

Evidence - Dead Man's Act - Applicability to Heirship Proceedings

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proceedings against an incompetent defendant be suspended until he can defend himself.²⁰

Traditionally, the court, by its own observation, took notice of the accused's competency through his demeanor at the trial. The instant case provides an important modification of this principle. The Supreme Court held that, while the accused's "demeanor at the trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue."²¹ The decision thus provides an additional criterion for the court to consider in determining whether to order a competency hearing *sua sponte*. As a result of *Pate v. Robinson*, the courts must now take into account the "uncontradicted testimony of the accused's history of pronounced irrational behavior."²² In so holding, the Supreme Court served notice on the lower courts that it would continue to vigorously protect the rights of the individual.

Kenneth Siegan

²⁰ *People v. Anderson*, 31 Ill.2d 262, 201 N.E.2d 394 (1964); *People v. Bender*, *supra* note 7; *People v. Burson*, 11 Ill.2d 360, 143 N.E.2d 239 (1957).

²¹ *Pate v. Robinson*, 383 U.S. 375, 386 (1966).

²² *Id.* at 385.

EVIDENCE—DEAD MAN'S ACT—APPLICABILITY TO HEIRSHIP PROCEEDINGS

Decedent died in 1963 leaving a will that failed due to the prior death of the sole legatee. Appellants filed a petition for leave to appear as heirs of the decedent, claiming to be children of the decedent's purported half brother. Appellees filed a petition stating that they were the sole heirs of the decedent. At the proceeding to establish heirship the magistrate allowed one of the appellees, an admitted heir, to testify as to heirship. The court overruled appellant's objection that the admitted heir was disqualified under section 2 of the Evidence Act¹ which prohibits an interested party from testifying on his own behalf when an adverse party sues or defends as an heir. The magistrate ruled that the appellee was a competent witness and on the basis of the disputed testimony held that appellants were not heirs. On appeal, the Appellate Court held that section 2 of

¹ ILL. REV. STAT. ch. 51, § 2 (1965): "No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends 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 guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending. . . ."

the Evidence Act² barred the testimony of the admitted heir because he was adverse to a party protected by the Act. *In re Diak*, 70 Ill. App. 2d 1, 217 N.E.2d 106 (1966).

This is a case of first impression in which the Appellate Court considered the pivotal issue to be whether a witness, conceded to be an heir, may testify in a proceeding to establish heirship in which he challenges the claim of other parties attempting to establish their heirship from the same decedent. However, the more salient issue is whether section 2 of the Evidence Act, more commonly referred to as the Dead Man's Act, was intended to be applicable to an heirship proceedings in which there are contesting heirs.

At common law a party was disqualified and thus not permitted to testify in a suit in which he had an interest.³ However, by statute this general interest-disqualification was removed.⁴ Nonetheless one remnant of the interest-disqualification did remain, namely, that testimony by a survivor as to a transaction with a decedent was still excluded, when offered against the latter's estate. The statutes that express this surviving part of the common law interest-disqualification have been classified together and are called Dead Man's Acts.

The general purpose of the Dead Man's Act is to protect estates of deceased persons against fraudulent claims.⁵ More specifically the traditionally accepted purpose attributed to the Dead Man's Act is to prevent a living party to a transaction with a decedent from testifying because the decedent cannot be produced to contradict the survivor in the case of false swearing.⁶ To allow the survivor to testify would result in a hardship to the estate because the adverse party's lips have been sealed by death.⁷

The Dead Man's Act, although adopted by an overwhelming majority of jurisdictions,⁸ has not been immune to criticism by various commentators. Dean Wigmore observes:

² *Supra* note 1.

³ CLEARY, ILLINOIS EVIDENCE § 8.6 (2d ed. 1963).

⁴ A typical example of a statute that abrogates the common law interest-disqualification is ILL. REV. STAT. *supra* note 1, at § 1, which states "No party shall be disqualified as a witness in any civil action, suit or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise, . . .

⁵ *Fredrich v. Wolf*, 383 Ill. 638, 50 N.E.2d 755 (1943).

⁶ *Rouse v. Tomasek*, 279 Ill. App. 557 (1935).

⁷ McCORMICK, EVIDENCE § 65 (1954).

⁸ WIGMORE, EVIDENCE § 488 (3d ed. 1940). Dean Wigmore in his treatise tabulates the various states that have Dead Man's Acts and gives their terminology which indicates that the Dead Man's Acts are not governed by a model act but rather have a variety of constructions.

As a matter of policy, this survival of a part of the now discarded interest-qualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decisions than it prevents, and it encumbers the profession with a profane mass of barren quibbles over the interpretation of mere words.⁹

This disapproval of the Dead Man's Acts is reiterated by Professor McCormick in his treatise on Evidence. He points out that: "[i]n seeking to avoid injustice to one side, the statute-makers have ignored the equal possibility of injustice to the other. . . . The survivor's disqualification is more likely to balk the honest than the dishonest survivor."¹⁰ Acting on this type of criticism, some states have liberalized the rules regarding the survivor disqualification and have allowed their testimony in certain instances.¹¹

In the case at bar, the Appellate Court not only accepted the much criticized traditional purpose of the statute but also broadened this purpose and included any situation in which the witness would gain or lose by the event of the litigation. This is the reasoning set forth by the Illinois Supreme Court in the case of *Jones v. Abbot*¹² in which an heir attempted to set aside a will and enforce a contract with the decedent for the partition of land. In that case the heirs were disqualified and not permitted to testify because of the gain that would result to them if they were successful. However, it is important to note that the decedent was a party to the contract concerning which the heirs attempted to testify.

The rationale for the broader interpretation of the Illinois' Dead Man's Act¹³ can be traced to its terminology which prohibits any party to a civil action, suit or proceeding from testifying therein when any party sues or defends as the heir of any deceased person. However, this provision must be considered in light of section 57 of the Probate Act¹⁴ which defines heirship proceedings and authorizes the court to ascertain and declare the heirship of a decedent based on facts subscribed to by any

⁹ WIGMORE, *op. cit. supra* note 8, § 578.

¹⁰ McCORMICK, *op. cit. supra* note 7, at 143.

¹¹ Oregon, New Mexico and Canada have provided that the survivor may testify but his uncorroborated testimony will not support a judgment. New Hampshire and Arizona exclude the testimony but authorize the trial judge to permit the survivor to testify when it appears that this is necessary to prevent injustice. Finally, a third group of states, including Connecticut, Louisiana, Massachusetts, Oregon, Rhode Island, and South Dakota, permits the survivor to testify but reduces the danger of injustice to the decedent's estate by allowing in evidence oral statements by the decedent concerning the controversy which ordinarily would be excluded as hearsay.

¹² 235 Ill. 220, 85 N.E. 279 (1908).

¹³ ILL. REV. STAT. *supra* note 1.

¹⁴ ILL. REV. STAT. ch. 3, § 57 (1965). It is to be noted that this statute is entitled "Power to Ascertain and Declare Heirship—Evidence."

person. The court is to make an inquiry and it is authorized to call any person who is able to shed light on the family relationships of the decedent. There is no exclusion reflecting the Dead Man's Act disqualification. A General Order of the Circuit Court of Cook County¹⁵ further clarifies the nature of the proceeding. This order provides when a petition for admission of a will to probate or for letters of administration is filed, proof of heirship may be made by the testimony of witnesses examined in open court. This testimony as to heirship shall be given by a person related to the decedent by consanguinity, adoption, or affinity. A comparison of the Dead Man's Act to the applicable Probate provision and its supplemental general order results in an obvious conflict. Under the Probate provisions the judge is to declare and ascertain heirship by means of testimony of witnesses related to the decedent. Yet, the Dead Man's Act disqualifies these very witnesses because of their interest. The Appellate Court in the noted case resolved the conflict by giving greater effect to the broad language of the Dead Man's Act and concluding that proof of heirship is a civil proceeding within the meaning of the Act. Thus, the court seemingly construed the Dead Man's Act as transcending all civil actions or proceedings including heirship and thereby precluded the testimony of an admitted heir whose testimony is apparently permitted under section 57 of the Probate Act and General Order 14.4.¹⁶

In the instant case the court predicated its decision on an expansive interpretation of the words "civil proceeding." Acceptance of this view would result in the statute encompassing any formalized non-criminal judicial process. But such universal application does not take into consideration the unique character of an heirship proceeding. While the Probate Act specifically provides for heirship proceedings the Evidence Act only incidentally includes such a proceeding under its general language. It is a well recognized rule of law that the specific governs the general.¹⁷ Thus it seems reasonable that the specific language of the Probate Act intended to apply solely to heirship proceedings should govern the general language of the Evidence Act. Such an application of the Probate Act does not violate the traditional purpose of the Dead Man's Act since the heirship proceeding involves neither a conversation or transaction in which the decedent was involved.

Though there are no Illinois cases applying the Dead Man's Act to heirship proceedings involving opposing heirs, there are many cases that have applied the statute in somewhat analogous cases. In the noted case the

¹⁵ General Order 14.4 (1964) Proof and Declaration of Heirship.

¹⁶ *Supra* notes 14 and 15.

¹⁷ 50 AM. JUR. *Statutes* §§ 366, 367 (1938). See also *Bowes v. Chicago*, 3 Ill. 2d 175, 120 N.E.2d 15, *cert. denied* 348 U.S. 857 (1954).

court relied on *Mires v. Laubenheimer*,¹⁸ which involved an action for a bill of partition brought by the son of the deceased. The deceased's daughter defended for the estate. Here the petitioner claimed to have an agreement with his father regarding a certain parcel of real estate. Both the son and his sister as a party adverse to an heir were held to be incompetent. The other case cited by the court is *Weiss v. Beck*,¹⁹ which involved specific performance of a contract to adopt. The claimant contended that the decedent had promised to adopt him in return for years of faithful service. The court again held that the claimant was a party adverse to the estate and thereby disqualified under the Act. However, both proceedings not only involved a transaction with the decedent but also represented an assault upon the estate whereas the noted case represents a conflict internal to the estate not involving a transaction with the decedent.

The case most analogous to an heirship proceeding involves the situation where heirs seek to set aside the will of a decedent.²⁰ In such a will contest, the heirs on both sides are prohibited from testifying. However, this case is also distinguishable from the instant case in that the issue once again involves a transaction of the decedent, the execution of his will. In *Heintz v. Dennis*,²¹ heirs were held incompetent to testify in a suit to quiet title to property. The heirs' interest arose as a consequence of a resulting trust allegedly created by the decedent, i.e. a transaction involving the decedent. Finally in *Guild v. Warne*,²² heirs sought to set aside a deed granted by a decedent prior to his death. The decedent had conveyed the property to his grandson and the heirs claimed the deceased was incompetent at the time. The heirs were held disqualified to testify as to the deceased's competency at the time of the conveyance. All the previously discussed cases involved contests between heirs but, more importantly, all the cases reflect some transaction participated in by the deceased!

Considering other jurisdictions, thirty-nine²³ have enacted Dead Man's Acts which disqualify parties adverse to heirs from testifying. However, in none of these jurisdictions has the Dead Man's Act been applied to a factual situation such as the case at bar. Ohio,²⁴ New York,²⁵ Texas,²⁶ and

¹⁸ 271 Ill. 296, 111 N.E. 106 (1915). *Accord*, *Bogart v. Brazee*, 331 Ill. 160, 162 N.E. 877 (1928).

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

²⁰ *Mitchell v. Van Scoyk*, 1 Ill. 2d 160, 115 N.E.2d 226 (1953); *Joyal v. Pilotte*, 293 Ill. 377, 127 N.E. 741 (1920).

²¹ 216 Ill. 487, 75 N.E. 192 (1905).

²² 149 Ill. 105, 36 N.E. 635 (1893).

²³ *Supra* note 8.

²⁴ *Browley v. Thomas*, 82 Ohio App. 400, 81 N.E.2d 719 (1947); *Dibble v. Dibble*, 88 Ohio App. 490, 100 N.E.2d 451 (1950).

²⁵ *In re Cooke's Estate*, 85 N.Y.S.2d 104, 195 Misc. 468 (1948).

²⁶ *Salvini v. Salvini*, 2 S.W.2d 963 (1928).

Georgia²⁷ have construed their Dead Man's Act as applicable with respect to heirship proceedings. However, such application has been limited solely to cases in which a woman attempted to establish a common law marriage with the decedent. This is, in effect, a situation in which a woman is trying to prove a marriage contract entered into with the decedent, a transaction involving the decedent. It is the woman alone, the purported heir, who is disqualified and this would be true even under the traditional purpose of the statute.

All the cases cited as being analogous to the case at bar involved an external attack upon the estate. In every case the claimant sued in the capacity of a survivor to a transaction with the decedent; he was only coincidentally an heir of the decedent. In these cases, the heirs might just as well have been strangers to the estate because their interest was not based on their heirship. However, in the case of a contested heirship proceeding, an internal conflict, not an external conflict, is involved. As a result, the estate will not be reduced, only the aliquot shares of the heirs will be affected. In the internal conflict the interest of the contesting parties is based solely on their status as heirs, not on any transaction or conversation with the decedent. The Appellate Court in its application of the Dead Man's Act failed to consider this distinction between an external and an internal attack upon an estate. The Illinois Supreme Court has long recognized this distinction in holding that

Section 2 was intended to protect the estate of deceased persons from the assault of strangers and relates to proceedings wherein the decision sought by the party so testifying would tend to reduce or impair the estate, and does not relate to the relative rights of heirs or devisees as to the distribution of an estate, in proceedings by which the estate is in no event to be reduced or impaired.²⁸

Though the instant case is in line with a strict and literal construction of the statute itself, the traditional concept of the purpose for the Dead Man's Act has been ignored. Cognizant of the fact that the only issue at bar was the extrinsic fact of proper heirship, it is difficult to perceive how the estate could be adversely affected by allowing the testimony of the admitted heir. True, the decedent was not present to rebut the claims advanced by the purported heirs, nevertheless, it is conjectural whether his testimony would be decisive in this regard.

In light of the court's strict adherence to the literal meaning of the statute, it is ironical that they allowed a presumption to be accepted which is the very basis of the exclusion. In order to hold the admitted heir as incompetent it is necessary to presume that the purported heir is, in fact, an heir. The purported heir must be considered an adverse party "suing or

²⁷ *Ellison v. Aiken*, 74 Ga. App. 541, 40 S.E.2d 441 (1946).

²⁸ *Pigg v. Carroll*, 89 Ill. 205 (1878).

defending as the heir of the deceased."²⁰ Yet, this is the very issue at bar. Only by conceding that the purported heir has the very status he is claiming to possess can the admitted heir be disqualified.

As a result of the instant case, whenever heirship is contested there will be a need for the testimony of impartial third parties and other extrinsic evidence. The persons most closely related to and best qualified to shed light on the lineage of the decedent in most cases will not be allowed to testify. In many cases this disqualification will result in extra expense to the estate and lack of convincing evidence. The court in the noted case was very much aware of the fraud that could be perpetrated by allowing the admitted heir to testify to the claim of the purported heir. However, it is equally conceivable that a fraud on the estate could be successfully effected by a false heir because his claim could not be refuted by the testimony of admitted heirs.

John Wols

²⁰ *Supra* note 1.

INSURANCE—ESCAPE CLAUSE—EXCESS CLAUSE CON- TROVERSY—ILLINOIS JOINS THE MAJORITY

Chester A. Fiske was involved in an accident while driving a rented automobile which was insured under an "omnibus" clause by the defendant. Fiske was also insured personally by the plaintiff. The defendant's policy included an "other insurance" clause which provided that if the insured is covered by other valid and collectible insurance he would not be entitled to indemnification under its policy.¹ This is commonly referred to as an escape clause. The plaintiff's policy also contained an other insurance clause which provided that the insured would only recover the excess over any other valid and collectible insurance.² This is commonly referred to as an excess clause.

The plaintiff sought reimbursement for the settlement of the claim against Fiske and recovered a judgment on the pleadings. On appeal, the Appellate Court reversed, holding that each insurer should bear a pro rata portion of the liability. The Supreme Court reversed the decision of the

¹ The clause in question stated as follows: "If any person, firm, or corporation other than the Assured named in the schedule is, under the terms of this policy, entitled to be indemnified hereunder and is also covered by other valid and collectible insurance, such other person, firm, or corporation shall not be indemnified under this policy."

² The clause in plaintiff's policy stated: "[T]he insurance with respect to . . . other automobiles under Insuring Agreement V. shall be excess insurance over any other valid and collectible insurance available to insured, either as an insured under a policy applicable with respect to said automobile or otherwise."