 S.E. at 359). Accord Diehl v. Butts, 255 Va. 482, 489, 499 S.E.2d 833, 838 (1998).

Recent decisions have allowed some testimony by the survivor and found other testimony impermissible, and a 2003 decision suggests that testimony by an adverse party about her version of the events may be "corroboration" in some contexts. Compare *Johnson v. Raviotta*, 264 Va. 27, 34-35, 563 S.E.2d 727, 732-33 (2002), with *Williams v. Condit*, 265 Va. 49, 574 S.E.2d 241 (2003) (four-to-three decision).

Heightened corroboration and heightened uncertainty. In addition to the case-by-case feature of current law, requiring parties to guess and requiring the Supreme Court frequently to determine the merits of a deadman's issue on specific or unique facts, there is the problem of "heightened corroboration." The Court has held that owing to the confidential or fiduciary relationship between some professionals and the decedent/ incapacitated person, allowing testimony by the survivor requires especially powerful corroboration. This standard is not explainable other than by stating that it must be "*more*" than is normally required to corroborate the living witness' testimony. See, e.g., *Diehl v. Butts*, 255 Va. 482, 499 S.E.2d 833 (1998). It applies to some client-professional relationships and some family situations as well, but not parent-child relationships, unless one family member provides financial advice or handles the affairs of another, in which case the higher standard does apply.[5] Some "principal-agent" relationships trigger the application of the heightened requirement.[6] Confusingly, some reported cases say only that a higher standard "***may***" be applied, without specifying whether and when application of the higher burden would be appropriate or necessary.[7]

This "higher" standard is not "clear and convincing proof" but it is more than "ordinary" corroboration. Since the circumstances that would amount to "ordinary" corroboration are uncertain and vary from case to case, the standards and outcomes in cases involving doctors, lawyers, and other professionals, fiduciaries and family members to whom the "extra" or "higher degree" corroboration requirement applies are even less objectively defined or predictable. Many reported decisions appear to simply announce that the required "higher degree" of corroboration is absent without providing guidance on the forms of proof required or the measures for satisfying the standard.[8]

Overall workability of the corroboration requirement. Evidence experts and commentators for many decades have argued that a corroboration requirement "has serious defects" in making an utterly unwarranted "assumption that uncorroborated claims are of such doubtful validity that all must be rejected."[9] Moreover, no court in the Nation has succeeded in defining the application of a corroboration requirement in a fashion that helps lower courts and the practicing bar.

As a major Law Review study of deadman's statutes concluded a number of years ago, one principal "objection to the corroboration requirement is the difficulty in

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[5] Compare Nuckols v. Nuckols, 228 Va. 25, 36-37, 320 S.E.2d 734, 740 (1984); Carter v. Carter, 223 Va. 505, 509, 291 S.E.2d 218, 221 (1982) with Jackson v. Seymour, 193 Va. 735, 740-41, 71 S.E.2d 181, 184-85 (1952).

[6] Creasy v. Henderson, 210 Va. 744, 749-50, 173 S.E.2d 823, 828 (1970).

[7] "In a case involving parties between whom a confidential relationship existed at the time of the transaction relied on, a higher degree of corroboration may be required than in other transactions. Everton v. Askew, 199 Va. 778, 782, 102 S.E.2d 156, 158 (1958) (emphasis added).

[8] See, e.g., Everton v. Askew, 199 Va. 778, 782, 102 S.E.2d 156, 158 (1958); Seaboard Citizens Nat'l Bank of Norfolk v. Revere, 209 Va. 684, 690, 166 S.E.2d 258, 263 (1969).

[9] Roy Ray, DEAD MAN'S STATUTES, 24 Ohio St. Law Journal 89, 111 (1963).

administering such a rule. How can corroboration be defined in a way so that the test can be applied in individual cases without resulting in substantial litigation? [T]he requirement is unsound, [and] the courts should not be burdened with its administration."[10] Wigmore declared statutes with this requirement "misguided."[11]

In 1953 a Virginia Law Review article proposed that the corroboration aspect of the statute be abolished in order to "insure to the survivor of a transactions, or any other interested or adverse witness, an equal status with that of the decedent or any other person incapable of testifying." I.e., the proposal was to abolish the corroboration requirement while retaining the hearsay exception in favor of the decedent/incapacitated party's side. Note, *Corroboration in Virginia under Section 8-286*, 39 VA. L. REV. 395, 404 (1953).

As of 1953, only two other states had the corroboration requirement. While several states maintained special disqualifications for certain cases involving decedents, all states but Virginia and two others had abolished the interested-party disqualification of the 1800's without imposing the special corroboration burden on survivors in those states. As of 1953, Virginia was in a minority of 3 states.

Since 1953 both of the other "corroboration-requiring" states – New Mexico and Oregon – have ABOLISHED the corroboration requirement. From about 1980 onward, both of these states have had "Rule 601-style" competency rules, which are provisions stating generally that *any witness with knowledge is competent*. Thus for over 20 years Virginia appears to have been alone in continuing to require corroboration from a live person about a transaction with a decedent.

Academic[12] and judicial criticism of restrictions on the survivor's testimony are long-standing,[13] and Professor McCormick, author of the leading one-volume treatise on

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[10] Roy Ray, DEAD MAN'S STATUTES, 24 Ohio St. Law Journal 89, 112 (1963).

[11] 7 Wigmore on Evidence § 2065. Dean Wigmore, perhaps the most famous evidence scholar in American history, denounced statutes that preclude use of a survivor's testimony: "As a matter of policy, this survival of the now discarded interest disqualification is deplorable in every respect; for it is based upon a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words."

[12] Professor Morgan, one of the great evidence scholars of the 20th Century and Reporter for the Model Code of Evidence, spoke of the shortcomings of the statutes in these terms:

> All are based upon the delusion that perjury can be prevented by making interested persons incompetent or by excluding certain classes of testimony. They persist in spite of experience which demonstrates that they defeat the honest litigant and rarely, if ever, prevent the dishonest from introducing the desired evidence; if the dishonest party is prevented from committing perjury, he is not prevented from suborning it. If the statutes protect the estates of the dead from false claims, they damage the estates of the living to a much greater extent. And frequently their application prevents proof of a valid claim by the representative of decedent's estate.

Edmund Morgan, Some Problems of Proof Under the Anglo-American System of Litigation, 187 (1956).

[13] See, e.g., St. John v. Lofland, 64 N.W. 930 (N.D. 1895), in which a justice of the North Dakota Supreme Court concluded:

> Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them by destroying the evidence to prove such claims than there would be fictitious claims established if all such enactments were swept away, and all persons rendered competent witnesses. To assume that in that event many false claims would be established by perjury is to place an extremely low estimate on human nature, and a very high estimate on human ingenuity and adroitness. He who possesses no evidence to prove his case save that which such a statute declares incompetent is

Evidence, reports that "commentators agree that . . . the expedient of refusing altogether to listen to the survivor is, in the words of Bentham, a 'blind and brainless' technique. In seeking to avoid injustice to one side, the statute-makers have ignored the equal possibility of injustice to the other."[14] One nationwide academic study found over six fundamental flaws in statutes excluding testimony from the surviving witness,[15] concluding that "the vagaries and inconsistencies pointed out are sufficient to demonstrate that the thousands and thousands of decided cases have built here one of the most complex and hazardous fields of the law of evidence."[16]

Waste of Appellate Resources. Other jurisdictions have also experienced the phenomenon that the deadman's statute generates an ocean of litigation which provides very little guidance to the bar or the trial courts.[17] An experienced trial lawyer in another state indicted the statute in his jurisdiction barring testimony from the survivor in certain

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remediless. But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can contradict the survivor, who supports his claim with his oath. In the legal armory, there is a weapon whose repeated thrusts he will find is difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods - the sword of cross-examinations;

[14] McCormick EVIDENCE § 65.

[15] Roy Ray, DEAD MAN'S STATUTES, 24 Ohio St. Law Journal 89, 108 (1963):

(1) The statutes are based upon the fallacy that the number of dishonest persons is greater than the number of honest ones; and that self-interest makes it probable that people will commit perjury.

(2) The statutes themselves cause injustice by preventing proof of honest claims and defenses. In seeking to avoid the possibility of injustice to one side, they work a certain injustice to the other. "It is difficult to understand why all the concern is for the possibility of unfounded claims against the estate. Why is there no concern for loss by the survivor who finds himself unable to prove his valid claim against decedent's estate? Surely a litigant should not be deprived of his claim merely because his adversary dies. It cannot be more important to save dead men's estates from false claims than it is to save living men's estates from loss by lack of proof."

(3) The statutes fail to accomplish their purported purpose since they suppress only a small part of the opportunities for perjured testimony. They block the testimony of the witness only as to certain subjects, leaving him free to testify falsely as to other matters if he sees fit to do so. Furthermore, a witness who will not stick at perjury will not hesitate to suborn perjury by getting a third person to testify as to those matters as to which his own testimony is barred.

(4) The statutes impede the search for truth. The real hazard in shaping any exclusionary rule is that the jury cannot be expected to make sensible findings when it is deprived of substantial parts of available evidence bearing on the issue in dispute. The great danger thus lies in the suppression of truth.

(5) The statutes underestimate the efficacy of cross-examination in exposing falsehood, and the abilities of the judge and jury to separate the false from the true. These safeguards have proved adequate in other situations involving the testimony of parties and interested persons. Why not here?

(6) The statutes burden the parties with uncertainties and appeals. For a hundred years or more, our courts have been struggling with the interpretation of these statutes. The result is a labyrinth of decisions which have often brought confusion rather than clarity. The statutes continue to mystify able judges and lawyers in endless complexities of interpretation and application.

[16] Id.

[17] At a time when the Texas statute was similar to the Virginia Code provision, a prominent trial judge in that state said: "A legal beginner, as well as a veteran, knows well that, at its best, the Dead Man's Statute is full of snares, traps, and pitfalls, and that we have a rule by a wilderness of cases as well as a rule by an uncertain statute. Stout, "Should the Dead Man's Statute Apply to Automobile Collisions?," 38 TEXAS L. REV. 14, 23 (1959).

circumstances on grounds of unfairness *and* on the ground that continued efforts to construe the exceptions lead to a tangled mass of appellate decisions:

> The time consumed in applying and interpreting the statute is out of all proportion to the doubtful good it does. A statute so difficult of definite limitation should be one of undoubted desirability before it is justified. The statute cannot meet this test. It has so befogged our decisions that the Courts and the bar do not yet know the limitations of the rule.[18]

The Blunderbuss Hearsay Exception. The Committee has not located a single other state that maintains the additional feature of the present Virginia statute, a blunderbuss exception for all manner of written and oral hearsay from the decedent/disabled person's side of the case. Under the present Code provision, ANY hearsay statement of the decedent will be received in evidence, whether it is reliable or not, and whether the decedent had any personal knowledge of the subject or not.

McCormick's treatise reports that a very small number of jurisdictions adopted a "balancing" or "rebuttal" hearsay provision by the late 1940s, based on an ABA report in 1938 that suggested it.[19] The idea was that IF the survivor gave live oral testimony, the opportunity for the decedent/disabled person's side to offer prior out-of-court statements provided some opportunity to respond to the live witness. The proposal endorsed by the ABA report, however, suggested that only the decedent's statements "*made in good faith and upon personal knowledge*" be received where the live witness has testified and the decedent/incapacitated person cannot otherwise respond. Virginia law is much less balanced than the ABA proposal of 1938: it allows use of any and all hearsay, regardless of circumstances or whether the declarant had personal knowledge of the topics opined upon, and it applies whether or not the survivor offers live testimony about the disputed events or transactions. It appears, therefore, that about 50 years ago the General Assembly enacted the hearsay portions of the 1938 ABA report, but omitted the protections that the authors of that very proposal recommended!

Worse, in connection with the recodification of the procedure code in 1977, portions of the language were dropped, such that the hearsay exemption is available to the decedent/disabled person's side, whether or not the surviving witness testifies.

The Committee's review of other jurisdictions disclosed no other state with the unrestricted freedom to offer hearsay currently found in the Virginia deadman's statute.[20]

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[18] Cheek, "Testimony as to Transactions with Decedents," 5 TEXAS L. REV. 149, 172 (1927).
[19] See 63 A.B.A.R. 597 (1938).
[20] A law review article in 1963 reported that only two states had such an unrestricted charter for offering statements of a decedent, Massachusetts and Rhode Island. Roy Ray, DEAD MAN'S STATUTES, 24 Ohio St. Law Journal 89, 112-13 (1963). Neither of those two states still has the cited provisions.

Proper Balance of Protections: the Advent of Discovery

Most jurisdictions abandoned concerns over live witness testimony by parties 100 years ago, relying on cross-examination as the protection against perjurious testimony by a party.

In the last 50 years, however, there has been one other major development in the litigation of cases that affects the balance of concerns when an interested witness gives live testimony in our courts: the availability of pretrial discovery.

Discovery had not been invented in 1919 when the Virginia statute was cast in essentially its current form, and thus could not have been considered in assessing the protections needed in the courts of the Commonwealth to deal with the risk of perjury by a party.

Today, however, Virginia provides the right to conduct depositions, propound interrogatories, engage in the discovery and inspection of property and documents, utilize requests for admissions and arrange for the physical examinations of parties by independent examiners. The creation and implementation of these tools are among the most important developments in civil litigation in the last 200 years.[21] They are surely among the most important features of modern litigation, and they were totally absent when the Virginia deadman statute was created in essentially its present form in 1919.

Today, therefore, the equation is:

Discovery + cross-examination by skilled counsel = safeguards against perjury

In 1919, "trial by surprise" was the norm: litigants did not pre-disclose their expected testimony, and even a good lawyer would need to scramble during cross-examination of a witness who might make up dramatic proof at the last moment. Today discovery and pretrial practice in Virginia ward off these risks to a great extent, and both common law and statutory provisions for impeachment, including use of prior inconsistent statements, bolster the ability of counsel to rein in a witness who attempts to prevaricate.

Thus the present Boyd-Graves Conference Committee came to the view that the need to restrict the availability of live testimony is far less today than it might have been in 1866, or even 1919. The loss of live testimony by an interested witness, and the enforcement of artificial and ill-defined "corroboration" requirements (regular, and "heightened") is no longer necessary. Nor does a blanket hearsay exception making admissible anything and everything the decedent may have uttered, regardless of the circumstances, seem fair or appropriate.

Today the trier of fact can – and should – assess the credibility of the survivor's self-serving live testimony as an interested party in the litigation. The precipitous remedy

[21] See Nathan Glazer, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM (1963).

of completely foreclosing a claim by a survivor is no longer necessary to assure careful and fair assessment of claims in cases involving decedents or incapacitated person.

Most members of the Committee felt that total abolition of the deadman's statute would not be a dangerous or unwarranted step. However, the Committee considered at some length whether there could conceivably be a "pro-plaintiff" or "pro-defendant" aspect of changing or eliminating the deadman's statute for any possible subject area of the Virginia litigation landscape. We did not think there was a serious risk in any subject matter. Nonetheless, it was recognized that allowing more live-witness testimony under a revamped statute could slightly increase the number of oral contract/services claims that would be viable against an estate, and may allow some doctors to testify as to events during treatment that would not be permitted presently absent "high level" corroboration.

Proposal. To make sure that both sides have fair protections, the Committee resolved to recommend to the Conference that the statute be retained insofar as it allows the decedent/incapacitated party's side to offer proof that would otherwise be excludable as hearsay in those cases where the deadman's act applies (basically: where no interested witness has testified for the decedent or incapacitated person's side) in those instances where the living witness has been allowed to testify about the disputed events or transactions. In that core situation, the mouth of the decedent/incapacitated person has been silenced and the survivor has been able to give his/her version of the events.

The Committee proposal adds one further provision as protection for the parties: an express provision requiring that the trier of fact consider the interests and motives of the parties in weighing the evidence received. This will protect the decedent/incapacitated party's side by encouraging the judge or jury to consider the motivation of the live witness in testifying to what happened. It will also protect the surviving party by encouraging the jury to consider the motives and circumstances of the hearsay statements from the decedent/incapacitated person in those cases where the provision allowing out-of-court statements is triggered.

The changes the Committee proposes would therefore accomplish three important improvements:

❶ **Interested Witness Rule to be Codified (Again).** The Committee's proposed revisions would codify the law of the last 100 years in Virginia that the deadman's statute does not apply where an interested witness testifies for the decedent/incapacitated party. A clear statement of this provision was in the Virginia Code as early as 1887 and, while it is not expressly stated in the current version of the statute, this black-letter rule has been embodied in numerous decisions from the Supreme Court of Virginia over several decades and repeatedly emphasized in the last 18 months. Having this provision back in the statute will assist both lawyers and judges in knowing when provisions of the revised statute are applicable.

❷ **Corroboration Requirement Replaced by Credibility Assessment.** The proposed revision would eliminate the requirement of corroboration in all cases, and replace it with a requirement that the trier of fact be directed to assess the

motivation and interest of witnesses and hearsay declarants whose evidence is received in cases where one participant is incapable of live testimony.

❸ **Hearsay Exception to Apply Only After Live Testimony by the Adversary.** Finally, the proposed revision restates the hearsay exception portion of the statute so that it will provide (as was the case in the 1919 version of the Code) that it is the testimony of a survivor about the disputed events or transactions that triggers the option of the decedent/disabled person's side to offer hearsay in response. This is coupled with the requirement that in a jury case the judge instruct the jury to consider the interests and motivations of the persons whose evidence has been received. Under this proposed revision, if no survivor testifies, the special hearsay provision of the deadman's statute is not applicable (and thus the decedent/disabled person's statements can be offered if they meet one of the 25 recognized hearsay exceptions, but the blanket permission to use hearsay under the deadman's statute would not apply).

All of these changes will improve the quality of fact-finding in Virginia courts by increasing the amount of testimony from living witnesses with knowledge that may be used by judges and juries in deciding cases, while balancing the credibility concerns that arise when competing live testimony and hearsay declarations are received.

These changes also reflect the wisdom of Judge Burks' observation in the 1927 *Epes* decision that, as other protections for the integrity of the trial process are evolved, restrictions on the use of testimony from live witnesses with knowledge should be eliminated. 135 Va. at 84, 115 S.E. at 714.

TEXT OF THE STATUTE SHOWING PROPOSED REVISIONS,
WITH FOOTNOTES EXPLAINING VARIOUS PROVISIONS[22]

8.01-397. ~~Corroboration required and~~ Credibility assessment and evidence receivable when one party is incapable of testifying.

In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying ~~, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony.~~ :

A. If an interested witness[23] has testified on behalf of the person incapable of testifying about disputed events or transactions between the person incapable of testifying and another party to the litigation, or an agent of the person incapable of testifying has given evidence about such disputed events or transactions[24], (i) no witness with knowledge shall be disqualified from testifying about the disputed events or transactions solely because one participant therein is incapable of testifying[25], and (ii) the credibility of all witnesses in the case, including their interests and motivations in testifying, shall be considered by the trier of fact[26], and (iii) subdivision B of this section shall be inapplicable.[27]

B. If no interested witness or agent has testified on behalf of the person incapable of testifying about disputed events or transactions between the person incapable of testifying and another party to the litigation, and if a party adverse to the person incapable of testifying has given testimony, not elicited by the representative of the party incapable of testifying,[28]

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[22] Stricken material is shown lined-through, and new material is underscored.

[23] The Code does not – at present – define "interested witness" and this proposed revision does not attempt to do so. The intention of the present revision is clarify that the statute is not applicable if an interested witness testifies for the decedent/disabled person, and to make no change in the existing body of law defining the forms of pecuniary interest that render a witness an "interested witness" for purposes of the deadman's section.

[24] The fact that an agent of the decedent/incapacitated party can be the provider of interested testimony was first recognized by the General Assembly in the deadman's act provisions over 100 years ago.

[25] This provision implement's long-standing Virginia law that testimony for the decedent/disabled person by an interested witness ends the applicability of the deadman's act. See Johnson v. Raviotta, 264 Va. 27, 563 S.E.2d 727 (2002). See generally Merchants Supply Co., Inc. v. Ex'rs of the Estate of John Hughes, 139 Va. 212, 216, 123 S. E. 355, 356 (1924); Wrenn v. Daniels, 200 Va. 419 (1958) (contract dispute).

[26] The Committee felt that directing the attention of the trial judge to the credibility issue in cases where conflicting testimony of party and interested witnesses was presented was natural and helpful.

[27] Clause (iii) is included to make it clear that the blanket hearsay exception does not apply to support admission of the decedent/disabled person's statements unless there has been oral testimony by the opposing survivor. Other hearsay exceptions, recognized in the Virginia law of evidence, could be used to offer the decedent/disabled person's prior statements, and if the normal hearsay exception requirements are met the statements could be received on that basis.

[28] This phrase implements a well-documented exception to the application of the statute that applies where an adverse party is called by the representative of the incapacitated party and testifies regarding the facts in

about disputed events or transactions between such adverse party and the person incapable of testifying, (i) all entries, memoranda, and declarations by the party so incapable of testifying made while he or she was capable, relevant to the matter in issue, may be received as evidence,[29] ~~in all proceedings including without limitation those to which a person under a disability is a party.~~ and (ii) the credibility of all witnesses and the weight to be given to all evidence heard in the case shall be considered by the trier of fact in light of the interests and motivations of the persons whose evidence is received.

C. The phrase "from any cause" as used in this section shall not include situations in which the party who is incapable of testifying has been rendered ~~himself~~ unable to testify by an intentional self-inflicted injury.[30]

D. In all cases to which subdivision B of this section applies that are tried to a jury, the court shall expressly instruct the jury that in deciding the case and assessing the weight of the proof, it shall consider the interests and motivations of the persons whose evidence has been received in the case.

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dispute and that testimony is uncontradicted and not inherently improbable. Brown v. Metz, 240 Va. 127, 131-32, 393 S.E.2d 402, 404 (1990); Balderson v. Robertson, 203 Va. 484, 488, 125 S.E.2d 180, 184 (1962).

[29] This provision makes the blanket hearsay exception for statements of a decedent/disabled person applicable only where there has been oral testimony by the adverse survivor.

[30] This provision has been in the deadman section since 1988, and its basic effect is to make the statute inapplicable to cases of suicide. The effect of this provision is that the representatives of decedents who died by suicide do not have the right to demand special corroboration from the survivor, and do not have the right to offer hearsay without meeting one of the recognized hearsay exceptions. The Committee discussed this provision, and decided that the moral judgment of the General Assembly, along with concerns about the unfairness to the survivor of being placed at an evidentiary disadvantage due to another person's suicide, was not obviously wrong. Moreover, this provision has not presented the management problems that the general corroboration and hearsay provisions of the present statute cause. Nor is there any ambiguity about the applicable rule in suicide cases under this provision. The general section, Code § 8.01-396, makes all witnesses competent, and under this suicide provision the deadman section does not apply, so the party opposing the decedent would be competent to testify. In suicide cases, the representative of the decedent does not have any special hearsay exceptions (as provided when -397 applies) either. However, that situation is not inherently unfair to the decedent's side. There are about 25 Evidence law exceptions to the hearsay rule that could be used by the decedent's side to offer prior statements. Thus if the prior statements of the decedent are reliable enough to fit one of the regular hearsay exceptions, they will be admissible. In the absence of problems in Virginia practice in applying the suicide provision, the Committee resolved unanimously to refrain from proposing that this provision be substantively changed. Only a gender-neutralizing word change is proposed.

APPENDIX

NOTES ON THE DIVERSITY OF
CASE-BY-CASE CORROBORATION DECISIONS
under the Virginia Deadman's Statute

Example cases prior to 1950 decided under Code §6209 (originally written in 1919), from 1950-1976 under Code § 8-286, and from 1977 to present under Code § 8.01-397.

Traffic Accident Cases

- Collisions between two parties after which one party is deceased or incompetent, and for which there exist no other living witnesses. Survivor has been precluded from testifying in the following cases due to LACK OF CORROBORATION:
  - *Kimberlin v. PM Transport*, 254 Va. 261 (2002) (evidence of habit must be sufficiently numerous and regular in order to qualify as corroboration; testimony alone as to habit is not sufficient).
  - *Rice v. Charles*, 260 Va. 157 (2000) (recorded blood alcohol level and testimony of other witnesses that decedent saw survivor drinking beer was not sufficient to corroborate survivor's testimony that decedent appeared drunk and thus was contributorily negligent in her own death).
  - *Hereford v. Paytes*, 226 Va. 604 (1984) (credibility of surviving witness alone was not sufficient to corroborate the testimony).
- Survivor has been allowed to testify in the following cases due to CORROBORATION:
  - *Williams v. Condit*, 265 Va. 49 (2003) (defendant's interested spouse's testimony, which was offered *after* plaintiff's evidence).
  - *Penn v. Manns*, 221 Va. 88 (1980) (medical evidence and attendant circumstances show that complications from gun shot wound were likely both cause of car accident and cause of death of wounded passenger).
  - *Whitmer v. Marcum*, 214 Va. 64 (1973) (skid marks observed by state trooper corroborate survivor's testimony as to circumstances of accident).
- CORROBORATION NOT NECESSARY in these car accident cases:
  - Statute deemed inapplicable. *Sturman v. Johnson*, 209 Va. 227 (1968) (defendant's amnesia did not render him incompetent), *John Doe v. Faulkner*, 293 Va. 522 (1962) (hit and run driver is *unavailable*, not *incapable*).
  - *Gray v. Graham*, 231 Va. 1 (1986) (statements of decedent may be received as evidence in any action by or against the estate, even if not *offered* by the estate).
  - *Carter v. Nelms*, 204 Va. 338 (1963) (plaintiff's testimony was later stricken, so it did not require corroboration).
  - *Hoge v. Anderson*, 200 Va. 364 (1958) (when corroborated testimony offered by surviving party, decedent's statements regarding those issues made while capable may be received as evidence).

Medical Malpractice Cases

- Doctor's statements as a matter of law have been ruled NOT CORROBORATED in the following cases:
  - *Johnson v. Raviotta*, 264 Va. 27 (2002) (nurse's notes indicating "units of care," but not recording vital signs, not sufficient to corroborate either doctor's testimony that he instructed nurse to perform checks of vital signs every half hour or hour, or nurse's testimony that she did check decedent's vital signs; doctor's statement as to usual habits during physical examinations not sufficient to corroborate his testimony that he checked decedent's blood pressure twice at the examination prior to her hospitalization, that her blood pressure had dropped, and that this drop meant that he could not have diagnosed at that time the condition which eventually killed the patient).
  - *Diehl v. Butts*, 255 Va. 482 (1998) (testimony of neighbor and brother that decedent or his wife related to them that doctor had told decedent not to work was not sufficient to corroborate doctor's testimony as to the same given higher degree of corroboration required in confidential relationships).
  - *Taylor v. Mobil Corp.*, 248 Va. 101 (1994) (nurse's statement that decedent did not complain of chest pain during stress test does not corroborate as a matter of law doctor's statement that decedent did not complain to him of chest pain either, given her possible bias and conflicting evidence from the stress test).

Gift Cases

- CORROBORATION NOT ESTABLISHED for oral promise to make a gift when testimony of others was not sufficiently detailed. *Vaughn v. Shank*, 248 Va. 224 (1994), *Grace v. Virginia Trust Co.*, 150 Va. 56 (1928) (possession of key to lock box in addition to vague testimony also insufficient to corroborate gift of bond in box), *Nicholson v. Shockey*, 192 Va. 270 (1951) (signature of alleged donor on form account agreement did not corroborate gift of joint accounts to son).
- Corroboration was ESTABLISHED as to gift of bond by both grantees' possession of bond and testimony of others as to close relationship between grantor and grantees and to grantees' long service to grantor. *Shenandoah Valley Nat'l Bank v. Lineburg*, 179 Va. 734 (1942).

Deed Cases

- Corroboration determined NOT SUFFICIENT:
  - Recitals in written deed determine type of interest granted; oral testimony alone cannot alter these when grantor or grantee deceased. *Muth v. Gamble*, 216 Va. 436 (1975), *Roane v. Roane*, 193 Va. 18 (1951), *Crump v. Gilliam*, 190 Va. 935 (1950).
- Corroboration SUFFICIENT:
  - Deed including acknowledgement of conditions or intended possessor. *Hackett v. Emmett*, 215 Va. 726 (1975) (despite the fact that deed was not recorded, decedent's signature on copy of deed granting remainder interest to recipient and delivery to recipient of original through the mail sufficient), *Grimes v. People's Nat'l Bank of Pulaski*, 191 Va. 505 (1950) (text of deed and surrounding circumstances corroborate survivor's

testimony that he believed that incompetent seller had title to the property), *Harper v. Harper*, 159 Va. 210 (1932) (deed including acknowledgement of debt and lien corroborate testimony that survivors are due proceeds from land sale), *Battle and Wife v. Rock*, 144 Va. 1 (1926) (recital in deed releasing property from husband to wife corroborate testimony of others that farm was wife's property).

Will Cases

- Testimony was NOT CORROBORATED as to changes in a will when corresponding circumstantial evidence was ambiguous or nonexistent. *Clay v. Clay*, 196 Va. 997 (1955), *Truslow v. Ball*, 166 Va. 608 (1936).
- Testimony of non-interested parties was SUFFICIENT TO CORROBORATE changes to a will, or existence of extra-testatory parol contracts. *Everton v. Askew*, 199 Va. 778 (1958), *Clark v. Atkins*, 188 Va. 668 (1949), *Simpson v. Scott*, 189 Va. 392 (1949), *McNelis v. Colonial-American Nat'l Bank*, 163 Va. 284 (1934) (testimony of others plus possession of property).

Contract Disputes

- NO CORROBORATION was established in the following circumstances:
  - Written evidence supporting general concepts at issue did not corroborate specific terms of contract in dispute. *Wiltshire v. Pollard*, 220 Va. 678 (1980) (memoranda), *Seaboard Citizens Nat'l Bank v. Revere*, 209 Va. 684 (1969) (account books), *Trevillian v. Bullock*, 185 Va. 958 (1947) (evidence of other debts not at issue), *Noland Co., Inc. v. Wagner*, 153 Va. 254 (1929) (receipts including information about other projects as well), *Ratliff v. Jewell*, 153 Va. 315 (1929) (account book).
  - When testimony offered as corroboration was too vague to establish specifics, it was not sufficient. *Taylor v. Hopkins*, 196 Va. 571 (1954), *Kurtz v. Dickson*, 194 Va. 957 (1953), *Ingles v. Greear*, 181 Va. 838 (1943), *White v. Pacific Mutual Life Ins., Co.*, 150 Va. 849 (1928).
  - Testimony of other witnesses was not sufficiently corroborative when named party's testimony itself is uneven and contradictory. *Burton's Ex'er v. Manson*, 142 Va. 500 (1925).
- CORROBORATION was established in the following cases:
  - Testimony of other, non-interested parties. *Brooks v. Worthington*, 206 Va. 352 (1965), *Rorer v. Taylor*, 182 Va. 49 (1943), *Cannon v. Cannon*, 158 Va. 12 (1932) (contract for care also corroborated by plaintiffs' taking defendant's decedent into home), *Timberlake's Administrator v. Pugh*, 158 Va. 397 (1932) (circumstances and payment of property taxes also corroborated contract for property in return for care).
  - Written documentation or instruments. *Morris v. United Virginia Bank*, 237 Va. 331 (1989) (document signed by decedent in presence of non-interested witnesses), *Batleman v. Rubin*, 199 Va. 156 (1957) (small consideration paid by wife in return for antenuptial agreement), *Bickers v. Pinnell*, 199 Va. 444 (1957) (letter, notations on cancelled checks, and testimony to others), *Leckie v. Lynchburg Trust and Savings Bank*, 191 Va. 360 (1950) (account statement and testimony from uninterested parties), *Southern Materials Co. v. Marks*, 196 Va. 295 (1954) (invoice which laid out standard terms for contracts), *Purcell v. Purcell*, 188 Va. 91

(1948) (letter and statements to others), *Kirkorian v. Dailey*, 171 Va. 16 (1938) (record of sales and rent charges, contract for lease), *Southwest Motor Co. v. Kendrick*, 157 Va. 251 (1931) (reduction of rent and supplemental lease corroborate testimony of tenant as to promise of landlord to remedy poor condition of leased property), *Epes' Administrator v. Hardaway*, 135 Va. 80 (1923) (written instrument and status of son as mother's official agent).

- INTERESTED PARTIES may not provide corroboration in contract disputes.
  - Third party is still deemed interested if his sale of stock or other assets in a company which is a named party in the case at issue was for the sole reason of enabling that third party to introduce testimony without corroboration as an uninterested individual. *Atlantic Coast Realty Co. v. Robertson's Ex'er*, 135 Va. 247 (1923).
  - Individual with similar claims who has not joined as a party in present action is not "interested" and may corroborate party's testimony. *Arwood v. Hill's Administrator*, 135 Va. 235 (1923).
- EXPERT WITNESS CAN CORROBORATE statement of a party who hired him, if an adverse party testifies first. *Haynes v. Glenn*, 197 Va. 746 (1956) (expert testimony to value of items stolen which party had contracted with other party to keep safe).

Loans

- Corroboration was ESTABLISHED in:
  - *Morrison v. Morrison*, 174 Va. 58 (1939) (cancelled checks corroborated existence of a loan, testimony established existence of will directing debts to be paid).
  - *Davies v. Lucy*, 148 Va. 132 (1927) (evidence of cancelled checks for repayment of another obligation corroborated non-payment of the contested loan).

Other Cases

- Corroboration was NOT established in:
  - *Gillespie v Somers*, 177 Va. 231 (1941) (letters contradicted the survivor's testimony).
  - *Heath v. Valentine*, 177 Va. 731 (1941) (notes directly contradicted testimony).
  - *Wills v. Chesapeake Western Rwy, Co.*, 178 Va. 314 (1941) (testimony of bond holder that he did not order trustee to sell property held by trustee to secure bond payments, and that he was not aware that property had been sold, was not corroborated by the fact that the trustee paid bond holder interest due on the bond).

Corroboration not necessary when:

- *Officer* of corporate party who engaged in transaction was the deceased. *Union Trust Corp. v. Fugate*, 172 Va. 82 (1939)
- Testimony was offered by opposing party, if not inherently improbable. *Balderson v. Robertson*, 203 Va. 484 (1962) (car accident), *Brown v. Metz*, 240 Va. 127 (1990) (promise to make gift), *Enright v. Bannister*, 195 Va. 76 (1953) (delivery of deed), *Economopoulos v. Kolaitis*, 259 Va. 806 (2000) (testimony by survivor regarding validity of new will elicited by adverse parties during their portion of the case; despite fact that survivor was beneficiary to will and had previously had a business relationship with decedent, which, had it continued, would have given rise to a presumption of fraud, his testimony does not need to be corroborated).
- An interested party testifies on behalf of decedent. *Paul v. Gomez*, 118 F. Supp. 2d 604 (2000) (car accident), *Wrenn v. Daniels*, 200 Va. 419 (1958) (contract dispute).
- Living parties are disputing validity of a will. *Croft v. Snidow*, 183 Va. 649 (1945).
- Witnesses are not interested parties (contract disputes). *Scholz v. Standard Accident Ins. Co.*, 145 Va. 694 (1926) (witness was merely agent of an interested party). Nor is it necessary if general corroboration as to item at issue is established. *Downing v. Huston, Darbee, Co.*, 149 Va. 1 (1927) (only have to corroborate payment of debt at issue), *Doughty v. Thornton*, 151 Va. 785 (1928) (do not have to corroborate specific amount of payment, if can corroborate general contract for care).

Other Corroboration issues:

- *Adams v. Adams*, 233 Va. 422 (1987) (decedent's statements made while alive were admissible under the statute).
- *Ricks v. Sumler*, 179 Va. 571 (1942) (case remanded for proof of corroboration which was not at issue in prior trial).
- *Mapp v. Byrd*, 169 Va. 519 (1938) (court may decide case on other evidence if it is sufficient after eliminating all contradictory and non-corroborated testimony).