St. John's Law Review

Volume 22
Number 2 *Volume 22, April 1948, Number 2*

Article 24

July 2013

Disqualification of Witness as to Transactions with Decedent or Lunatic--Recent Exception

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corporation, the reasoning in that case strongly indicated that the courts would probably have followed the *Benintendi* ruling in such later case. By making the amendment applicable to certificates of incorporation only, the new legislation does not specifically rectify the *Benintendi* decision. However, as the court in the latter case based its statutory interpretation largely on the intent of the legislature, if such a case were to come before the court today, it is possible that the intent of the legislature as set forth in the new Section 9, Stock Corporation Law, will be given effect as being directly in point. On the other hand, it is possible that courts will place a limited construction on the new section, holding that though such corporate action is now possible, it is desirable that such requirements be placed in the certificate of incorporation which, after all, is a document of public record, whereas by-laws are not. This is suggested by the fact that the legislature set forth certain specific limitations to the validity of such requirements, as indicated above.

It is submitted that the new legislation will be of salutary effect. The new Section 9 will enable one or more shareholders of a close corporation, subject to certain statutory safeguards, to exercise some form of veto power over the actions of directors or shareholders. This may be accomplished by requiring either unanimity or majority vote greater than prescribed by statute, either for the taking of any action or the taking of specific action. Then, too, the legislature by a clearly formulated policy, and by an unmistakable manifestation of its intent in reference to close corporations, has probably laid to rest much of the controversial matter evoked by the decision of the *Benintendi* case.

ISADOR LIDDIE.

DISQUALIFICATION OF WITNESS AS TO TRANSACTIONS WITH DECEDENT OR LUNATIC—RECENT EXCEPTION.—In 1948 the New York Legislature further amended Section 347 of the Civil Practice Act to provide that a party to an action may testify where the other party has died, as to the facts of an accident and the results therefrom where such accident arose out of the ownership or operation of an airplane or vessel within the state.[1]

Thus the disqualification of a party or of one from through or under whom the party derived his interest is relaxed once again by our legislature. It would appear, therefore, that New York is gradually adopting a more liberal attitude towards such testimony whereas previously a strict adherence to the rule of disqualification was indicated. This state of the law as exhibited by the 1948 amendment may be contrasted with the situation as it stood formerly. At early

[1] Laws of N. Y. 1948, c. 705.

common law, a party to an action was not allowed to testify.[2] As an interested person, he could not be relied upon to testify truthfully, and his testimony was therefore unworthy of credit.[3] It was presumed that such a party would color the circumstances to favor his own position. This was, indeed, unfortunate as the administration of justice depended on obtaining a complete picture of the incident which created the right to relief. In many instances, this essential evidence could be revealed only by a party to the action. Many cases had to be decided on incomplete evidence unless the parties were allowed to testify. Admitting such testimony offered less possibility of injustice. In New York State, Civil Practice Act Section 346[4] made the parties to the action competent to testify, thus eliminating this difficulty. Similar legislation was enacted throughout the country.[5]

In New York and the majority of the other states, the admission of testimony by a party to the action was subject to one exception. This exception, commonly known as the "Dead Man's" statute, was encoded under New York law as Section 347 of the Civil Practice Act.[6] It excluded the testimony of a party when the other party to the action was deceased or incompetent. Such adverse party was denied the privilege of testifying as to all personal transactions and communications with the deceased. This exception was included in the law in order to prevent undue advantage to the survivor over the estate of the deceased. The temptation for falsehood remained and it was felt that in this single case the circumstances invited false testimony and concealment of the truth, more than in any other instance, since the other party to the transaction could not contradict the testimony. In this single instance the fear of perjury was still too strong and it outweighed the possible injustice that could result in declaring the survivor incompetent to testify.[7] It was felt that this one exception to Section 346 was necessary to preserve equality in these special circumstances.[8]

This exception has been severely criticized by many authorities.[9] Where one of the parties is dead, the opportunity to fabricate testimony is present, but competent and thorough cross-examination offers a suitable counteragent. Even the most skilled perjurer can

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[2] 3 BL. COMM. 370. On the history of the rule, see 2 WIGMORE, EVIDENCE § 575 (3d ed. 1940).

[3] Pack v. The Mayor & C. of New York, 3 N. Y. 489 (1850).

[4] Laws of N. Y. 1920, c. 925.

[5] For reference to statutes, see 2 WIGMORE, EVIDENCE § 488 (3d ed. 1940).

[6] Laws of N. Y. 1920, c. 925.

[7] Saxe, *Laws of 1940 Affecting Practice and Related Matters*, 12 N. Y. STATE BAR ASS'N BULL. 86, 92 (1940).

[8] *See* Freygang v. Train, 42 Misc. 49, 51, 85 N. Y. Supp. 538, 539 (Sup. Ct. 1903).

[9] MORGAN, THE LAWS OF EVIDENCE, 1941-45 (1946); 2 WIGMORE, EVIDENCE §578a (3d ed. 1940); 46 HARV. L. REV. 834 (1933).

be discovered by careful cross-examination which will discredit the testimony and unveil contradictions therein. But the implication of the statutory disqualification is that the number of persons who will perjure themselves is so great that we are justified in barring from the witness stand all those who have honest claims, thus making proof of the honest matter difficult and often impossible; that those dishonest survivors will be such consummate liars that cross-examination will be powerless to expose them; and that the court and jury will be incompetent to weigh the credibility of such persons' testimony.[10] The majority of men are not so corrupt, or, if corrupt, so skillful, that their falsehood cannot be revealed or that their testimony cannot be attacked as unworthy of belief. To recognize such a rule of law impairs to a great extent the possibility of the collection of honest claims by the living. It may prevent perjury of a claimant but it does not prevent subornation of perjury by a claimant and perjury by other witnesses.[11]

In several states throughout the country, the force of the criticism of the rule resulted in attempts to correct the injustice. These changes have been produced by one of three methods:

(1) Allow no recovery in such cases where one party is deceased and the other party testifies unless the survivor's testimony is corroborated.[12]

(2) Admit any declarations and writings of the deceased witness to counterbalance the testimony of the survivor.[13]

(3) Exclude the testimony of the survivor except where it appears to the court to work an injustice.[14]

The 1948 amendment indicates that New York will not follow any of the methods but will travel parallel with the third method.

In New York Section 347 specifies the following elements as conditions to rendering a party incompetent:

(1) One of the parties must be dead.

(2) The survivor wishes to testify as to a personal transaction or communication with the deceased.

(3) The testimony of the survivor is being offered on his own behalf and not by the representative of the deceased as evidence on the case of the deceased.

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[10] Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 47 YALE L. J. 194, 199 (1937).

[11] MODEL CODE OF EVIDENCE, Rule 92 (1942).

[12] N. Mex. Stat. Ann. 1929, §§ 45-601; Va. Code 1936, § 6209.

[13] Conn. Gen. Stat. 1930, § 5609; Mass. Ann. Laws 1938, c. 233, § 66; Ore. Code Ann. 1930, §§ 9-403; R. I. Gen. Laws 1923, § 5039.

[14] Ariz. Rev. Stat. 1913, Civil Code § 1678; N. H. Pub. Laws 1926, c. 336, §§ 27, 28; Mont. Rev. Code Ann. § 10535.

(4) The representative of the deceased has not opened the door for the survivor to testify.

If any one of the above elements is not present the survivor is competent and may testify. If the above elements are fully satisfied, the party cannot testify.

With the removal of abatement upon death in personal injury actions in 1935,[15] the implementation of Section 347, in actions where one party had died, increased, and the intended benefit of the removal of the abatement of actions was minimized. Where the case could be established without the testimony of the parties thereto, no difficulty arose. Where, however, the testimony of the parties constituted a material and necessary part of the plaintiff's case, even after 1935, the relief was in fact lost on the death of the defendant.

In wrongful death cases, the statute gave a cause of action to the deceased's representatives and placed the burden of proving the contributory negligence of the deceased on the defendant.[16] This statutory relief in favor of the deceased's survivors was indirectly extended by denying to the defendant a chance to testify as to the circumstances of the occasion causing death. When his testimony was immaterial, it made no difference; when it was material to the case, the defendant was subject to a judgment without an opportunity to testify on his own behalf or as to the contributory negligence of the deceased.

Prior to 1940 while the statute remained unmodified, the meritorious claims or defenses of the living were sacrificed in wholesale fashion in order to preserve or benefit the estates of the dead. The estates of the dead were not affected since the testimony of the survivor was always available to them if they chose to open the door for its admission. An injured plaintiff was denied relief because the guilty party's death had sealed the lips of the survivor.[17] An innocent defendant could not offer his testimony, even though true, in a suit against him by the representative of a negligent decedent unless the door was opened by the representatives of the deceased. Injustice multiplied in ever increasing instances as the traffic on the highways swelled and the accidents with injury and death to person and damage to property grew to large proportions. Because of the nature of the actions involving motor vehicles, the best, and at times the only evidence, was available in the testimony of the surviving parties. The material elements generally included the facts immediately preceding the accident. These were unknown to disinterested witnesses in most cases since such persons were frequently first attracted by the accident and were therefore only qualified to state what took place thereafter.

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[15] Laws of N. Y. 1935, c. 795.
[16] N. Y. DECEDENT ESTATE LAW § 131.
[17] Wright v. Wilson, 154 F. 2d 616 (C. C. A. 3d 1946).

By statutory amendment in 1940,[18] an incompetent party under Section 347 was permitted to testify under the following conditions:

(1) He was competent to testify in a trial of a cause of action involving a claim of negligence or contributory negligence.

(2) The cause of action must have arisen out of the operation or ownership of a motor vehicle within the state on the highways of the state.

(3) One or more of the parties must be the representative of the deceased.

(4) He was to testify as to the facts of the accident or the results therefrom.

(5) Proposed testimony should not include testimony as to conversations with the deceased.

In these limited circumstances parties were excepted from the ordinary operation of Section 347 and were allowed to testify. In these instances the injustice of the situation produced a change and a remedy.

The 1940 Act was the result of a legislative determination that to exclude the testimony was an injustice. The amendment removed the handicap in securing evidence in the mass of litigation involving motor vehicles. The amendment was to be a proving ground of the fundamental issue inherent in the criticism of the "Dead Man's" statute—whether the truth or perjured testimony would be the ultimate result if a survivor was permitted to testify in his own behalf. In 1940 New York was not ready to follow some of the other states and open the door wide for the admission of a survivor's testimony in every instance. It chose rather a conservative course in modifying the law, changing it only where justice required it and observing the results.

In 1948 the second amendment to Civil Practice Act, Section 347, and, specifically, to the exception stated above, was enacted. After eight years the legislature has extended the amendment of 1940 (allowing parties otherwise incompetent to testify in motor vehicle accident cases) so that under the present law parties otherwise incompetent may now testify as to the facts of an accident and the results therefrom involving a motor vehicle, an airplane or a vessel operated within the state. The new amendment indicates that air and water travel has increased since 1940 with a resulting increase in litigation in such instances to the point that the injustice of incompetency under Section 347 outweighs the fear of perjury and loss to an innocent deceased person's estate.

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[18] Laws of N. Y. 1940, c. 620.

After the amendment of 1940 with respect to motor vehicle accidents it was written that the amendment was ". . . a possible forerunner of a more general abandonment of the rule." [19] It does not appear that the disqualification has been, or will be, ruthlessly abandoned but it does seem that a gradual enlargement of the exceptions to the statute may be prophesied. The trend is toward liberalization of the rule which suppresses essential testimony.

JOHN P. MAHON.

AMENDMENT TO THE PERSONAL PROPERTY LAW RELATIVE TO RECOVERY OF DAMAGES UPON RESCISSION OF SALE OF GOODS FOR BREACH OF WARRANTY.—On the recommendation of the Law Revision Commission, a bill to amend Section 150 of the New York Personal Property Law [1] passed the New York Legislature and was approved by the Governor March 21, 1948. This statute, "An Act to Amend the Personal Property Law, in Relation to Recovery of Damages Upon Rescission of a Sale of Goods for Breach of Warranty," becomes effective September 1, 1948.[2] It enables a buyer of goods rescinding for breach of warranty to recover damages for a breach not compensated by recovering the purchase price paid or by discharge of the obligation to pay.[3]

Section 150 of the Personal Property Law contains seven subdivisions which define the remedies of a buyer of goods, where there is a breach of warranty by the seller.[4] Of these only subdivision 1, paragraph (d), has been affected by the new amendment to Section 150. The measure of damages for breach of warranty and the prerequisites for rescission remain unchanged.[5] Section 151 of the Personal Property Law preserves the right, in an action for breach of warranty, to recover interest and special damages where they are otherwise recoverable.[6]

Subdivision 1, paragraph (d), of Section 150 of the New York Personal Property Law as it has been amended reads: "1. Where there is a breach of warranty by the seller, the buyer may, at his election, (d) Rescind the contract to sell or the sale and refuse to

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[19] Recent Statutes, 10 FORD. L. REV. 123, 124 (1941).

[1] N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. No. 65(F) (1948).

[2] Laws of N. Y. 1948, c. 276.

[3] N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. No. 65(F) (1948).

[4] N. Y. PERS. PROP. LAW § 150.

[5] *Ibid.*

[6] N. Y. PERS. PROP. LAW § 151.