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PARTIES AND SUITS WITHIN THE PROTECTION OF THE DEAD MAN'S ACT

Section 1 of the Illinois Evidence and Depositions Act¹ removes the common law rules of incompetency pertaining to witnesses having an interest in the litigation. However, section 2 of the act establishes a statutory incompetency. This incompetency is not as all-encompassing as that of the common law. Only persons or parties directly interested in the outcome of the litigation are rendered incompetent when testifying in their own behalf. Furthermore, the protection of the statute is given only to certain adverse parties. To be granted the protection of section 2, the adverse party must be suing or defending as

. . . the trustee or conservator of any habitual drunkard, or person who is mentally ill or mentally deficient, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as the guardian or trustee of any such heir, legatee or devisee . . .²

The list of cases concerning protected parties is long and without any inherent format by which it can be analyzed. Therefore, the approach to the discussion herein will be twofold: first, protection as it is afforded to particular groups; and second, protection as it appears in certain kinds of causes of action.

PROTECTED PARTIES

Heirs

The basic purpose of the Dead Man's Act is to "protect the estates of deceased persons from the assaults of strangers."³ Protection of heirs, as such,⁴ is therefore of paramount importance.

Such protection can be seen in the cases of *Brumfield v. Wise*⁵ and *Gladville v. McDole*.⁶ Both cases were brought for specific performance of alleged parol contracts made by the ancestors of the defendant-heirs. The plaintiffs were disqualified as witnesses concerning either the making of the contract or its alleged reformation.

The statute, in general, prohibits those parties adverse to heirs from testifying; not heirs themselves. In *Weiss v. Beck*,⁷ the plaintiff was suing

¹ Ill. Rev. Stat. ch 51, § 1 (1967).

² Ill. Rev. Stat. ch 51, § 2 (1967).

³ *Heintz v. Dennis*, 216 Ill. 487, 488, 75 N.E. 192, 193 (1905).

⁴ Protection was denied when an heir defended as a grantee. *Wurth v. Hosmann*, 410 Ill. 567, 102 N.E.2d 800 (1951). An heir is not protected if his claim is not connected with heirship. *Camfield v. Plummer*, 212 Ill. 541, 72 N.E. 787 (1905) (Heir's claim based on money lent to deceased; resulting trust sought).

⁵ 373 Ill. 263, 26 N.E.2d 82 (1940).

⁶ 247 Ill. 34, 93 N.E. 86 (1910).

⁷ 1 Ill. 2d 420, 115 N.E.2d 768 (1953).

for specific performance of an alleged parol contract for adoption made by the defendant-heir's mother. The defendant was allowed to testify, the court saying, "It is not the heir who is disqualified from testifying under the Evidence Act, but it is the party adverse to the one suing as an heir that is disqualified."⁸

The general premise that an heir can testify must be qualified to the extent that this right to be a witness in his own behalf does not exist if his testimony is adverse to another protected party. For example, heirs can not testify if they are suing other heirs of the same decedent. In *Alward v. Woodward*,⁹ the plaintiff-heir brought a partition action. The defendant, another heir, sought to show that the plaintiff had released his expectancy in the estate. The plaintiff was not allowed to testify concerning his release since such testimony adversely affected the interests of another heir.¹⁰

Likewise, an heir cannot testify if he is suing heirs of another estate. In *Gillam v. Wright*,¹¹ the plaintiff-heirs sought to have a deed from their deceased mother to her second husband set aside. The husband was also deceased and represented by heirs. Neither the plaintiffs nor the defendants were allowed to testify in their own behalf.

This prohibition on heirs testifying in their own behalf when adverse parties are in a protected class is further shown by *Heintz v. Dennis*.¹² The plaintiff, as devisee of his father, sought to gain title to a certain parcel of real estate. The defendant, on a cross-complaint, claimed that the property had been purchased with her mother's money. The defendant's claim to title was on the theory that the money given to the plaintiff's testator by her mother was from her former husband, defendant's father. Therefore, as heir of the father she was entitled to a resulting trust in the property. Both of the parties were held to be incompetent witnesses, since the testimony of each was adverse to a protected party.

Devisees or Legatees

All protected groups are given the same extent of protection; that is, the testimony of adverse witnesses in furtherance of their own interest is prohibited. Several examples should be sufficient to show such treatment concerning devisees or legatees.

In *Lotta v. Lotta*,¹³ the plaintiffs sought to establish a resulting trust in a parcel of land, which allegedly had been purchased with their money and conveyed to their mother. Their mother in turn deeded, through a straw-man, to her husband. The defendants were devisees of the husband.

⁸ *Id.* at 430, 115 N.E.2d at 774.

⁹ 315 Ill. 150, 146 N.E. 154 (1925).

¹⁰ *Cf.*, *Worrell v. Torrance*, 242 Ill. 64, 89 N.E. 63 (1909).

¹¹ 246 Ill. 398, 92 N.E. 906 (1910).

¹² 216 Ill. 487, 75 N.E. 192 (1905).

¹³ 6 Ill. 2d 397, 129 N.E.2d 153 (1955).

Consequently, the plaintiffs were not allowed to testify concerning the transaction.

The defendants in an ejectment action were barred from testifying in *Thompson v. Thompson*.¹⁴ The suit was brought by the plaintiff who was devisee of the record title holder. The defendants could not give testimony concerning transactions with the testator which gave rise to their alleged rights of possession.

A somewhat extended protection is shown by the case of *Geiger v. Merle*.¹⁵ The plaintiff sought dower rights in her deceased husband's estate. She had previously released her dower rights in an antenuptial agreement, and all of the husband's property had been transferred to his children, the defendants, in trust. She claimed that her signature on the antenuptial agreement had been obtained by fraud and, therefore, her rights in the trust property had not been released. The defendants were classified as legatees of the deceased rather than beneficiaries of a trust. The court's basic reason for this classification was that the trust contained provisions for testamentary distribution of the corpus after the settlor's death. The trust was considered to be part of the settlor's overall testamentary plan and not just a transfer of present interest in the property. Therefore, the plaintiff's testimony would have been incompetent were it not for the fact that one of the exceptions to the Dead Man's Act was found applicable.¹⁶

The case of *Diegley v. Lilly*¹⁷ points out the fact that a party seeking protection of the Act must be timely in asserting rights to a protected status. The defendant was sued for conversion of bonds. She had not appeared in probate court to determine her rights in the bonds as a legatee nor did the plaintiff concede any such rights in his pleadings. She was denied protection of the statute, since her first assertion of a protected position was not made until trial.

Executors and Administrators

Two suits for debt show the disqualification of interested party witnesses testifying in their own behalf against protected persons in this class.

In the first of these, the deceased's administrator sued on an open account.¹⁸ The defendant was not allowed to testify in his own behalf but could introduce other witnesses concerning his indebtedness.

¹⁴ 411 Ill. 232, 103 N.E.2d 607 (1952).

¹⁵ 306 Ill. 497, 196 N.E. 497 (1935).

¹⁶ Ill. Rev. Stat. ch. 51, § 2 (1967).

Third—Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any persons having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest shall also be permitted to testify as to the same conversation or transaction.

¹⁷ *Diegley v. Lilly*, 315 Ill. App. 491, 43 N.E.2d 156 (3d Dist. 1942) (Abstr.).

¹⁸ *Tucker v. Tucker*, 316 Ill. App. 671, 45 N.E.2d 558 (1st Dist. 1943) (Abstr.).

The second case was brought by the executor of an estate against a corporation for debts owed to the deceased by the corporation.¹⁹ The deceased's sons, who were officers of the corporation, were not allowed to overcome the protected position of the executor and testify.

An interesting extension of protection is presented by the case of *Redden v. Inman*.²⁰ An executor had entered into a contract for the sale of land with the plaintiff's assignee. The consideration consisted of part cash and the execution of several promissory notes. The plaintiff sought a reformation of the notes to lower the interest rate in accordance with the alleged terms of the parol contract made with the executor. Subsequently, the executor died and a successor was appointed. The court refused to allow the plaintiff to testify. It stated that the successor to the executor assumed a position similar to his administrator and was, therefore, entitled to protection of the Dead Man's Act.

In *In re Teehan's Estate*,²¹ a claim against an estate was defended by the executor. Over his objections, the wife of the claimant was allowed to testify to transactions with the decedent. The plaintiff contended that the wife's section 2 incompetency had been abrogated by section 5 of the Evidence and Depositions Act,²² which generally allows husbands and wives to testify for or against each other. The court said that while section 5 removed some of the common law disability concerning a wife's testimony for or against her husband, the section is a part of the overall Evidence and Depositions Act and cannot be used to alter the effect of other sections of the Act. Consequently, the phrase "in all civil actions"²³ in section 5 must be limited to exclude testimony where the adverse party is protected by the provisions of section 2.

Trustees

Trustees of heirs, legatees or devisees are entitled to the same protection as the heirs, legatees or devisees themselves.²⁴ There are no cases directly illustrating this protection. However, the case of *Michna v. May*²⁵ shows that the party must fit precisely into the classifications created by the statute to seek its protection. The plaintiff, wife of the deceased, brought suit against the trustee and beneficiaries of a trust created by her husband. The beneficiaries were the sisters of her husband. She sought to have the trust set aside as a fraud on her marital rights. The court permitted the plaintiff to

¹⁹ *City Nat'l Bank & Trust Co. v. Oberheide Coal Co.*, 307 Ill. App. 519, 30 N.E.2d 753 (1st Dist. 1941).

²⁰ 6 Ill. App. (4th Dist. 1880).

²¹ 287 Ill. App. 58, N.E.2d 513 (1st Dist. 1936).

²² Ill. Rev. Stat. ch. § 5 (1967).

²³ Ill. Rev. Stat. ch. 51, § 5 (1967).

²⁴ Ill. Rev. Stat. ch. 51, § 2 (1967).

²⁵ 80 Ill. App. 2d 281, 225 N.E.2d 391 (1st Dist. 1967).

testify, since the beneficiaries were such through the creation of a trust, and not as heirs, legatees or devisees of the decedant²⁸

Conservators

Suits initiated by a conservator of an insane²⁷ or feeble-minded person²⁸ are of a protected nature, so that adverse parties cannot testify in their own behalf. Thus, plaintiffs cannot testify that deeds to a party, who after their execution became insane and represented by a conservator, were forgeries.²⁹ Nor can a husband testify in an annulment proceeding when his wife is insane and represented by a conservator ad litem.³⁰

However, when a suit is brought by a next friend to set aside a deed on the basis that the grantor was incompetent when it was executed, the next friend cannot claim the benefit of the statute when the grantor's general sanity was not in issue.³¹

The extent of disqualification of witnesses adverse to a conservator does not prevent the adverse party witness from introducing and making affidavits for the purpose of having records of conveyances made a part of the record.³² The section only prohibits direct testimony concerning the cause of action and not foundation evidence for introducing secondary evidence of lost documents.³³

Assignees of Deceased Persons

The statute does not explicitly protect assignees of decedants from testimony of persons whose interest is adverse to the assignee. Nor has the protection been extended to such persons by case law. The maker of a note may testify even though the original payee-assignor is dead.³⁴ Likewise, the transferees of a deceased's stock are not entitled to any benefit from section 2. In *Winger v. Chicago City Bank and Trust Co.*,³⁵ plaintiff stockholders sought a lien on profits resulting from the directors' transfer of stock to a successor corporation in violation of their management and fiduciary obligations. The plaintiffs sought to trace the profits received by the directors into the new issue of stock of the second corporation. They were allowed to testify against the transferee of a portion of a deceased director's stock, but

²⁸ *But see* Geiger v. Merle, 306 Ill. 497, 196 N.E. 497 (1935).

²⁷ Partridge v. Berliner, 325 Ill. 253, 156 N.E. 352 (1927).

²⁸ Hinkley v. Wynkoop, 305 Ill. 115, 137 N.E. 154 (1922).

²⁹ Holton v. Dunker, 198 Ill. 407, 64 N.E. 1050 (1902).

³⁰ Morrison v. Morrison, 241 Ill. App. 359 (4th Dist. 1926).

³¹ Tompkins v. Tompkins, 257 Ill. 557, 100 N.E. 965 (1913).

³² Scott v. Basset, 194 Ill. 602, 62 N.E. 914 (1902).

³³ Ill. Rev. Stat. ch. 30, § 36. (1967).

³⁴ Andrews v. Matthewson, 332 Ill. App. 325, 75 N.E.2d 123 (4th Dist. 1947).

³⁵ 325 App. 459, 60 N.E.2d 560 (1st Dist. 1945), *rev'd on other grounds*, 394 Ill. 94, 67 N.E.2d 265 (1946).

their testimony was not allowed as it referred to stock in the hands of the director's administrator.

Trustees in Bankruptcy

It must be remembered that the effect of the Dead Man's Act is in ". . . reference only to that class of cases where a party sues or defends in a fiduciary capacity, and where the judgment would affect an estate represented by a fiduciary or trustee . . ." ³⁶ Therefore, no reason exists for extending its effect to a trustee in bankruptcy of a deceased bankrupt. The rights of persons interested in the estate through devise or descent are not diminished since nothing would be left to them anyhow. Only the various rights of creditors are concerned, so any party, otherwise qualified, can testify. ³⁷

After-afforded Protection

Generally, the protected status exists from the moment the litigation is initiated, since at that time one of the parties is suing or defending in one of the enumerated representative capacities.

In certain instances, the protection has been given after the suit has started, even after the witness has testified. The case of *Smith v. Billings* ³⁸ is a good example of such after-afforded protection. The plaintiff's entire testimony, consisting of depositions and his direct testimony, had been presented. The plaintiff had also been cross-examined. The defendant died prior to presenting his case and his personal representative was substituted as a party. The court held that the testimony of the plaintiff should be totally excluded, since the defendant was protected by section 2 of the Act. ³⁹

Representative Capacity

For the protection of section 2 to be given to a party he must be involved in the litigation in an enumerated representative capacity, and not personally.

In *Roberts v. Pierce*, ⁴⁰ the plaintiff in an action on several promissory notes described himself in his pleadings as an administrator of an estate. The facts disclosed that the promissory notes had been directly assigned to him as administrator and had never belonged to the estate of his intes-

³⁶ *McFarland v. McFarland*, 4 Ill. App. 157, 159 (4th Dist. 1880).

³⁷ *In re Knetzer*, 229 F.2d 232 (7th Cir. 1956), *rev'd on other grounds*, 352 U.S. 280, 77 S. Ct. 307 (1957).

³⁸ 177 Ill. 446, 53 N.E. 81 (1899).

³⁹ *Ibid. Accord*, *Clark v. Harper*, 215 Ill. 24, 74 N.E. 61 (1905). The plaintiff had to defend on a cross-complaint. He died during the proceedings and was replaced by his heirs and personal representative. All testimony of the defendant in his own behalf was excluded.

⁴⁰ 79 Ill. 378 (1875).

tate. They were, in fact, assigned after the death of his intestate for a debt owed to the deceased. The court held that, under the circumstances, he could bring the suit in his own name and was, therefore, not entitled to the protection of the Act.

An action for non-payment of notes secured by a trust deed was brought by the trustee in *Mester v. Hauser*.⁴¹ The suit was initiated in the name of the trustee "for the use of the executor" of the deceased payee of the notes. The court held that section 2 did not apply since "for the use of the executor" was not a protected category and the suit was actually brought on the basis of the trustee's legal title without the need of joining the beneficial interest of the note holder.

In *Bradenkamp v. Rouge*,⁴² the defendants were heirs of a person who had promised to pay the plaintiff five hundred dollars. The defendants, after the death of the original promisor, promised to pay the five hundred dollars if the plaintiff would make no claim against the estate. The court allowed the plaintiff to testify, stating that, although the defendants were heirs, they were being sued on their own individual and personal promise.

Likewise, an executrix of an estate was not given the protection of the statute in *Pickering v. Hickox*.⁴³ She sought to enforce an agreement made by all of the children of the deceased, including herself, which provided that they would all contribute to the support of their mother and then to her estate for a number of years. The defendants counterclaimed, alleging a breach of the same agreement by the plaintiff individually. In the counterclaim, the defendants were allowed to testify, since the executrix was being sued individually and not as a representative of the estate.

Split Protection

Sometimes cases arise in which one of the parties is entitled to protections under the statute while others suing or defending with him are not. This raises the problem of how protection can be given to the proper party without also giving it to the others who are not entitled to it.

The case of *Eich v. Sievers*⁴⁴ shows how the problem can be solved. The entire testimony of the plaintiff concerning promissory notes executed by the administrator's deceased and by a co-maker was allowed to stand as being non-prejudicial. But the court, by way of dictum, stated that a protected person under the Dead Man's Act should be given protection in such a situation through a limiting instruction, which in effect would cancel the adverse party's testimony as it pertained to the administrator.

⁴¹ 94 Ill. 433 (1880).

⁴² 143 Ill. App. 492 (4th Dist. 1908).

⁴³ 303 Ill. App. 372, 24 N.E.2d 755 (3d Dist. 1940).

⁴⁴ 73 Ill. 194 (1877).

Another example of the same solution can be seen in *Clarke v. A. Bazzoni & Co.*⁴⁵ The plaintiff sought to recover for personal injuries resulting from a collision between his bicycle and a truck. The driver died subsequent to the accident. The trial court allowed the plaintiff to testify in his own behalf, but gave an instruction to the jury that his testimony should only be considered against the owner of the truck and not the administrator of the deceased driver. On appeal, the court held that the testimony, in light of such a limiting instruction, was not reversible error.

Split protection in another form can be seen in the case of *Scully v. Wilhelm*.⁴⁶ Plaintiffs, heirs of their mother, sought to have her marriage to the defendant annulled and to have certain deeds executed by the mother to the defendant set aside as having been procured through fraud. The defendant answered personally, as administrator and as an heir. The court, by way of dicta, stated that the plaintiffs could testify concerning the deeds, since the defendant was defending as a grantee in that instance. However, they should have been precluded from testifying in regard to the marriage, since its valid existence affected the rights of the defendant as an heir.

Vicarious Protection

A person claiming protection under the statute must do so on the basis of his own status as a protected party and not through any relationship that he has with a protected party.

Merely because stock was purchased from a now-deceased person and the plaintiff's testimony concerning the transaction would not be allowed against the representative of the deceased, does not render incompetent the plaintiff's testimony against the corporation in a suit to compel transfer of the shares of stock.⁴⁷ Nor is the master protected because testimony of the plaintiff is barred concerning the deceased servant.⁴⁸

SPECIFIC CAUSES OF ACTION

Certain types of legal action have dealt with the Dead Man's Act somewhat frequently or have circumvented the statute, and deserve particular treatment.

*Citation Proceedings*⁴⁹

The primary purposes of citation proceedings are to discover assets of estates⁵⁰ and recover possession of specific property.⁵¹

⁴⁵ 7 Ill. App. 2d 334, 129 N.E.2d 435 (1st Dist. 1955).

⁴⁶ 368 Ill. 573, 15 N.E.2d 313 (1938) (Abstr.).

⁴⁷ *Fireman's Ins. Co. v. Peck*, 126 Ill. 493, 18 N.E. 752 (1888).

⁴⁸ *Clark v. A. Bazzoni & Co.*, Ill. App. 2d 334, 129 N.E.2d 435 (1st Dist. 1955); *Hudson v. Augustine's Inc.*, 72 Ill. App. 2d 225, 218 N.E.2d 510 (2d Dist. 1966).

⁴⁹ Ill. Rev. Stat. ch. 3, § 183 (1967) (The Probate Act).

⁵⁰ *Storr v. Storr*, 329 Ill. App. 537, 69 N.E.2d 916 (2d Dist. 1946).

⁵¹ *Dawdy v. Strickland*, 378 Ill. 230, 37 N.E.2d 817 (1941).

In *Storr v. Storr*⁵² the decedant's son appeared in answer to a citation order.⁵³ He claimed that certain property had been given to him as a gift prior to his father's death. Although the proceedings had been initiated by the executor of the father's estate, the son was allowed to testify in his own behalf. The Appellate Court held that such testimony was admissible, since in such proceedings the witness is a court's witness and, being such, the court's discretion controls the admissibility and propriety of his testimony.⁵⁴

In the case of *Merchants Loan & Trust Co. v. Egan*,⁵⁵ the plaintiff claimed that certain bonds had been converted by the deceased. The defendant executor claimed that such bonds came into the possession of the deceased as a gift. He was examined by the court under the provisions of the citation statute,⁵⁶ and testified to transactions which had occurred prior to the death of his testator. However, the court stated that the executor, by testifying in such a proceeding, did not waive his protected status in a subsequent suit for trover.

The basis for not applying the Dead Man's Act in citation proceedings is that such proceedings are not considered to be a "suit" within the meaning of the Act.⁵⁷

*Heirship*⁵⁸

Heirship proceedings are statutory in nature.⁵⁹ However, the Illinois Supreme Court has held that such actions, although statutory, are chancery proceedings and consequently civil actions.⁶⁰ They are, therefore, subject to section 2 of the Evidence & Depositions Act.

Such proceedings are adversary in essence, so admitted heirs can not testify in their own behalf against persons claiming heirship.⁶¹ Such exclusion of testimony is necessary to prevent an heir from gaining a greater portion of the estate than he might otherwise acquire. Of course, the claimant is disqualified from testifying in his own behalf since such testimony would be adverse to heirs whose rights are already established or to the administrator seeking to protect the estate from possible spurious claims.

The court, due to the adversary nature of heirship proceedings, does not have the wide latitude of discretion that it has in citation proceedings.

⁵² *Supra* note 2.

⁵³ Action brought under the statute is basically for information to enable the executor to gather assets of the estate.

⁵⁴ *Contra, In re Magill's Estate*, 327 Ill. App. 212, 63 N.E.2d 634 (1st Dist. 1945) (Abstr.). Therein, the court held the Dead Man's Act to be fully applicable unless waived.

⁵⁵ 143 Ill. App. 572 (1st Dist. 1908).

⁵⁶ At that time the statute was Ill. Rev. Stat. ch. 3, § 81 (1871).

⁵⁷ *In re Halaska's Estate*, 307 Ill. App. 176, 30 N.E.2d 119 (3d Dist. 1940).

⁵⁸ See 44 Chi-Kent L. Rev. 75 (1967) (Student recent decision comment on *In re Estate of Diak*, 70 Ill. App. 2d 1, 217 N.E.2d 106 (1st Dist. 1966)).

⁵⁹ Ill. Rev. Stat. ch. 3, § 57-59 (1967).

⁶⁰ *Welch v. Worsley*, 330 Ill. 172, 161 N.E. 493 (1928).

⁶¹ *In re Estate of Diak*, 70 Ill. App. 2d 1, 217 N.E.2d 106 (1st Dist. 1966).

Therefore, claimants or heirs in such heirship contests can not be made court's witnesses.⁶²

Claims Against Estates

Parties seeking to establish claims against estates for property or money due, based on their own testimony, universally meet the statute head-on.⁶³ For example, a plaintiff cannot testify concerning his claim for reimbursement from the deceased's estate for food, lodging and other services he allegedly furnished to the deceased.⁶⁴ This general incompetency also prohibits a party from supporting a claim, on personal testimony, for a debt allegedly owed by the deceased.⁶⁵ The claimant can not be a witness in his own stead on any matters that occurred before the death of the testator.⁶⁶

Will Contests

The same blanket form of disqualification that exists in claims against estates exists in will contests. All persons interested in sustaining or defeating a will cannot testify in their own behalf.⁶⁷

An heir is barred from testifying when he seeks to have a will set aside since the action is defended by an executor or devisees.⁶⁸ Such a bar also prevents a party from testifying about transactions with the deceased on which the party based an opinion that the testator did not have sufficient mental awareness to make a will.⁶⁹

Wrongful Death and Personal Injury Actions

A defendant sued by an administrator or other representative of a deceased person for wrongful death can not testify in his own behalf.⁷⁰ Nor can he testify in favor of his co-defendants even if he offers to limit his testimony to their liability. This is true regardless of the fact that he was joined strictly to prevent his testifying.⁷¹

The defendant's testimony must be excluded if it in any way affects the plaintiff's cause of action. For example, in *Robinson v. Workman*,⁷² the plaintiff administrator brought an action for wrongful death, which oc-

⁶² *Id.* at 7, 217 N.E.2d at 110.

⁶³ This is true since their testimony would always be adverse to a representative of the estate.

⁶⁴ *In re Moore's Estate*, 310 Ill. App. 365, 33 N.E.2d 130 (1st Dist. 1941).

⁶⁵ *Branger v. Lucy*, 82 Ill. 91 (1876); *Vose v. Strong*, 144 Ill. 108, 33 N.E. 189 (1893).

⁶⁶ *Kempton v. People*, 139 Ill. App. 563 (2d Dist. 1908).

⁶⁷ *Taylor v. Pegram*, 151 Ill. 106, 37 N.E. 837 (1894).

⁶⁸ *Lyman v. Kaul*, 275 Ill. 11, 113 N.E. 944 (1916).

⁶⁹ *Beemer v. Beemer*, 252 Ill. 452, 96 N.E. 1058 (1912).

⁷⁰ *Sullivan v. Corn Products Refining Co.*, 245 Ill. 9, 91 N.E. 643 (1910).

⁷¹ *Id.* at 10, 91 N.E. at 644.

⁷² 7 Ill. App. 2d 42, 129 N.E.2d 32 (3d Dist. 1955), *rev'd on other grounds*, 9 Ill. 2d 420, 137 N.E.2d 804 (1956).

curred while the deceased was in a car owned by the defendant. There was no direct evidence concerning whether the defendant or deceased was driving at the time of the accident. The defendant was not allowed to give any such evidence through his testimony.

The protection remains until the administrator offers evidence which removes the disqualification.⁷³ Under Illinois evidence law, when there are no disinterested eyewitnesses to an accident, testimony concerning the deceased's habits of due care is admissible.⁷⁴ But testimony by the representative concerning such habits removes the protection of the statute and allows the defendant to testify concerning the deceased's conduct at the time of the accident.⁷⁵

Likewise, in actions for personal injuries the plaintiff cannot testify in his own behalf against the administrator of a deceased defendant.⁷⁶ In addition, a co-defendant's testimony must be disregarded to the extent that it would adversely affect a representative of the estate of a deceased defendant.⁷⁷

WILLIAM J. JOOST

⁷³ Ill. Rev. Stat. ch. 51, § 2, (1967) (exception 3).

⁷⁴ Gard, Illinois Evidence Manual 123 (1966).

⁷⁵ Rouse v. Tomasek, 279 Ill. App. 557 (1st Dist. 1935).

⁷⁶ Clark v. A. Bazzoni & Co., 7 Ill. App. 2d 334, 129 N.E.2d 435 (1st Dist. 1955).

⁷⁷ Mernick v. Chiodini, 12 Ill. App. 2d 249, 139 N.E.2d 784 (4th Dist. 1956).