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Exceptions to the Dead Man's Act

Jerry C. Lagerquist

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EXCEPTIONS TO THE DEAD MAN'S ACT

Section 2 of the Evidence and Depositions Act (commonly known as the Dead Man's Act), which seals the lips of a party or interested person¹ when he is suing or defending against a party who is protected under the Act,² is subject to certain exceptions. The exceptions to the Dead Man's Act include a proviso in the first paragraph of the Act and five separately enumerated exceptions.

CALLING BY THE ADVERSE PARTY

The first paragraph of the Dead Man's Act provides "No party . . . or person directly interested . . . shall be allowed to testify therein of his own motion, or in his own behalf . . . when the adverse party sues or defends (in one of the enumerated protected capacities) . . . *unless when called as a witness by such adverse party. . .*"³

When a person who is protected by the Dead Man's Act calls as his witness a person who is disqualified from testifying by the Act the disqualification of that person is removed. Prior to 1934, a protected party would call the disqualified witness under Section 6 of the Evidence and Depositions Act⁴ and the witness became a witness of the calling party in the same manner and subject to the same rules as other witnesses called by him. In other words, the person called under Section 6 of the Evidence and Depositions Act had to be examined by the use of the direct question; leading questions were not permitted. Since 1934 the calling of a disqualified witness is provided for under Section 60 of the Civil Practice Act.⁵ Section 60 of the Civil Practice Act differs from former Section 6 of the Evidence and Depositions Act in that no longer is the witness examined in the same manner as other witnesses. Under Section 60 the witness may be examined by the use of leading questions, as though he were being cross-examined.

The calling party of the otherwise incompetent witness by the protected party opens the door to the attorney for the opposing party to examine the witness at the close of the primary examination.⁶ However, the extent to which the witness may be examined by the attorney for the adverse party is within the discretion of the court;⁷ but the examination must remain within the bounds of the matter upon which he has al-

¹ See discussion of "parties" and "interested parties" at page 40 of this symposium.

² See discussion of "protected parties" at page 49 of this symposium.

³ Ill. Rev. Stat. ch. 51, § 2 (1967) (emph. added).

⁴ Ill. Rev. Stat. ch. 51, § 6 (1933), repealed by Act approved June 23, 1933, L.1933, p. 785, effective Jan. 1, 1934.

⁵ Ill. Rev. Stat. ch. 110, § 60 (1967).

⁶ *Combs v. Younge*, 281 Ill. App. 339 (2d Dist. 1935); *Bertolet v. Stoner*, 164 Ill. App. 605 (2d Dist. 1911); *Harnish v. Miles*, 111 Ill. App. 106 (2d Dist. 1903).

⁷ *Combs v. Younge*, *supra* note 6.

ready been examined and must not be an interjection of his own case at this stage of the proceedings.⁸

The calling of a party⁹ or an interested person¹⁰ by a protected party under the Dead Man's Act opens the door for the opposing party and removes the disqualification, to a limited degree, of the witness who was called by the protected party. Thus, the calling of an otherwise incompetent witness renders the witness competent to testify for the opposing party on that party's own motion and in his behalf during his presentation of the case.¹¹ However, the witness is not made competent to testify generally to all matters for the opposing party.¹² The extent and limitation to which the otherwise incompetent witness is rendered competent is only to those matters on which he was examined by the protected party.¹³ Thus, in *Perkins v. Brown*,¹⁴ an action was brought by heirs to set aside a deed given to the defendant. The heirs (protected parties) had called the defendant under Section 60 of the Civil Practice Act and examined him as to when he received the deed, from whom he received it, by whom, when and where the deed was signed. They also elicited from him that he did not give consideration for the deed. In the defendant's presentation of the case he testified to the entire transaction, including conversations with the decedent concerning the conveyance of the property. The protected party objected to this testimony. The trial court overruled the objection and allowed into evidence his testimony as to the whole transaction surrounding the giving of the deed. In affirming the trial court, the Supreme Court said:

The rule is that where a party, who is incompetent to testify for himself as to a transaction, is called by the adverse party [protected party] and questioned concerning the same, he is thereby made competent to testify in his own behalf as to the whole of such transaction, although his incompetency is not removed as to matters about which he was not interrogated by the adverse party [protected party] It would be probably unjust if a litigant were permitted to call an adverse party [disqualified witness] and examine him as to one fact or phase of a transaction in his favor and then invoke the bar of the statute when the party examined sought to testify further with regard to the same transaction for the

⁸ *Grace v. Grace*, 270 Ill. 558, 110 N.E. 784 (1915); *DeYoung v. Halley*, 329 Ill. App. 1, 67 N.E.2d 221 (1st Dist. 1946).

⁹ *Perkins v. Brown*, 400 Ill. 490, 81 N.E.2d 207 (1949); *Duffy v. Duffy*, 243 Ill. 476, 90 N.E. 697 (1909).

¹⁰ *Hoffer v. Custer*, 237 Ill. 476, 86 N.E. 737 (1908); *Bertolet v. Stoner*, *supra* note 6.

¹¹ *Perkins v. Brown*, *supra* note 9; *Chabot v. Kelly*, 72 Ill. App. 2d 150, 218 N.E.2d 207 (1st Dist. 1966); *Combs v. Younge*, *supra* note 6; *Harnish v. Miles*, *supra* note 6.

¹² *Perkins v. Brown*, *supra* note 9; *Grace v. Grace*, *supra* note 8; *Merchants' Loan and Trust Co. v. Egan*, 22 Ill. 494, 78 N.E. 800 (1906); *Chalkowski v. Szafronski*, 250 Ill. App. 359 (1st Dist. 1928).

¹³ *Perkins v. Brown*, *supra* note 9; *Washington v. Peterson*, 320 Ill. App. 140, 49 N.E.2d 883 (3d Dist. 1943); *In re Estate of Wright*, 304 Ill. App. 87, 25 N.E.2d 909 (2d Dist. 1940); *Blumb v. Getz*, 294 Ill. App. 434, 13 N.E.2d 1019 (3d Dist. 1938).

¹⁴ *Supra* note 9.

purpose of explaining his former testimony or correcting an erroneous impression left thereby.¹⁵

The taking of a deposition of a party or an interested person by the protected party prior to trial is not a calling within the meaning of the statute;¹⁶ however, if the deposition of the disqualified witness is introduced at the trial, the disqualification is removed to the same extent as it would be if the witness has been called by the protected party.¹⁷

In order to remove the disqualification of the statute, the calling of the otherwise incompetent witness by the protected party must be in the same suit in which the witness is seeking to testify.¹⁸ Thus, in *Merchants' Loan and Trust Co. v. Egan*,¹⁹ an action in trover, the protected party introduced testimony given by the incompetent witness during a citation to discover assets proceeding in the Probate Court. The court held that the introduction of the disqualified witness' testimony taken at the citation proceeding was not a "calling by the adverse party" (protected party) within the meaning of the statute.

FACTS OCCURRING AFTER THE DEATH OF THE DECEASED

The first separate exception to the Dead Man's Act provides:

In any such action, suit or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person, or after the ward, heir, legatee of devisee shall have attained his majority.²⁰

Under this exception to the Dead Man's Act, when the action is brought by or against the executor, administrator, heir, legatee or devisee of any deceased person and the witness otherwise disqualified by the Act attempts to testify in behalf of the opposing party the question to be answered is whether or not his testimony is to facts that occurred after the death of the decedent. The rationale for allowing a witness disqualified by the Dead Man's Act to testify to facts occurring after the death of the decedent is that the inequality in availability of proof, which the Act seeks to prevent, does not exist between the parties as to facts that occur after death.²¹

A disqualified witness is competent, by the exception, to testify to the finding of documents among the effects of the decedent.²² Thus, in *Doyle v. Doyle*,²³ the disqualified party in a will contest was held competent to

¹⁵ *Id.* at 497, 81 N.E.2d at 210-211.

¹⁶ *Pink v. Dempsey*, 350 Ill. App. 405, 113 N.E.2d 334 (1st Dist. 1955); *Wasserman v. Darr*, 11 FR Serv. 577 (1948).

¹⁷ *In re Estate of Hershon*, 329 Ill. App. 328, 68 N.E.2d 482 (1st Dist. 1946).

¹⁸ *Merchants' Loan and Trust Co. v. Egan*, *supra* note 12.

¹⁹ *Ibid.*

²⁰ Ill. Rev. Stat. ch. 51, § 2, par. 1st (1967).

²¹ *Stone v. Cook*, 79 Ill. 424 (1875).

²² *Doyle v. Doyle*, 257 Ill. 229, 100 N.E. 950 (1913); *Griffin v. Griffin*, 125 Ill. 430, 17 N.E. 782 (1888).

²³ *Doyle v. Doyle*, *supra* note 22.

testify to finding among the testatrix's effects a letter written by the plaintiff to the testatrix which tended to rebut allegations of misrepresentation of the plaintiff's character to the testatrix by the defendant. Likewise, the otherwise incompetent witness has been held competent to testify that he first discovered a cause of action against the decedent after the death of the decedent;²⁴ also he has been held to be competent to testify to conversations or agreements made among the parties to the law suit after the death of the decedent.²⁵

A disqualified witness, however, remains incompetent to testify to facts occurring after the death of the decedent when the testimony sought to be introduced seeks to prove a fact which occurred prior to the death of the decedent.²⁶ In *Halladay v. Blair*,²⁷ an action to establish an *inter vivos* gift, the executor put in issue the delivery of the claimed gift and the alleged donee sought to testify to having the gift in her possession at the time of and after the alleged donor's death. The court in that case said:

The obvious purpose of eliciting the testimony from the claimant that she had been in possession of the notes in question from the time of the death of her mother until she delivered them to her attorneys was to furnish proof that the claimant had possession of the notes prior to the death of her mother. If the claimant's counsel had asked her upon the trial whether or not she had possession of the notes prior to the death of her mother, such question would have been objectionable. . . . What cannot be allowed by direct question cannot be allowed through a skillfully formed indirect interrogatory.²⁸

Similarly, in *Romines v. Illinois Motor Freight*,²⁹ the defendant-truck driver in a wrongful death action attempted to testify that the day after the accident he went to the scene of the accident and observed marks on the pavement. The court held that although the defendant could observe the physical facts after the death of the decedent, his testimony was properly excluded since the marks were made at the time of the accident and prior to the death of the decedent.

The disqualification of a witness is only removed to the extent provided by the exception, that is, as to facts which occur after the death of the

²⁴ *Crimp v. First Trust and Sav. Bank*, 352 Ill. 93, 185 N.E. 179 (1933), *affirming* 263 Ill. App. 499 (1st Dist. 1931); *Vigus v. O'Bannon*, 118 Ill. 334, 8 N.E. 778 (1886).

²⁵ *Swirski v. Darlington*, 369 Ill. 188, 15 N.E.2d 856 (1938). Plaintiff in a will contest was held competent to testify that the attorney of the deceased showed him a different will than the will admitted to probate, and also to conversations with the attorney, all of the facts occurring after the death of the deceased. See also *Schmidt v. Schmidt*, 311 Ill. 458, 142 N.E. 75 (1924); *Wood v. Tyler*, 256 Ill. App. 401 (1st Dist. 1930); *Parrish v. Vancil*, 132 Ill. App. 495 (2d 1908).

²⁶ *In re Estate of Stahl*, 305 Ill. App. 517, 27 N.E.2d 662 (1st Dist. 1940); *Halladay v. Blair*, 223 Ill. App. 609 (2d Dist. 1921).

²⁷ 223 Ill. App. 609 (2d Dist. 1921).

²⁸ *Id.* at 612.

²⁹ 21 Ill. App. 2d 380, 158 N.E.2d 97 (2d Dist 1959).

decendent. The fact that he is on the witness stand does not open the door to allow him to testify generally for the opposing party.³⁰

When the protected party sues or defends as the guardian or trustee of any heir, legatee, or devisee, an additional statutory requirement must be met before the disqualification of a party or interested person is removed by the first exception. Although there has been no case construing this provision, dictum in *Stone v. Cook*³¹ indicates the interpretation which will be placed on the provision. In *Stone* the court said:

. . . . [I]f the adverse party sues or defends as guardian or trustee for such heir, legatee or devisee, then the additional restriction is imposed, that such fact shall have occurred not only subsequently to the death of the deceased, but also after such heir, legatee or devisee shall have attained his or her majority.³²

CONVERSATIONS AND TRANSACTIONS TESTIFIED TO BY AN AGENT OF THE DECEDENT ON BEHALF OF THE PROTECTED PARTY

The second enumerated exception to the Dead Man's Act provides:

When, in such action, suit or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or party in interest, such opposite party or party in interest may testify concerning the same conversation or transaction.³³

When an agent of a deceased person testifies for the protected party to a conversation or transaction between himself and a disqualified witness such disqualified witness is permitted to testify to the same conversation or transaction for the opposing party.³⁴

In order to render a disqualified witness competent to testify for the opposing party under this exception, the witness who testifies for the protected party must have been an agent of the deceased.³⁵ Although the courts have never specifically held so, it is obvious that who is an agent is determined by the law of agency. The Restatement of Agency defines agency as: ". . . [T]he fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other party to act," and it goes on to define agent, "[T]he one who is to act is the agent."³⁶ The courts have held that when the witness who has testified for the protected party was a scrivener to draw an

³⁰ *In re Estate of Law*, 214 Ill. App. 8 (1st Dist. 1920).

³¹ 79 Ill. 424 (1875).

³² *Id.* at 428.

³³ Ill. Rev. Stat. ch. 51, § 2, par. 2d (1967).

³⁴ *Frike v. McClure*, 389 Ill. 543, 60 N.E.2d (1945); *Marshall v. Karl*, 60 Ill. 206 (1871); *Jocquin v. Davidson*, 49 Ill. 82 (1868).

³⁵ Ill. Rev. Stat. ch. 51 § 2, par. 2d (1967).

³⁶ Restatement (Second), Agency § 1 (1958).

instrument,³⁷ or where the witness was the housekeeper of the deceased,³⁸ or the custodian of documents of the deceased,³⁹ that the witness was not an agent of the deceased and the statutory disqualification of the opposing party was not removed.

The agent of the deceased person must be called as a witness by the protected party in order to remove the disqualification of the Act. The opposing party cannot render a disqualified witness competent to testify in his behalf by calling an agent of the deceased. The calling of the agent must be on the behalf of the protected party.⁴⁰

This exception applies only to "conversations" or "transactions." The courts have never attempted to define precisely what is meant by either of these terms. It seems unlikely that the court will be called upon to define what constitutes a "conversation." Webster's Dictionary defines "conversation" as "social interchange."⁴¹ Although the courts have never precisely defined what constitutes a "transaction," it is evident that the courts have construed it in a broad sense. Thus, the courts have permitted a disqualified witness to testify to the facts and circumstances out of which the consideration for a note arose,⁴² and they have allowed a disqualified witness to give his version of an automobile accident.⁴³ However, in *Symonds v. Caldwell*,⁴⁴ an action for distress for rent, in which the agent of the deceased testified to conversations and transactions between himself and the defendant-tenant, but also gave his opinion as to the value of the crops remaining on the leased land, the defendant-tenant attempted to testify as to the value of the crops. The court held that the opinion as to value was not a conversation or transaction and the defendant's testimony was properly excluded at the trial.

The fact that the agent of the deceased was called as a witness by the protected party does not render the otherwise disqualified witness competent to testify generally for the opposing party. The otherwise disqualified witness may only testify to the same conversations or transactions which the agent of the deceased testified to for the protected party.⁴⁵ Also, the opposing party under the Dead Man's Act cannot render an otherwise disqualified witness competent to testify by cross-examining the agent of the deceased as to conversations or transactions which were not gone into upon his

³⁷ *Spencer v. Boardman*, 118 Ill. 553, 9 N.E. 330 (1886).

³⁸ *Kramer v. Hakel*, 240 Ill. App. 40 (2d Dist. 1926).

³⁹ *Comer v. Comer*, 24 Ill. App. 526 (3d Dist. 1886), *affirmed* 120 Ill. 420, 11 N.E. 848 (1887).

⁴⁰ *Elwell v. Hicks*, 238 Ill. 170, 87 N.E. 316 (1909); *Loeb v. Stern*, 198 Ill. 372, 64 N.E. 1044 (1902).

⁴¹ Webster's Third New Int'l Dictionary (1964).

⁴² *Marshall v. Karl*, *supra* note 34.

⁴³ *Beeke v. Workman*, 336 Ill. App. 1, 82 N.E.2d 701 (2d Dist. 1948).

⁴⁴ 112 Ill. App. 341 (1st Dist. 1904).

⁴⁵ *Symonds v. Caldwell*, 112 Ill. App. 341 (1st Dist. 1904).

direct examination. Thus, in *Loeb v. Stern*,⁴⁶ the attorney for the opposing party elicited testimony that was not part of the agent's direct examination. The opposing party (disqualified witness) then sought to testify himself as to the transaction brought out by his attorney. The court held that the incompetency of the disqualified witness was not removed, since the transaction that was elicited on cross-examination was not testimony on behalf of the protected party.

When the agent of a deceased person testifies to a conversation or transaction between his principal and a disqualified person, the disqualified witness is not rendered competent to testify for the opposing party to the conversation or transaction. The second exception applies only to conversations and transactions between the agent of the deceased party and the adverse party, not to conversations and transactions between the adverse party and the deceased principal.⁴⁷

CONVERSATIONS AND TRANSACTIONS TESTIFIED TO BY THE PROTECTED PARTY OR PARTY IN INTEREST

The third separate exception to the Dead Man's Act provides:

Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any person 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 to the same conversation or transaction.⁴⁸

A disqualified witness under the Dead Man's Act is rendered competent to testify to any conversation or transaction to which a protected party or person having a direct interest in the result of the suit has testified. When the otherwise incompetent witness attempts to testify by this exception, in order to remove the disqualification it must be shown that either the protected party or a person having a direct interest in the result of the suit has testified to the conversation or transaction to which the incompetent witness is going to testify.

The statute enumerates the capacities in which a party suing or defending is a protected party. A party is protected if he is a trustee or conservator of any habitual drunkard, or a person who is mentally ill or mentally deficient, or he sues or defends as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of

⁴⁶ 198 Ill. 372, 64 N.E. 1044 (1902).

⁴⁷ *First Nat'l Bank of Monmouth*, 118 Ill. 625, 9 N.E. 196 (1888); *Whisman v. Small*, 188 Ill. App. 61 (3d Dist. 1914); *Moore v. Botto*, 159 Ill. App. 322 (1st Dist. 1911); *Maher v. Title Guar. and Trust Co.*, 95 Ill. App. 365 (1st Dist. 1900).

⁴⁸ Ill. Rev. Stat. ch. 51, § 2, par. 3d (1967).

any such heir, legatee or devisee.⁴⁹ The statute, however, does not define or enumerate who is a person having a direct interest in the suit. In construing "direct interest" the court in *Butz v. Schwartz*, said:

At the time of enactment of this exception, the words "person having a direct interest in the event of such action, suit or proceeding," had a well known meaning. . . . The rule was, where the event of the suit, if adverse to the party adducing the witness, would render the latter liable either to a third party or to the party himself, there was a direct interest on the part of the witness⁵⁰

Under this definition, persons who have been held to have a "direct interest" are those who would receive the direct, certain and immediate benefits of a wrongful death action.⁵¹ Likewise, an agent who would be liable over if the action was adverse to the decedent⁵² was found to be interested. Although a person who testifies for a protected party may have the outward appearance of being a person with a direct interest because of the relationship to the protected party or to the person for whom the suit is brought, the disqualified witness will not be rendered competent unless the person does in fact have a direct interest in the suit. Thus, in *Citizens Nat'l Bank of Decatur v. Doran*,⁵³ a personal injury action in which the wife of an incompetent plaintiff testified in his behalf, the court held that the incompetency of the disqualified witness was not removed. The court held that the fact that the wife might suffer a possible loss of support was not a legal interest which was direct, certain or immediate so that she would gain or lose as a result of the suit. Since she was not an interested person, the disqualification of incompetent witnesses was not removed.

The removal of the disqualification of the otherwise incompetent witness is not a complete removal of the incompetency; it is only removed to those conversations and transactions testified to by the protected party or person directly interested.⁵⁴ When the otherwise incompetent witness is rendered competent under this exception he may testify to the same conversation or transaction, for example, by rebutting the testimony or by explaining the testimony or by calling out the whole of the conversation or transaction.⁵⁵ Thus, if the protected party has only produced testimony to

⁴⁹ See discussion of "protected parties" at page 49 of this symposium.

⁵⁰ 135 Ill. 180, 188-189, 25 N.E. 1007, 1008-1009 (1890).

⁵¹ *VanMeter v. Goldfarb*, 317 Ill. 620, 148 N.E. 391 (1925), *affirming* 236 Ill. App. 126 (1st Dist. 1925) (the brother of the decedent testified as an occurrence witness); *Rouse v. Tomasek*, 279 Ill. App. 557 (1st Dist. 1935) (the husband of the decedent, in a wrongful death action, testified to her normal careful habits).

⁵² *Butz v. Schwartz*, *supra* note 50.

⁵³ *Citizens Nat'l Bank of Decatur v. Doran*, 3 Ill. App. 2d 383, 122 N.E.2d 450 (3d Dist. 1954). See also *Greenwood v. Commercial Nat'l Bank of Peoria*, 7 Ill. 2d 436, 130 N.E.2d 753 (1955).

⁵⁴ *Newman v. Youngblood*, 349 Ill. 617, 69 N.E.2d 309 (1946); *Roche v. Roche*, 286 Ill. 336, 121 N.E. 621 (1919); *Vail v. Rynearson*, 249 Ill. 501, 94 N.E. 942 (1911); *Blanchard v. Blanchard*, 191 Ill. 450, 61 N.E. 481 (1901).

⁵⁵ *VanMeter v. Goldfarb*, *supra* note 51; *Allen v. McGill*, 311 Ill. 170, 142 N.E. 480 (1924); *Blanchard v. Blanchard*, *supra* note 54.

a part of the conversation or transaction, the disqualified witness may testify to the whole of the conversation or transaction, including those parts which the protected party did not elicit. The disqualified witness, however, is not rendered competent to testify generally for the opposing party.⁵⁶

The third exception covers "any conversation" testified to by the protected party or person directly interested. Thus, the courts have permitted the disqualified witness to testify after the disqualification has been removed under this exception to conversations with the protected party or the person directly interested, whether or not the decedent was present,⁵⁷ and also to conversations with the decedent.⁵⁸

The courts have been liberal in construing "transactions."⁵⁹ It has been held that the concept of a "transaction" permits the otherwise disqualified witness to testify, after the disqualification is removed, to the facts surrounding the delivery of a deed,⁶⁰ or to the facts, as he interprets them, surrounding an automobile accident,⁶¹ or to the facts surrounding the giving of commercial paper.⁶² The liberal construction of "transactions" is best illustrated in *Rouse v. Tomasek*,⁶³ a wrongful death suit arising out of an automobile accident. In *Rouse* the husband of the decedent testified to her normal careful habits in crossing streets. The court held that his testimony opened the door for the opposing party to testify as to what occurred at the time of the accident.

When, however, a witness for a protected party merely testified to the earnings of the deceased, the disqualified witness was not rendered competent to testify as to the circumstances surrounding the accident upon which the suit was brought.⁶⁴ Likewise, the disqualified witness was not competent to testify to the circumstances surrounding an ante-nuptial agreement between herself and her deceased husband when the husband's heirs merely testified to the signatures on the ante-nuptial agreement.⁶⁵

CONVERSATIONS AND ADMISSIONS TESTIFIED TO BY A DISINTERESTED WITNESS OCCURRING BEFORE THE DEATH AND IN THE ABSENCE OF THE DECEDENT

The fourth enumerated exception to the Dead Man's Act provides:

Where, in any such action, suit or proceeding, any witness, not a party to the record, or not a party in interest, or not an agent of

⁵⁶ *Mann v. Mann*, 270 Ill. 83, 110 N.E. 345 (1915); *Calkins v. Calkins*, 220 Ill. 111, 77 N.E. 102 (1906); *Pennington v. Rowley Bros. Co.*, 241 Ill. App. 58 (1st Dist. 1926).

⁵⁷ *Ogden v. Keck*, 253 Ill. App. 444 (4th Dist. 1929).

⁵⁸ *Johnson v. Lane*, 369 Ill. 135, 15 N.E.2d 710 (1935); *Maule v. Maule*, 312 Ill. 129, 143 N.E. 422 (1924); *Plain v. Roth*, 107 Ill. 588 (1882).

⁵⁹ *VanMeter v. Goldfarb*, 317 Ill. 620, 148 N.E. 391 (1925).

⁶⁰ *Newman v. Youngblood*, 394 Ill. 617, 69 N.E.2d 309 (1946).

⁶¹ *Supra* note 59.

⁶² *Butz v. Schwartz*, 135 Ill. 180, 25 N.E. 1007 (1890).

⁶³ *Rouse v. Tomasek*, 279 Ill. 557 (1st Dist. 1935).

⁶⁴ *Pennington v. Rowley Bros. Co.*, 241 Ill. App. 58 (1st Dist. 1926).

⁶⁵ *Mann v. Mann*, 270 Ill. 83, 110 N.E. 345 (1915).

such deceased person, shall, in behalf of any party to such action, suit or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation.⁶⁶

The fourth exception to the Dead Man's Act, like the second and the third, removes the disqualification of an otherwise incompetent person only when the protected party has first called a witness who testifies to matters covered by the exception. The witness upon whom the disqualified witness relies to render him competent, must have been called by the protected party.⁶⁷

If, however, the protected party cross-examines a witness of the opposing party beyond the scope of the direct examination, and the examination touches upon matters that are covered by the exception, the witness will be said to have been a witness of the protected party and the incompetency of the disqualified witness will be removed to the extent provided by the exception.⁶⁸ Thus, in *Stevens v. Brown*,⁶⁹ the protected party, while cross-examining a witness of the opposing party, elicited testimony concerning conversations which the opposing party neither brought out nor laid the foundation for in his direct examination of his witness. The court held that the protected party cannot misuse his right of cross-examination and elicit testimony which exceeds the bounds of the direct examination and then seek to prevent the opposing party from giving his version of the testimony by claiming that it was the opposing party's witness who testified in the first instance. Similarly, if the witness of the disqualified party volunteers information when on the stand and the protected party cross-examines the witness as to the volunteered matter, the disqualification of the otherwise incompetent witness is removed, and he may rebut the testimony of his witness.⁷⁰

To remove the incompetency of a disqualified witness under this exception the protected party's witness under whom the disqualified witness seeks to introduce testimony must have been a "witness," as defined by the exception. A witness for the protected party who will qualify the otherwise disqualified person must be someone who is neither a party, nor a party in interest, nor an agent of the deceased. If the protected party's witness under whom the disqualified witness seeks to testify is an agent, or a party, or a party in interest, the disqualification is not removed by the fourth exception.⁷¹

Although the witness called by the protected party is a witness as defined by the fourth exception, this alone will not remove the incompetency

⁶⁶ Ill. Rev. Stat. ch. 51 § 2, par. 4th (1967).

⁶⁷ *Richardson v. Sternburg*, 65 Ill. 273 (1872).

⁶⁸ *Stevens v. Brown*, 12 Ill. App. 619 (1st Dist. 1883).

⁶⁹ *Ibid.*

⁷⁰ *Kitz v. Scudder Syrup Co.*, 199 Ill. App. 605 (1st Dist. 1916).

⁷¹ *Gardner v. Atchison, Topeka and Santa Fe Ry.*, 226 F.2d 109 (7th Cir. 1955); *Darling v. Wood*, 168 Ill. App. 272 (2d Dist. 1912).

of a disqualified person. To remove the disqualification the testimony of the protected party's witness must be to the matters enumerated in the exception. The witness must testify to a "conversation" or "admission" made by the disqualified person which occurred prior to the death of the decedent and out of the presence of the decedent.⁷² This exception does not apply to testimony as to "transactions."⁷³

If the conversation or admission occurred while the deceased was present,⁷⁴ or was a conversation or admission made to the deceased,⁷⁵ the incompetency of the disqualified person is not removed by this exception. Thus, to qualify a witness under this exception four requirements must be met: (1) the witness under whom the disqualified witness seeks to testify must not be a party or party in interest or agent of the deceased; (2) the protected party's witness must have testified to a conversation or admission made by the adverse party or party in interest; (3) the conversation or admission must have occurred prior to the death of the deceased; (4) the conversation or admission must have been made outside the presence of the deceased.

The courts have never, in reference to the Dead Man's Act, defined what is an admission. An admission is defined in *Corpus Juris Secundum* as: "Any statement, whether oral or written, made by or attributable to a party to an action, which tends to establish or disprove any material fact in a case. . . ."⁷⁶ In *Pink v. Dempsey*,⁷⁷ an action on an oral contract to make a will, a witness for the protected party testified that the claimant had made long trips during the time that she alleged she was in the continuous services of the deceased. The court held that this was not an admission which would entitle the disqualified witness to testify. The court said that to hold such testimony to be an "admission" would be a strained construction of the word.

Once a disqualified person is rendered competent to testify, he may rebut, deny or explain any conversation or admission attributed to him by the witness for the protected party.⁷⁸

RELEVANT AND COMPETENT MATTERS IN THE DEPOSITION OF DECEASED INTRODUCED BY THE PROTECTED PARTY

The fifth separate exception to the Dead Man's Act provides:

When, in any such action, suit or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any

⁷² *Bundy v. White*, 297 Ill. 238, 130 N.E. 709 (1921); *Pink v. Dempsey*, 350 Ill. App. 405, 113 N.E.2d 339 (1st Dist. 1953).

⁷³ *Pink v. Dempsey*, *supra* note 72.

⁷⁴ *Volbracht v. White*, 197 Ill. 298, 64 N.E. 324 (1902).

⁷⁵ *Ruchman v. Alwood*, 71 Ill. 155 (1873).

⁷⁶ 31A C.J.S., *Evidence* § 272(a).

⁷⁷ *Supra* note 72.

⁷⁸ *Judy v. Judy*, 261 Ill. 470, 104 N.E. 256 (1914); *Jones v. Gilbert*, 135 Ill. 27, 25 N.E. 566 (1890); *Crow v. Blaser*, 335 Ill. App. 281, 81 N.E.2d 472 (2d Dist. 1948); *Robnett v. Robnett*, 43 Ill. App. 191 (4th Dist. 1892).

adverse party or party in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency.⁷⁹

When the deposition of the deceased person is read into evidence, the disqualified person is rendered competent to testify to all matters and things which were not excluded from the deposition because of irrelevancy or incompetence.⁸⁰

The testimony of a now deceased person given in a former trial,⁸¹ and the testimony of a party who has died pending the litigation,⁸² have been likened to a deposition, so that the introduction of such testimony removes the incompetency of the otherwise disqualified witness. However, in *Grommes v. St. Paul Transit Co.*,⁸³ the court held that the reading of a prior judgment was not evidence of the facts upon which the judgment was founded, but merely that the judgment existed. The judgment was therefore not likened to a deposition so that the disqualified person was rendered competent.⁸⁴

When the disqualified person is rendered competent, he may rebut, deny or explain what was brought out in the deposition of the deceased.⁸⁵ The exception provides that the disqualified person may testify to "all matters and things" brought out in the deposition of the deceased. This provision is construed liberally by the courts.⁸⁶ In *Turner v. Lee*,⁸⁷ for example, the deposition of the deceased was introduced by the protected party. The deposition primarily covered the conversations at the time the deed was executed but it also touched upon other conversations relating to the consideration for the deed. The disqualified person was held competent to testify to all conversations with the deceased concerning the consideration as being "matters and things" touched upon by the deceased in her deposition; the disqualified person was not limited to the conversation on the day the deed was executed.

As with the second, third and fourth exceptions to the Dead Man's Act, under the fifth exception the opposing party cannot render disqualified persons competent by his acts. To remove the bar of the Act the deposition of

⁷⁹ Ill. Rev. Stat. ch., 51 § 2, par. 5th (1967).

⁸⁰ *DeCosta v. Bischer*, 287 Ill. 598, 122 N.E. 819 (1919); *Turner v. Lee*, 254 Ill. 141, 98 N.E. 246 (1912); *Tanner v. Clapp*, 139 Ill. App. 353 (2d Dist. 1908).

⁸¹ *Chicago Trust Co. v. Lumber Co.*, 242 Ill. 468, 90 N.E. 282 (1909); *Vancuren v. Vancuren*, 348 Ill. App. 351, 109 N.E.2d 225 (3d Dist. 1952); *Tanner v. Clapp*, *supra* note 80.

⁸² *Turner v. Black*, 19 Ill. 2d 296, 166 N.E.2d 588 (1960); *Turner v. Lee*, *supra* note 80.

⁸³ 147 Ill. 634, 35 N.E. 820 (1893).

⁸⁴ *Ibid.*

⁸⁵ *Turner v. Lee*, *supra* note 80; *Eastman v. United Marble Co.*, 224 Ill. App. 256 (1st Dist. 1922).

⁸⁶ *Turner v. Lee*, *supra* note 80.

⁸⁷ *Ibid.*

the decedent under which the disqualified person seeks to testify must have been introduced by the protected party. The disqualified party cannot qualify himself or others by introducing the deposition of the decedent.⁸⁸

JERRY C. LAGERQUIST

⁸⁸ Doggett v. Greene, 254 Ill. 134, 98 N.E. 219 (1912).