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## Deceased Partner, Joint Contractor or Agent

William J. Joost

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## DECEASED PARTNER, JOINT CONTRACTOR OR AGENT

Section 4 of the Illinois Evidence Act is the last section of the Act that refers to protection afforded deceased persons. It provides:

In any action, suit or proceeding by or against any surviving partner or partners, joint contractor or joint contractors, no adverse party or person adversely interested in the event thereof, shall, by virtue of Section 1 of this act, be rendered a competent witness to testify to any admission or conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation; and in every action, suit or proceeding a party to the same who has contracted with an agent of the adverse party—the agent having since died—shall not be a competent witness as to any admission or conversation between himself and such agent, unless such admission or conversation with the said deceased agent was had or made in the presence of a surviving agent or agents of such adverse party, and then only except where the conditions are such that under the provisions of Sections 2 and 3 of this act he would have been permitted to testify if the deceased person had been a principal and not an agent.<sup>1</sup>

This section is, in effect, an extension of the protection afforded in section 2 of the Act. The estate of the deceased need not be a party to the suit in order for this section to be applicable.

The intention of the legislature in this section was to protect a successor to contract rights, when the contract was originally made by a deceased partner, joint contractor or agent, from fraudulent statements made by adverse parties.<sup>2</sup> This protection was deemed necessary since the successor would be unable to contradict or explain the allegations unless, as provided in the section, another agent, partner or joint contractor were present at the time the statements were made.<sup>3</sup>

The protection explicitly applies to parties jointly obligated by simple contract rights.<sup>4</sup> In *Henry v. Tiffany*,<sup>5</sup> the protection was extended to protect parties jointly liable in a suretyship bond transaction.

Only admissions or conversations of the deceased person are mentioned in the section. The fact that the protection of the section will not be extended beyond admissions or conversations is shown by *People v. Borders*.<sup>6</sup> The plaintiff, therein, was allowed to testify regarding the fraudulent manner in which the deceased principal debtor in a suretyship arrangement obtained a release of his liability as principal. The court held that such testi-

<sup>1</sup> Ill. Rev. Stat. ch. 51, § 4 (1872) as amended 1879 and 1899.

<sup>2</sup> *Foster v. Hart*, 29 Ill. App. 260 (3d Dist. 1890).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Supra* note 1.

<sup>5</sup> 5 Ill. App. 548 (3d Dist. 1880).

<sup>6</sup> 31 Ill. App. 426 (4th Dist. 1890).

mony was admissible since it concerned a transaction with the deceased and not an admission or conversation. Therefore, it was not within the limitation of the statute.

As in section 2, the party or person seeking to have evidence of conversations or admissions of the deceased must be interested in the outcome of the suit to be barred.<sup>7</sup>

#### PARTNERS AND JOINT CONTRACTORS

The protection afforded surviving partners and joint contractors can be seen by several cases.

The plaintiff in *Foster v. Hart*,<sup>8</sup> suing a surviving partner in replevin to recover property allegedly purchased from a deceased partner, was not competent to testify concerning conversations with the deceased partner at the time of sale. Likewise, plaintiffs suing a surviving partner for the fraud of a deceased co-partner were not allowed to testify concerning conversations with the deceased partner.<sup>9</sup>

However, when a surviving partner was present at the time of conversations, an adverse party may testify concerning what the deceased partner said.<sup>10</sup>

#### AGENTS

In order to be barred from testifying concerning statements of deceased agents, the witness must be an adverse party or interested person.<sup>11</sup>

A plaintiff suing a company for wages cannot testify as to conversations with the deceased president of the company.<sup>12</sup> Nor may he testify concerning statements of a deceased treasurer of a local lodge in an action on a lodge benefit certificate.<sup>13</sup>

Corporations,<sup>14</sup> banking associations,<sup>15</sup> and individuals<sup>16</sup> are protected by the statute.

A party is not incompetent to testify as to conversations of a deceased agent when another agent of the adverse party was present at the time.<sup>17</sup>

<sup>7</sup> *Supra* note 1.

<sup>8</sup> 29 Ill. App. 260 (3d Dist. 1890).

<sup>9</sup> *Kraft v. Greenough*, 175 Ill. App. 124 (2d Dist. 1913).

<sup>10</sup> *Greenleaf v. Feinberg*, 210 Ill. App. 271 (1st Dist. 1919).

<sup>11</sup> *Spitzer v. Bradshaw Praeger Co.*, 10 Ill. App. 2d 445, 135 N.E.2d 114 (1st Dist. 1956).

<sup>12</sup> *Warszawa v. White Eagle Brewing Co.*, 299 Ill. App. 509, 20 N.E.2d 343 (1st Dist. 1939).

<sup>13</sup> *Grand Lodge A.O.U.W. v. Young*, 123 Ill. App. 628 (3d Dist. 1906).

<sup>14</sup> *Standard Brewery v. Sweeney*, 185 Ill. App. 430 (1st Dist. 1914) (Abstr.).

<sup>15</sup> *First State Bank of Mt. Carmel v. Holsen*, 245 Ill. App. 75 (4th Dist. 1927).

<sup>16</sup> *Foster v. Hart*, 29 Ill. App. 260 (3d Dist. 1890).

<sup>17</sup> *Kinney Rodier Co. v. National Parlor Furniture Co.*, 176 Ill. App. 282 (1st Dist. 1913).

Nor is a party precluded from testifying about transactions with a deceased agent, such as delivery of an insurance policy and payment of the premium.<sup>18</sup>

Evidence received in a former trial sometimes is affected by the provisions of this section. For example, in *Trunkey v. Hedstrom*,<sup>19</sup> the plaintiff was incompetent to testify at a second trial concerning conversations with a deceased agent where the agent had died since testifying at the first trial, even though it was stipulated that the agent's testimony might be used as a deposition. A similar result was reached in *Chicago Title & Trust Co. v. Sagola Lumber Co.*<sup>20</sup>

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<sup>18</sup> *Helbig v. Citizens Ins. Co.*, 234 Ill. 251, 84 N.E. 897 (1908).

<sup>19</sup> 131 Ill. 204, 23 N.E. 587 (1890).

<sup>20</sup> 242 Ill. 468, 90 N.E. 282 (1910).