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Witnesses—Competency—Whether the Statute Prohibiting an Adverse Party from Testifying to Admissions by a Deceased Joint Contractor Unless the Surviving Joint Contractor Was Also Present Applies to a Surviving Joint Tenant

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WITNESSES—COMPETENCY—WHETHER THE STATUTE PROHIBITING AN ADVERSE PARTY FROM TESTIFYING TO ADMISSIONS BY A DECEASED JOINT CONTRACTOR UNLESS THE SURVIVING JOINT CONTRACTOR WAS ALSO PRESENT APPLIES TO A SURVIVING JOINT TENANT—The Supreme Court of Illinois, in the recent case of *Anderson v. Lybeck*,¹ construed, for the first time, that portion of the “dead man’s statute”² which is concerned with the admissions of a deceased joint contractor. Certain realty had been conveyed by a father to his son under circumstances creating a constructive trust. After the father’s death, the son repeatedly acknowledged the interest therein of the father’s other heirs. However, the son’s death seven years later revealed that he had reconveyed the property to himself and his wife in joint tenancy. At this juncture, one of the father’s heirs brought suit against the surviving joint tenant seeking to impose a constructive trust on the realty. The defendant relied on the statute of limitations³ and, in response thereto, the plaintiff offered to prove by her own testimony the aforementioned acknowledgments which had been made within the limitation period. The defendant objected to the testimony on the ground that it was inadmissible because of the statutory prohibition regarding the admissions of a deceased joint contractor. The circuit court sustained the objection and dismissed the suit on the ground that it was barred by the statute of limitations. On a direct appeal to the Supreme Court of Illinois,⁴ the lower court’s decision was reversed and remanded. The high court held that a joint tenant can be distinguished from a joint contractor and, therefore, such testimony was not within the scope of the statutory prohibition.

Under the common law all witnesses with an interest in the outcome of the litigation were disqualified, because of the fear that interested persons would resort to calculated mendacity to further their own causes. Presently, because of enabling statutes passed almost a century ago, interested persons are, in general, deemed to be competent witnesses.⁵ These statutes were probably motivated by the realization that in most litigation interested persons are more apt to be cognizant of the pertinent facts than

¹ 15 Ill. (2d) 227, 154 N. E. (2d) 259 (1958).

² Ill. Rev. Stat. 1957, Vol. 1, Ch. 51, § 4, prohibits a person adversely interested from testifying to admissions or conversations by any deceased partner or joint contractor unless one or more of the surviving partners or joint contractors were also present.

³ Ill. Rev. Stat. 1957, Vol. 2, Ch. 83, § 16, provides for a five year limitation on actions stemming from oral contracts.

⁴ Direct appeal to the Illinois Supreme Court was made by the authority of Ill. Rev. Stat. 1957, Vol. 2, Ch. 110, § 75, which provides for such procedure where a freehold is involved.

⁵ Ill. Rev. Stat. 1957, Vol. 1, Ch. 51, § 1, generally permits all persons to give testimony.

are uninterested third parties, and that modern procedures for cross-examination, impeachment and contradiction afford a feasible means for determining the credibility of witnesses. The "dead man's statute,"⁶ a relic of the aforementioned common law rule, remains as an exception to the general enabling statutes. Its purpose and intent is to put the parties on an equal footing,⁷ since the dead man cannot contradict or explain the testimony of the adversely interested witness.

That portion of the "dead man's statute" on which the defendant relied in the instant case is actually a protraction of the main body of the "dead man's statute" in that it is applicable even though the estate of the deceased is not a party to the suit. The intention of the legislation is to protect the surviving interested party from the possibility of fraudulent allegations regarding the admissions and conversations of the deceased when there is no means of contradicting or explaining such allegations.⁸

The sole appellate court construction of the term "joint contractor," since the enactment of the "dead man's statute" in 1867, occurred in 1880 in the case of *Henry v. Tiffany*⁹ in which the court held that this phraseology encompasses not only parties jointly obligated by a simple contract but also includes the parties jointly obligated by the accessory contract in a suretyship transaction. However, the dead party to the suretyship contract involved in the case of *People v. Borders*¹⁰ was not treated so kindly. Therein, the court admitted the testimony of the plaintiff creditor regarding the fraudulent manner in which the deceased principal debtor had obtained a receipt which purported to release the principal. It was there held that the testimony in question was concerned with a transaction of the deceased rather than an admission or conversation and, therefore, was not within the limitation of the statute. There appears to be a basic inconsistency in these two cases in that the living joint contractor's interest is as vulnerable to fraudulent testimony regarding transactions of the deceased as it is to fraudulent testimony regarding the verbal admissions and conversation of the deceased.

With this sparse and uncertain background the court was faced with the contention that the joint tenancy arose by contract and, therefore, the joint tenants were joint contractors and the surviving joint tenant was

⁶ Ill. Rev. Stat. 1957, Vol. 1, Ch. 51, § 2, provides that no party to a civil action shall be permitted to testify therein on his motion or in his own behalf, when any adverse party sues or defends as heir or devisee.

⁷ *Nordman v. Carlson*, 291 Ill. 438, 10 N. E. (2d) 53 (1937); *Vancuren v. Vancuren*, 348 Ill. App. 351, 109 N. E. (2d) 225 (1953).

⁸ *Foster v. Hart*, 29 Ill. App. 260 (1890).

⁹ 5 Ill. App. 548 (1880).

¹⁰ 31 Ill. App. 426 (1889).

entitled to the protection afforded by the statute. The court, however, distinguished a joint tenant from a joint contractor on the ground that a joint tenant has no duty to maintain the joint tenancy and, therefore, ruled that the testimony regarding the admissions of the deceased joint tenant was competent. This ruling seemingly ignores the underlying policy of the statute because the absence of a duty on a joint tenant to maintain the joint tenancy has no apparent bearing on the necessity of protecting the surviving interested party from fraudulent testimony as to the admissions of the deceased.

The decision also emphasizes some incongruous results caused by the "dead man's statute." For example, if the deceased in the instant case had not deeded the property in question, the crucial testimony probably would not have been admitted because the defendant would then have been in the position of an heir or a devisee of the decedent. A case in point is *Lotta v. Lotta*,¹¹ one wherein the plaintiffs' mother acquired property under circumstances sufficient to create a resulting trust. The mother then deeded the property to her husband and later regained title by devise from him. In the plaintiffs' suit to impose a trust, their testimony was denied admission for the reason that the mother was defending as a devisee.¹² The apparent inconsistencies in the two cases are compounded by the fact that, in the first case, the statute was not applied although the parties would thereby be placed on an unequal footing because the deceased party would have been the only one capable of explaining or contradicting the plaintiffs' testimony. However, in the *Lotta* case the statute was applied even though a failure to do so would not have placed the parties on an unequal footing since the deceased party had no connection with the facts alleged in seeking to establish the trust while the mother, a party to the questioned transactions and a defendant in the case, was in a position to explain or contradict the plaintiffs' testimony.

Notwithstanding these ostensibly incongruous holdings, the court's decision not to apply the statute in the instant case was a good one in that it opened the door to testimony intended to prevent fraud whereas a decision to apply the statute, as in the *Lotta* case, would have allowed the defendant to reap the benefits of fraud. The paradox resulting where the application of a statute whose basic policy is the prevention of fraud fails to prevent it and where a failure to apply the statute does prevent fraud delineates a basic fault, namely, that while the statute shields the

¹¹ 6 Ill. (2d) 397, 129 N. E. (2d) 153 (1955), noted in 35 CHICAGO-KENT LAW REVIEW 39.

¹² *Ibid.* Ill. Rev. Stat. 1957, Vol. 1, Ch. 51, § 2, makes a party directly interested incompetent to testify in his own behalf or on his own motion in a civil suit against a devisee.

interests of the dead, it does so by removing a means of protection otherwise available to the living. This fault could be overcome either by the complete repeal of the "dead man's statute" or by amending it to allow its application at the discretion of the court.¹³

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¹³ See Vol. 2, Wigmore, Evidence, §§ 422 and 578 (3rd ed. 1940), wherein the "dead man's statutes" in effect in various states are quoted and the two suggested corrective measures are discussed.