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New Life to the Dead Man's Act in Illinois

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New Life to the Dead Man's Act in Illinois

For more than a century Illinois courts were plagued with the one remaining vestige of the common law bar to a witness's competency—The Dead Man's Act.[1] This statute, enacted in 1872, rendered anyone with direct interests adverse to an incompetent's or deceased's estate incompetent to testify in his own behalf unless the testimony fell within one of six exceptions. The statute protected the representative of the estate in any civil action brought by or against the representative.

On September 6, 1973, the Illinois legislature enacted a new Dead Man's Act which became effective on October 1, 1973. In order to

1. [1872] Ill. Laws 183 (repealed 1973):

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, and also except in the following cases, namely:

First-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 or devisee shall have attained his or her majority.

Second-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.

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.

Fourth-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 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.

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

evaluate the impact of this new statute it is necessary to discuss the manner in which the courts applied the old statute.

THE OLD DEAD MAN'S ACT

The Illinois courts faithfully followed the incompetency mandate of the old statute, using the following rationales: in cases involving contract claims against the estate or determining rights in the estate, the courts reasoned that the statute "protect[ed] the estates of deceased persons from the assaults of strangers";[2] in wrongful death and negligence actions the statute guarded against the surviving party's false testimony and "put the two parties to a suit upon terms of equality in regard to the opportunity of offering testimony."[3]

Unfortunately, in protecting the estates of the dead, the statute placed an overwhelming burden on the living. Although no court expressly held that the Dead Man's Act prohibited the survivor[4] from testifying to *everything* that occurred during the deceased's life or during the incompetent's incompetency, the statute was unambiguous on this point: It stated that "[n]o party. . . shall be allowed to testify . . . on his own behalf" against a party who represents a deceased's or incompetent's estate. Illinois courts clearly accepted the literal meaning of the statute and held that the survivor could not testify even to facts unknown by the deceased.

In *Engstrom v. Edgar*[5] the plaintiff sued the owner of a funeral home to recover for injuries sustained at the funeral home when the defendant-owner was not present. When the defendant-owner died shortly before trial, the court applied the Dead Man's Act in favor of his executor. The court held that the plaintiff was barred from testifying to anything that occurred prior to the defendant's death, even though the defendant-owner, while alive, could not have personally testified to any details of the accident.[6] The courts have even applied the statute when a party died during the trial. In *Smith v. Billings*[7] the defendant died during an adjournment after the plaintiff

2. Mueller v. Rebhan, 94 Ill. 142, 149 (1879).
3. VanMeter v. Goldfarb, 317 Ill. 620, 623, 148 N.E. 391, 392 (1925).
4. For the purposes of this article the party representing the estate is referred to as the "protected party," and the person whose interests are adverse to the estate is referred to as the "survivor."
5. 126 Ill. App. 2d 369, 267 N.E.2d 788 (1970).
6. Martin v. Miles, 41 Ill. App. 2d 208, 190 N.E.2d 473 (1963), is often erroneously cited for the proposition that the survivor is competent to testify to matters which occurred while the decedent was alive. The ambiguous language used in this case was clearly dicta since the trial judge had sustained each of the protected party's objections to the survivor's testimony.
7. 177 Ill. 446, 53 N.E. 81 (1898).

had read his own deposition into the record and closed his case. The court struck the plaintiff's testimony from the record, holding that the plaintiff had become incompetent to testify against the deceased's representative. Application of the statute was particularly paralyzing in cases such as this, where the survivor had planned his case on the assumption that he was competent to testify on his own behalf.

Representative Capacity of the Protected Party

In view of the devastating effect of the statute, the courts refused to apply the statute where the party claiming its protection was not defending assets of or attempting to recover assets for the estate.[8] The courts looked behind the mere title of guardian, executor or heir to determine whether the party claiming protection was proceeding in the prescribed representative capacity.

Thus, an executor suing in his capacity as trustee of the deceased's inter vivos trust was not a protected party since he sought to preserve assets for the trust, not for the deceased's estate.[9] An heir who defended his title to property against other heirs by claiming an inter vivos gift from the decedent was not a protected party since the success of his claim would diminish the decedent's estate.[10] An administratrix bringing a wrongful death action was clearly a protected party; however, if she joined a personal claim with the wrongful death action, she was not a protected party as to the personal claim.[11] The joinder of such claims effectively operated as a waiver of protection where the issues under both claims were identical.

The courts completely ignored the statute in proceedings among devisees or among heirs, even though they were clearly proceeding in a representative capacity, where the only issue was the method of distributing the estate. The courts reasoned that the statute did not "relate to the relative rights of heirs and devisees, as to the distribution of an estate, in proceedings by which the estate itself is in no event to be reduced or impaired."[12]

8. The representative of an estate under the statute was the executor, administrator, heir or devisee of a deceased person; the guardian of conservator of a mentally incompetent person or of a habitual drunk; and the guardian or trustee of an heir, legatee or devisee.

9. Rose v. St. Louis Union Trust Company, 99 Ill. App. 2d 81, 241 N.E.2d 16 (1968), *aff'd*, 43 Ill. 2d 312, 253 N.E.2d 417 (1969).

10. Simpson v. Wrate, 337 Ill. 520, 169 N.E. 324 (1929); Lasky v. Smith, 407 Ill. 97, 94 N.E.2d 898 (1950).

11. Cunningham v. Central & Southern Truck Lines, 104 Ill. App. 2d 247, 244 N.E. 2d 412 (1968), where the administratrix joined a tort claim to recover funeral expenses with her wrongful death action.

12. Mueller v. Rebhan, 94 Ill. 142, 149 (1879). *See also* Pigg v. Carroll, 89 Ill. 205 (1878); Alward v. Woodard, 315 Ill. 150, 146 N.E. 154 (1924).

Once the court was satisfied that the protected party was proceeding in the prescribed representative capacity, the court then had to determine whether the person seeking to testify against the protected party was disqualified from doing so.

Disqualification of the Adverse Party and Directly Interested Witness

The old Dead Man's Statute barred the testimony of all parties and witnesses whose interests were adverse to those of the representative. Obviously, any party proceeding against the representative had direct interests adverse to those of the representative. The mere naming of a person as a defendant, however, did not necessarily bar his testimony. In *Sankey v. Interstate Dispatch*,[13] for instance, the court held that one of the persons named as a defendant was competent to testify on his own behalf since the plaintiff-administrator had never served him with process as a defendant.[14]

If the person seeking to testify was not a party opposing the estate, the court had to determine whether he had a direct interest adverse to that of the protected party. He was incompetent to testify if he had such an interest. The courts held that the spouse of a survivor always had a direct interest adverse to the protected party's; on the other hand, neither children nor relatives of a survivor were directly interested solely because of their relationship.[15]

The standard test used to determine "direct interest" was whether the witness would "either gain or lose by the direct legal operation and effect of the judgment, or [whether] the record [would] be legal evidence for or against him, in some other action."[16] The courts looked to the substance of the controversy to determine on which side the witness's real interests lay. Thus *Pyle v. Pyle*[17] held that where the estate representative's direct financial interest was really adverse to the estate, the representative's spouse was incompetent to testify against the estate.

The determination of direct interest was even more complex in cases where a witness might later be held liable to one of the parties.

13. 339 Ill. App. 420, 90 N.E.2d 265 (1950).
14. Likewise, where the judge directed a verdict in favor of one of the defendants, that defendant was no longer an "adverse party" and was competent to testify. Hawthorne v. New York Central Ry. Co., 2 Ill. App. 2d 338, 119 N.E.2d 516 (1954).
15. Pyle v. Pyle, 158 Ill. 289, 41 N.E. 999 (1895). A spouse's incompetency continues even after the marriage is dissolved. Hann v. Brooks, 331 Ill. App. 535, 73 N.E. 2d 624 (1947).
16. Bellman v. Epstein, 202 Ill. App. 247, 249 (1916), *aff'd*, 279 Ill. 34, 116 N.E. 707 (1917).
17. 158 Ill. 289, 41 N.E. 999 (1895).

This issue often arose where an employer was sued by an estate's representative for the acts of his employee. Most courts concluded that the employee was directly interested only if the record of the proceedings could be used for or against him in a subsequent indemnification proceeding by his employer.[18] If the record could not be used against the employee, he was competent to testify in behalf of the defendant-employer.[19] In reaching this conclusion the courts ignored the fact that any admission made by the employee while testifying could probably be used against him in the subsequent proceeding.

Exceptions to the Survivor's Disqualification

Recognizing the inequities of the old statute's absolute prohibition on the survivor's testimony, the drafters provided six exceptions. The first exception permitted the survivor to testify to anything which occurred after the decedent's death or the incompetent's recovery.[20]

Four other exceptions presented circumstances under which the protected party was deemed to have waived his protection. If the protected party introduced the decedent's deposition into evidence, the survivor could testify to any relevant matters brought out in the deposition.[21] If the protected party called the survivor as an adverse witness, the survivor in his own defense could rebut or explain any conversation or transaction brought out in such testimony.[22]

If the protected party took the stand himself or called anyone with a direct interest in the proceeding to the stand, the survivor could rebut or explain any conversation or transaction brought out in the testimony. The courts often interpreted "direct interest" under this exception more broadly than they did under the general section.[23] Thus, the court in *Butz v. Schwartz*[24] held that the protected party waived his protection by calling the decedent's employee to testify since the employee might have been required to idemnify the decedent's estate.

18. Feitl v. Chicago City Ry. Co., 211 Ill. 279, 71 N.E. 991 (1904).
19. Sankey v. Interstate Dispatch, 339 Ill. App. 420, 90 N.E.2d 265 (1950). See discussion of case at text accompanying note 13 *supra.*
20. Swirski v. Darlington, 369 Ill. 188, 15 N.E.2d 856 (1938). *But see* Halladay v. Blair, 223 Ill. App. 609 (1921), where the court barred the survivor's testimony that she possessed certain promissory notes immediately after the testatrix' death, reasoning that this was tantamount to testifying that the testatrix had delivered the notes during her lifetime. Such reasoning clearly defeated the purpose of this exception.
21. Eastman v. United Marble Company, 224 Ill. App. 256 (1922).
22. Clifford v. Schaefer, 105 Ill. App. 2d 233, 245 N.E.2d 49 (1969); Perkins v. Brown, 400 Ill. 490, 81 N.E.2d 207 (1948); Combs v. Younge, 281 Ill. App. 339 (1935).
23. See text accompanying note 16 *supra.*
24. 32 Ill. App. 156 (1889), *aff'd,* 135 Ill. 180, 25 N.E. 1007 (1890).

The court reasoned that the employee's contingent liability to the estate rendered him directly interested in the proceeding.

If the protected party called the decedent's agent on his behalf, the survivor could rebut or explain any conversation or transaction brought out in the agent's testimony. The protected party waived his protection, however, only if the conversation or transaction testified to arose during the agency relationship[25] and only if the conversation or transaction took place between the agent and the survivor.[26] Therefore, this exception effectively permitted the survivor to testify only in situations where the agent had acted in behalf of the dead principal regarding transactions outside the decedent's immediate control.

Under each of these exceptions the conversation or transaction had to be brought out on direct examination of the protected party's witness.[27] The survivor could never remove his own incompetency under these exceptions by eliciting testimony on cross-examination.

The last exception was the only means whereby the survivor could provide for himself an opportunity to testify. Under this exception if either party called a "disinterested witness," the survivor could explain or rebut any conversation or transaction to which the disinterested witness testified so long as the conversation or transaction took place *outside the presence of the decedent.* A "disinterested witness" was an innocent bystander to the accident in issue,[28] a policeman investigating the accident,[29] or anyone not directly interested in the outcome of the proceeding.[30]

Problems Produced by the Old Dead Man's Act

The old Act's absolute prohibition on the survivor's testimony was extreme in light of the purposes of the statute to protect estates and to place the survivor and the representative on an equal footing in presenting testimony. It was unnecessary, for instance, to prohibit testimony on matters totally outside the decedent's knowledge in order to meet these objectives. The statute clearly gave an unjust advantage to the estate's representative.

25. First National Bank of Monmouth v. Dunbar, 118 Ill. 625, 9 N.E. 186 (1886).
26. Cunningham v. Central & Southern Truck Lines, 104 Ill. App. 2d 247, 244 N.E.2d 412 (1968). In this wrongful death action, the agent happened to be a passenger in the car driven by the deceased. The court held that the collision at issue was not a transaction between the agent and the survivor since the agent was not driving; therefore, the agent's testimony did not allow the survivor to testify in his own behalf.
27. Loeb v. Stern, 198 Ill. 371, 64 N.E. 1043 (1902).
28. Logue v. Williams, 111 Ill. App. 2d 327, 250 N.E.2d 159 (1969).
29. Loeb v. Stern, 198 Ill. 371, 64 N.E. 1043 (1902).
30. Butz v. Schwartz, 32 Ill. App. 156, *aff'd*, 135 Ill. 180, 25 N.E. 1007 (1890).

On the other hand, the statute's exceptions were totally inadequate to neutralize the representative's advantage. Since both the agent and disinterested witness exceptions merely permitted the survivor to testify to matters occurring outside the decedent's presence or immediate control, they did not allow the survivor to rebut or explain an agent's or disinterested witness's testimony regarding the survivor's conversations or transactions *with* the decedent. Furthermore, the agent or disinterested witness could testify to any admissions of the survivor, made in the presence of the decedent, without affording the survivor an opportunity to explain or deny these admissions.

By holding that the protected party had not called the survivor "on his own behalf" until he actually placed the survivor on the stand, the courts compounded the inadequacy of the exceptions. The protected party could introduce any admissions in the survivor's interrogatory or deposition without waiving his protection.[31] Likewise, in cases involving wills the courts allowed the protected party to introduce the survivor's admissions made in the prior probate court hearings without waiving his protection.[32]

The result of the combined inequities of the statute was particularly apparent in wrongful death and negligence actions where a survivor attempted to defend against a representative. Many a protected representative was able to prove each element of his case without affording the disqualified party an opportunity to take the stand in his own defense. Even if the survivor were the only eyewitness to the accident, the representative was not required to call the survivor to the stand to prove his case.[33] The courts instead allowed the representative to introduce evidence of the decedent's careful habits which established a prima facie case of freedom from contributory negligence.[34] The fact that the survivor could also introduce evidence of his own careful habits through disinterested witnesses[35] was of little

31. Premack v. Chicago Transit Authority, 2 Ill. App. 3d 127, 276 N.E.2d 77 (1971). This reasoning is consistent with the courts' conclusion that the protected party did not call the survivor as a witness by taking the survivor's deposition. Pink v. Dempsey, 350 Ill. App. 405, 113 N.E. 334 (1953). This unlimited freedom to depose the survivor has been justly criticized as allowing the protected party the benefit of a "fishing expedition" with the right to reject unfavorable results of the deposition. Annot., 23 A.L.R.3d 389, 396 (1969).

32. Merchants' Loan & Trust Co. v. Egan, 222 Ill. 494, 78 N.E. 800 (1906).

33. Nordman v. Carlson, 291 Ill. App. 438, 10 N.E.2d 53 (1937). Furthermore, the protected party was not required to call any eyewitness who was directly interested in the proceeding. Ogden v. Keck, 253 Ill. App. 444 (1929). The protected party was prohibited from introducing evidence of the decedent's habits *only* if the protected party himself was an eyewitness. *See* Plank v. Holman, 46 Ill. 2d 465, 264 N.E.2d 12 (1970).

34. Martin v. Miles, 41 Ill. App. 2d 208, 190 N.E.2d 473 (1963).

35. McElroy v. Force, 75 Ill. App. 2d 441, 220 N.E.2d 761 (1966), *aff'd*, 38 Ill.

consolation.

EVALUATION OF THE NEW DEAD MAN'S ACT

Illinois' new Dead Man's Statute represents an attempt to clarify the old statute and to resolve some of the inequities caused by the old statute.[36] The new statute allows the survivor and the directly interested witness to testify to anything except conversations with the deceased or incompetent or to events which took place in the presence of the deceased or incompetent.[37] Because the statute's prohibition is limited to matters within the knowledge of the decedent, a case like *Engstrom v. Edgar*[38] will now be resolved in favor of the survivor: Where the deceased defendant has no personal knowledge of the cir-

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2d 528, 232 N.E.2d 708 (1967). Rouse v. Tomasek, 279 Ill. App. 557 (1935), held that where the protected executor was also a beneficiary under the decedent's will, his *personal* testimony regarding the decedent's careful habits enabled the survivor to testify to the decedent's actions in the accident in issue. The protected party could easily avoid this problem, however, by calling someone else to testify to the decedent's careful habits.

36. ILL. REV. STAT. ch. 51, § 2 (1973):

> In the trial of any civil action in which any party sues or defends as the representative of a deceased or incompetent person, no adverse party or person directly interested in the action shall be allowed to testify on his own behalf to any conversation with the deceased or incompetent person or to any event which took place in the presence of the deceased or incompetent person, except in the following instances:
>
> (1) If any person testifies on behalf of the representative to any conversation with the deceased or incompetent person or to any event which took place in the presence of the deceased or incompetent person, any adverse party or interested person, if otherwise competent, may testify concerning the same conversation or event.
>
> (2) If the deposition of the deceased or incompetent person is admitted in evidence on behalf of the representative, any adverse party or interested person, if otherwise competent, may testify concerning the same matters admitted in evidence.
>
> (3) Any testimony competent under Section 3 of this Act, is not barred by this Section.
>
> (4) No person shall be barred from testifying as to any fact relating to the heirship of a decedent.
>
> As used in this section:
>
> (a) "Incompetent person" means any person who is adjudged by the court in the pending civil action to be unable to testify by reason of mental illness, mental retardation or deterioration of mentality.
>
> (b) "Representative" means an executor, administrator, heir, legatee or devisee of a deceased person and any guardian, or trustee of any such heir, legatee or devisee or a guardian or conservator of, or guardian ad litem for, an incompetent person.
>
> (c) "Person directly interested in the action" or "interested person" does not include a person who is interested solely as executor, trustee or in any other fiduciary capacity whether or not he receives or expects to receive compensation for acting in that capacity.

37. The new statute excludes the habitual drunk from its protection and narrows the definition of an "incompetent person" to one whom the court adjudges incapable of testifying because of mental illness, mental retardation or deterioration of mentality. *Id.* § 2(a).

38. 126 Ill. App. 2d 369, 267 N.E.2d 788 (1970). See discussion of case at text accompanying note 5 *supra*.

cumstances surrounding the plaintiff's injuries, the plaintiff will be fully competent to testify in his own behalf under the new statute.

Furthermore, this statutory change obviates the need for three of the old statute's exceptions: the exceptions regarding testimony of the decedent's agent and of disinterested witnesses—since these exceptions applied only to conversations and transactions outside the decedent's presence or immediate control—and the exception allowing the survivor to testify to facts occurring after the decedent's death.

The courts will still have to cope with the definition of "direct interest" in order to determine whether a witness's testimony falls within the statute's mandate. They will no doubt rely on precedent set by cases decided under the old statute.[39] The new statute does, however, permit an executor, administrator or conservator to testify in his own behalf if his sole interest in the estate is the receipt of compensation in this representative capacity.[40]

By expressly excluding the representative's compensation from the scope of "direct interest," the new statute changes the results of several cases decided under the old statute. In applying the old Act, the courts consistently held that in will contests the executor had a direct interest in the proceedings because he would receive compensation for administering the estate if the will was upheld.[41] Furthermore, if the parties contesting the will were attempting to reinstate an earlier will, the executors of both wills were barred from testifying regarding the wills.[42] Likewise, under the old statute if a conservator brought a suit in behalf of his incompetent, the conservator was considered to be directly interested in the proceedings if an award to the plaintiff incompetent would represent the sole assets of the incompetent's estate.[43] Under the new statute executors and conservators under these circumstances will be competent to testify against a protected party since they will not have a "direct interest" in the action.

Exceptions to the Survivor's Incompetency under the New Statute

The first exception provides that the protected party waives his pro-

39. See discussion of *direct interest* in text accompanying notes 15-18 *supra*.
40. ILL. REV. STAT. ch. 51, § 2(c) (1973). See note 36 *supra*.
41. Jones v. Abbott, 235 Ill. 220, 85 N.E. 279 (1908). Although Godfrey v. Phillips, 209 Ill. 584, 71 N.E. 19 (1904), allowed the executor of a prior will to testify in support of the prior will, the situation presented was unique: the executor had entered into a binding contract with the decedent to distribute the estate without charge. The court reasoned that the executor, therefore, had a legal duty to support the prior will.
42. Jones v. Abbott, 235 Ill. 220, 85 N.E. 279 (1908).
43. *In re* Estate of Franke, 124 Ill. App. 2d 24, 259 N.E.2d 841 (1970).

tection if he calls anyone to testify in his behalf regarding the survivor's conversation or transaction with the decedent. The witness's interest in the outcome of the litigation is irrelevant under this exception: If he is called by the protected party, the survivor can rebut or explain any conversation or event brought out in the testimony.

The new statute retains the old statute's exception allowing testimony to rebut any portion of the decedent's deposition read into evidence by the protected party and codifies decisions under the old statute[44] allowing the survivor to testify to any facts necessary to lay the foundation for the introduction of business records under Section 3 of the Evidence Act.[45]

The last exception allows the survivor to testify to "any fact relating to the heirship of a decedent." Although the statute does not define "heirship," this exception should allow any person to testify in his own behalf in order to establish his status as an heir. This exception will undoubtedly be a boon to common law wives who invariably failed under the old statute to establish heirship by proving a marriage "contract" with the decedent.[46] More importantly, this exception should permit all heirs of an estate to testify in proceedings where any heir's right in the estate is challenged. Under the old statute none of the parties were competent to testify in their own behalf in this situation since all the parties sued and defended on behalf of the estate.[47] However, if this exception is construed literally, it will not alter results under the old statute in will contests. In these cases all parties will remain incompetent to testify to conversations or transactions which occurred in the presence of the decedent[48] since the facts to be established are not related to the "heirship of a decedent."

The new Dead Man's Act is a tremendous improvement over the old statute. It clearly represents a more realistic balance between the need to protect the party whose lips are sealed by death or incompetency and the need to receive probative evidence. Under the new statute a representative who brings an action against a survivor should find it impossible to meet the burden of proving all the elements

44. *In re* Estate of Jarodsky, 122 Ill. App. 2d 243, 258 N.E.2d 365 (1970).
45. ILL. REV. STAT. ch. 51, § 3 (1973).
46. Laurence v. Laurence, 164 Ill. 367, 45 N.E. 1071 (1896); *In re* Estate of Maher, 210 Ill. 160, 71 N.E. 438 (1904); *In re* Estate of Enoch, 52 Ill. App. 2d 39, 201 N.E.2d 682 (1964).
47. Mires v. Laubenheimer, 271 Ill. 296, 111 N.E. 106 (1915); *In re* Estate of Diak, 70 Ill. App. 2d 1, 217 N.E.2d 106 (1966). Of course, once heirship is established, all parties can testify regarding distribution of the estate. See text accompanying note 12 *supra*.
48. Patton v. Gullett, 267 Ill. 569, 108 N.E. 660 (1915); Willison v. Stoutin, 4 Ill. App. 3d 490, 280 N.E.2d 564 (1972).

of his case without affording the survivor an opportunity to testify to the issues being litigated. Once the plaintiff-representative takes the stand or calls a witness in his behalf to testify to the decedent's conversation or transaction with the defendant-survivor, the survivor will become competent to testify to the conversation or transaction which the representative is seeking to prove. Furthermore, if the plaintiff-representative calls a reconstruction expert to testify to the physical facts and possible causes of the survivor's accident with the decedent, the survivor should become competent to testify to the entire accident.[49] Once the survivor, as the only living eyewitness to the accident, becomes competent to testify in his own defense, the plaintiff-representative should not be able to introduce evidence of the decedent's careful habits to prove freedom from contributory negligence.

Problems under the New Statute

Although the new statute solves the problems of the survivor who must defend against an estate representative,[50] it still places an overwhelming burden on the plaintiff-survivor who seeks to prove a claim against the deceased's or incompetent's estate. If the survivor cannot produce affidavits of disinterested witnesses to support his claim, in all likelihood he will not survive the representative's motion for summary judgment.[51] Even if the survivor prevails in the motion for summary judgment, he is still faced with the problem that he cannot rebut or explain any admissions contained in the record of a prior proceeding or in his interrogatory or deposition. The new statute apparently does not change the line of cases under the old statute which hold that the protected party retains his protection if he merely reads the survivor's admission into evidence.[52]

The most serious problem which the new statute will raise may well be the proper interpretation of the word "event." Under the old stat-

49. A reconstruction expert is allowed to give his opinion concerning the cause of the accident if there are no competent eyewitnesses. *See* Plank v. Holman, 46 Ill. 2d 465, 264 N.E.2d 12 (1970). Since the reconstruction expert's testimony renders the survivor competent to testify as an eyewitness, it might be argued that the expert's testimony should be stricken from the record, since there would then be a competent eyewitness. A more reasonable approach would allow both the expert's and the survivor's testimony to be weighed by the jury.

50. The new statute does not, however, assist the defendant-survivor where the representative brings a confession of judgment against him. In this situation the survivor's affidavit cannot be considered in his attempt to open the judgment. *In re* Estate of Segur, 5 Ill. App. 3d 459, 283 N.E.2d 76 (1972).

51. Where the protected party moves for summary judgment, the court will only consider affidavits of witnesses who will be competent to testify at trial. Scianna v. Scianna, 69 Ill. App. 2d 388, 217 N.E.2d 101 (1966).

52. See text accompanying notes 30 and 31 *supra*.

ute the survivor could rebut or explain certain "transactions" brought out in the protected party's case; under the new statute the survivor cannot testify to any "event" which occurred in the decedent's presence but can rebut or explain any "event" brought out by the protected party.

The Illinois courts had spent well over one hundred years clarifying the word "transaction" under the old statute and had settled on a broad interpretation of the word. For instance, where a protected party called the survivor to testify to any provision of the survivor's oral contract with the decedent, the survivor could testify to the entire contract[53] since the contract was one distinct transaction; the survivor could not, however, testify to the decedent's fraud or subsequent breach, because these were "transactions" distinct from the contract itself. Where a protected party called the survivor to testify to the decedent's actions immediately prior to an automobile accident, the defendant-survivor could testify to the entire accident.[54] Likewise, where the protected party called the survivor to testify to the condition of the survivor's brakes at the time of the accident, the survivor could "testify on his own behalf . . . to all primary and material facts . . . [which] are designated as the res gestae."[55]

In cases involving automobile accidents the Illinois courts had perhaps judicially substituted the word "event" for "transaction" in the old statute. If the drafters of the new statute merely codified this judicial substitution, the word "event" will not present a problem in wrongful death and negligence actions: Under the new statute, as under the old, the survivor will not be able to testify to any facts surrounding his accident with the decedent; by the same token, if the protected party introduces any evidence concerning the decedent's acts, the survivor's acts or physical facts surrounding the accident, the survivor will be competent to testify to the entire accident.

However, the word "event" may well plague the courts for yet another century in will contests and cases involving contract claims against the estate. The protected representative, defending the estate's assets, will seek an interpretation of "event" even broader than the courts' prior interpretation of a "transaction." For instance, in a case where several negotiation sessions, held outside the decedent's presence, have preceded the survivor's oral contract with the decedent,

53. Chabot v. Kelly, 72 Ill. App. 2d 150, 218 N.E.2d 868 (1966), *cert. denied*, 386 U.S. 971 (1967).
54. Clifford v. Schaefer, 105 Ill. App. 2d 233, 245 N.E.2d 49 (1969).
55. Combs v. Younge, 281 Ill. App. 339, 350 (1935).

the decedent's representative might argue that the statute prohibits the survivor from testifying to any of these negotiation sessions. He would reason that these sessions were part and parcel of the "event" at issue—the oral contract—which took place in the decedent's presence. Likewise, in a case where an heir seeks to strike down the decedent's will because of fraud, the protected executor and devisees might argue that the "event" at issue is the fraudulent influence over the testator's mind. Following this reasoning the statute would prohibit the survivor from testifying to any acts which created the fraudulent influence over the testator, even if such acts occurred out of the testator's presence.

Hopefully the courts will not be confronted with such semantic debates. If they are, however, they should consider the word "event" in light of the drafters' apparent intent to enlarge the scope of the survivor's competency under the new statute. Thus, they should interpret the word "event" as narrowly as possible: The claimant or the will contestant in the hypotheticals posited above should be allowed to testify to any negotiation session or to any fraudulent act which occurred outside the decedent's presence.[56]

It is clear that the Illinois courts will not be able to seek guidance from other jurisdictions in interpreting the word "event." Other states with Dead Man's Acts similar to Illinois' new statute use the word "transaction" rather than "event" in limiting the scope of the survivor's competency.[57] Furthermore, these jurisdictions do not even follow the Illinois courts' interpretation of "transaction" under the old statute. For instance, both the Florida and Wisconsin courts refuse to consider an ordinary automobile collision as a "transaction."[58] The New York statute expressly excludes vehicular accidents involving claims of negligence or contributory negligence; and even Ohio's statute,[59] which is as restrictive as the old Illinois statute, expressly excludes wrongful death actions from its prohibition.

By using the word "event" the drafters have made one thing clear: The Illinois Dead Man's Act is still be be applied in wrongful death

56. Although a narrow interpretation of "event" will broaden the scope of the survivor's general competency, such an interpretation may restrict the survivor's ability under the first exception to rebut or explain "events" brought out by the protected party's witnesses. See Comment, *Illinois' Amended Dead Man's Act: A Partial Reform*, 4 U. OF ILL. L.F. 711, 712 (1973).

57. FLA. STAT. ANN. § 90.05 (1960); N.Y.C.P.L.R. § 4519 (1963); WIS. STAT. ANN. § 885.16 (1966).

58. Farley v. Collins, 146 So. 2d 366 (Fla. 1962); Seligman v. Orth, 205 Wis. 199, 236 N.W. 115 (1931).

59. OHIO REV. CODE ANN. § 2317.03 (1954).

actions. As early as 1880, a survivor, attempting to defend against a wrongful death claim, urged the Illinois Supreme Court to hold that the Dead Man's Act did not apply to wrongful death actions since these actions are not brought in behalf of the decedent's estate, but rather in behalf of the decedent's *next of kin. Forbes v. Snyder* dismissed this argument in a sentence: "The same reasons which justify the limitation of the general statute so as to silence adverse parties where the effect of the proceeding is to increase or decrease the estate, seem equally cogent in a case like the present."[60] Although the drafters of the new statute had an opportunity to remedy the mistaken logic of *Forbes*, they chose instead to codify it.

Alternatives to the New Dead Man's Act

Because Illinois was one of the last states to rewrite its Dead Man's Act, the drafters of the new statute had several alternatives and variations which they might have considered. A different choice might have resolved some of the inequities which still exist under the new statute. The statutes of Arizona and Montana prohibit the survivor from testifying to matters occurring before the decedent's death but permit the judge to lift this prohibition at his discretion.[61] Unfortunately, under these statutes, the judge's discretion is severely limited; he cannot exercise this discretion unless the survivor first presents sufficient evidence to show that, as a matter of law, his testimony would prove a "prima facie, meritorious cause of action,"[62] or unless another witness has testified to the same facts.[63] There was precedent in the Illinois probate courts which would have supported the adoption of such a statute in Illinois. During "citation proceedings" the Illinois probate judge is permitted, in his discretion, to call a person as a witness of the court and allow him to testify to any matters relevant to the proceedings.[64] Perhaps the drafters of the new statute rejected such a discretionary provision because the precedents set by the probate courts in exercising their discretion have been inconsistent.[65]

60. 94 Ill. 374, 378 (1880).
61. ARIZ. REV. STAT. ANN. ch. 129, § 12-2251 (1972); MONT. REV. CODES ANN. § 93-701-3 (1964).
62. Langston v. Currie, 95 Mont. 57, 72, 26 P.2d 160, 164 (1933).
63. Goldman v. Sotelo, 7 Ariz. 23, 60 P. 696 (1900).
64. ILL. REV. STAT. ch. 183, §§ 183, 185 (1973), allows the estate representative to recover property for the estate through "citation proceedings," during which the probate judge can call any witness in behalf of the court.
65. (1) The judge has complete freedom to exercise his discretion, Storr v. Storr, 329 Ill. App. 537, 69 N.E.2d 916 (1946); (2) the judge can never call the survivor as a court witness, Rothwell v. Taylor, 303 Ill. 226, 135 N.E. 419 (1922); (3) the judge has a duty to hear the survivor's testimony if the survivor is "offered" to the court, *In re* Estate of LaRue, 53 Ill. App. 2d 467, 203 N.E.2d 47 (1964).

Michigan's statute allows the survivor to testify to any matter equally within the knowledge of the decedent or incompetent person so long as "some material portion of his testimony is supported by some other material evidence tending to corroborate his claim."[66] Although courts with this type of statute are faced with the problem of determining what evidence is sufficient to "corroborate" the survivor's claim,[67] such a statute at least allows the claimant who can support his claim with some other probative evidence to reach the jury.

Massachusetts, Connecticut, Rhode Island and South Dakota have placed the problem of credibility where it belongs—with the jury. The statutes of these states permit the survivor to testify to all matters, even to statements made in good faith by the decedent.[68]

The drafters of the new Illinois Dead Man's Act apparently rejected these more liberal approaches and continued the Illinois tradition of balancing the scales in favor of protecting the decedent's or incompetent's estate. The drafters may well have been influenced by the type of sentiment expressed by Robert S. Hunter, a probate judge for eight years:

> [T]he amount of perjury in our courtrooms is enormous and constantly increasing. The same decrease in morality that has produced sharply increased rioting, looting, murder, rape, and other crimes has brought with it an increasing disregard for the truth and the sanctity of the oath.
>
> Even though the Dead Man's Act is complicated and may sometimes result in hardship, the Act must be retained in substantially its present form. To discard it will only result in an increase in our present alarming volume of perjured testimony.[69]

On the other hand, opponents of dead man's statutes have long and vigorously argued that such a statute creates more perjury than it prevents. According to these opponents, many a survivor, who cannot testify in his own behalf, manages to procure a "disinterested" witness who is willing to perjure himself.[70] If this is so, the Dead Man's Act

66. MICH. COMP. LAWS ANN. § 600.2166 (Supp. 1973). Other statutes requiring corroboration: N.M. STAT. ANN. § 20-4-601 (Supp. 1973); VA. CODE ANN. tit. 8, § 286 (1957); LA. REV. STAT. § 13:3665, 3721, 3722 (1968).

67. National Rubber Supply Co. v. Oleson & Exter, 20 N.M. 624, 630, 151 P. 694, 696 (1915): Corroborating evidence "must be such as would, standing alone and unsupported by the evidence of the claimant, tend to prove the essential allegation or issue raised by the pleadings."

68. CONN. GEN. STAT. ANN. § 52-172 (1958); MASS. ANN. LAWS ch. 233, § 65 (1965); R.I. GEN. LAWS ANN. § 9-17-12 (1956); S.D. COMP. LAWS ANN. § 19-1-1 (1967).

69. Hunter, *The Dead Man's Act Must Be Retained*, 55 ILL. B.J. 512, 515 (1967).

70. Kahn, *Let's Give the Dead Man's Statute a Decent Burial*, 55 ILL. B.J. 430 (1967).

is a bar only to the honest survivor who attempts to prove his claim against an estate.

More importantly the statute, even in its improved new form, ignores the traditional concept of allowing a claimant the right to present his case to the jury and disregards the traditional role of the jury of evaluating the witnesses' credibility. Hopefully, within the next century, the Illinois legislature will return the question of credibility to the jury—unhampered by a Dead Man's Act.

ADRIENNE D. WHITEHEAD

Notes