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Evidence - Transaction with Deceased - Interest in the Event

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on a quasi contractual right, independent of contract. Upon breach of the contract by the vendor, the vendee is entitled to rescind the contract; and upon his election, a lien arises to secure his quasi contractual right to recover the payments made. *Wickman* v. *Robinson,* supra; *Taft* v. *Kessel,* 16 Wis. 291 (1862); *Richer* v. *Carlson,* 136 Wis. 353, 117 N.W. 815 (1908) and *Durkin v. Machesky,* 177 Wis. 595, 188 N.W. 77 (1922), where lien was given vendee, although the contract was void; 8 Col. Law Rev. 571 (1908); 29 Mich. Law Rev. 1103 (1931). Under the principal case this seems to be the controlling theory in Wisconsin. The case of *McLennan* v. *Church,* 163 Wis. 411, 158 N.W. 73 (1916), where the vendee, suing for specific performance, was granted a lien on the land for payments made and for damages, is expressly modified. The lien at most extends only to payments made, with interest and the value of the improvements made on the land, *Schneider* v. *Reed,* 123 Wis. 488, 101 N.W. 682 (1904); and it can only be enforced if the vendee waives all his other rights, i. e., to sue for specific performance or breach of contract, and sues only to recover the purchase money paid, in effect rescinding the contract. This is not the rule in New York, where enforcement of the contract gives rise to the lien which is lost by a suit for rescission. *Davis* v. *Rosenweig Realty Operating Co.,* 192 N.Y. 128, 84 N.E. 943 (1908); *Flickinger* v. *Glass,* supra; *Kaston* v. *Zimmerman,* 183 N.Y.S. 615 (1920); *Dioen* v. *Ashbaugh,* 200 N.Y.S. 634 (1923). The New York courts seem to have confused the real question in the cases; the theory of the Wisconsin court is more easily understood, since it embraces no legal fiction; gives greater effect to the intention of the parties, and is grounded in its entirety on principles of natural justice.

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EVIDENCE—TRANSACTION WITH DECEASED—INTEREST IN THE EVENT—In order to pay the balance due on some lots owned by husband and wife, the husband executed a note payable to the deceased. The money to pay the note was given to the wife by the husband, since she was accustomed to handle all financial affairs; but the deceased looked to the husband for payment, saying at the time the note was executed that the signature of the husband alone was sufficient. Upon action for the debt being brought by the administratrix of deceased's estate, the wife sought to testify as to payment of the debt. *Held,* the wife was competent to testify as to payment of the debt. *Laka* v. *Krystek,* 261 N.Y. 126, 184 N.E. 732 (1933).

Section 347 of the New York Civil Practice Act and sec. 325.16, Wisconsin Stats., provide, in substance, that upon the trial of an action, a person interested in the event shall not be examined as a witness in his own behalf against the administrator of a deceased person. It would be difficult to determine, however, whether the instant case would have been decided in the same way had it arisen in Wisconsin. An employer has been allowed to testify, in an action by a deceased's administrator against his employee, that payment of the claim sued upon was made to him, and he in turn applied the amount of the claim upon a contractual obligation due him from the deceased. *Laack* v. *Runge,* 104 Wis. 59, 80 N.W. 61 (1899). An agent has been allowed to testify although his principal was a party to the action. *Hanf* v. *Northwestern Masonic Aid Association,* 76 Wis. 450, 45 N.W. 315 (1890). Mere relationship has been held to affect only the credibility of the witness and not to render him incompetent. *Curtis* v. *Hoxie,* 88 Wis. 41, 59 N.W. 581 (1894). Parents have been competent

witnesses in actions involving their children. *Dilger* v. *McQuade,* 158 Wis. 328, 148 N.W. 1085 (1914). *Nelson* v. *Zeigler,* 196 Wis. 426, 220 N.W. 194 (1918). A witness was allowed to testify for her sister. *McHatton* v. *Estate of McDonnell,* 166 Wis. 323, 165 N.W. 468 (1917). However, a husband or wife is precluded from being a witness for or against the other in an action to which such witness is not a party. *In re Valentine,* 93 Wis. 45, 67 N.W. 12 (1896); *Farrell* v. *Ledwell,* 21 Wis. 182 (1867); *Butts* v. *Newton,* 29 Wis. 632 (1872); *Smith* v. *Merill,* 75 Wis. 461, 44 N.W. 759 (1890); *Hoffman* v. *Joachim,* 86 Wis. 188, 56 N.W. 636 (1893). [A wife has been held competent to testify that her husband's parents promised to transfer property to him, but only, apparently, because her husband was never seized, and so her dower right never vested. *Glander* v. *Glander,* 167 Wis. 12, 166 N.W. 446 (1918).]

The New York Supreme Court tends to interpret the statutory restriction broadly, since it feels that all legislation on the subject has been in favor of greater liberality in the rules relating to the competency of witnesses. *Eisenlord* v. *Clum,* 126 N.Y. 552, 27 N.E. 1024 (1891). The court considers the witness interested in the event if he will either gain or lose by the direct legal operation and effect of the judgment, or if the record will be legal evidence for or against him in some other action; the interest must be present, certain, and vested, and not an interest uncertain, remote, or contingent. *Jones on Evidence,* 3d Ed., § 2235; *Laack* v. *Runge,* supra; *Greenleaf on Evidence,* 16th Ed., § 390. Mere interest in the question involved may tend to lessen the credibility of the witness, but it does not render one so interested incompetent. *Hobart* v. *Hobart,* 62 N.Y. 80 (1875). An interest in the question—feelings in regard to the case or position in reference to the subject matter—is not enough to disqualify a witness, as that is not an interest in the event. Unless the witness will gain or lose by the direct legal operation and effect of the judgment of the court disposing of the facts in dispute, either directly, as in money, or indirectly, because the record could be used as evidence for or against him, he is not disqualified. *Albany County Savings Bank* v. *McCarty,* 149 N.Y. 71, 43 N.E. 427 (1896); *Miller* v. *Montgomery,* 78 N.Y. 283 (1879); *Riddle* v. *Dixson,* 2 Pa. 372; 44 Am. Dec. 207 (1846). The application of such liberal interpretation allows testimony as to the mental condition of deceased to be offered by heirs who are not parties to the action but who have received deeds similar to the one involved in the litigation. *Hobart* v. *Hobart,* supra. *Cf. In re Goerke's Will,* 80 Wis. 516, 50 N.W. 345 (1891); *In re Valentine,* supra. Similarly, the fact that the witness might gain a dower interest in the estate if her testimony as to the legitimacy of her plaintiff child succeeded in gaining a judgment for the child does not make her incompetent. *Eisenlord* v. *Clum,* supra. *Cf. Glander* v. *Glander,* supra. The same competency is, of course, imputed to a witness whose right to courtesy might result from his testimony. *Albany County Savings Bank* v. *McCarty,* supra. Bearing in mind that a contrary ruling might be reached by reasoning processes quite as valid, as the court infers in the instant case, it may safely be said that liberal interpretation, such as this must obviously be labelled, is quite in accord with a reasonable man's sense of justice. As a matter of fact, it serves to render competent under the restriction such witnesses as would be heard at the common law. *Eisenlord* v. *Clum,* supra; *Hanf* v. *Northwestern Masonic Aid Association,* supra.

Another problem presented in cases of this sort, where the witness' interest in the event is so readily capable of dispute, arises out of the fact that the witness may himself become involved in subsequent legislation upon the issues affected by his testimony. It would seem that a witness—agent, partner in matri-

mony, parent, child, or co-heir—who is not a party to the action, and is not so interested in the event as to be directly bound by the action or to have the record serve as evidence for or against him in a subsequent action, is not rendered incompetent by virtue of the possibility of such subsequent action being brought against him, even though such action should find its inception in his testimony. *Nearpass* v. *Gilman,* 104 N.Y. 506, 10 N.E. 894 (1887). Again, the witness is not incompetent if the recovery of judgment would not absolutely bar an action against the witness, although the trend of the testimony would seem to make such an action impossible. *Connelly* v. *O'Connor,* 117 N.Y. 91, 22 N.E. 839 (1889). Proof that the event of the instant suit may lead to other litigation affecting the witness is not sufficient to justify preclusion of his testimony; it must be shown that the judgment will be evidence for or against the witness in such subsequent action. *Franklin* v. *Kidd,* 219 N.Y. 409, 114 N.E. 839 (1916). A witness who, for example, failed to prevent a judgment against his principal and is consequently sued by said principal may introduce in the subsequent action any defense he may have; he is not bound by the judgment, even though he failed in the prior trial to make the same defense good on behalf of his principal. *Nearpass* v. *Gilman,* supra. It must be borne in mind that before a witness can be bound by a judgment, he must have been placed by formal notice to defend, or something tantamount to such notice from the defendant, in a situation calling upon him to assume control of the action, or to aid in its defense as though a party, with the right to adduce testimony, cross-examine witnesses, and appeal from the judgment. *Wallace* v. *Strauss,* 113 N.Y. 238, 21 N.E. 66 (1889).

In the instant case, the court reasoned that while the witness was interested in the question, she was not interested in the event; the election of the husband as the sole debtor removed the possibility of a suit against the witness, and so her only interest was in preventing a suit against her by her husband for half the debt. Assuming the possibility of such an action by the husband, the witness would not be rendered incompetent thereby, nor would she be prevented by a judgment against her husband from proving payment in such assumed subsequent action.

It can only be said that the New York Court has proved consistent in applying a most liberal interpretation to an exceedingly controversial problem, and that, by and large, the results are just and the reasoning gratifyingly lucid.

VERNON ERBSTOESZER.

INSURANCE—EXCEPTIONS TO LIABILITY—SUICIDE CLAUSE.—Defendant insurance company issued a policy upon the life of deceased, which contained the provision: "If within two years from the date hereof the insured shall, either sane or insane, die by his own hand, the liability of the company shall be limited to the premiums paid." The policy herein was issued in 1931; in 1932 the insured fell out of a third story window, and as a result died. In an action on the policy the jury found that defendant was intoxicated at the time to such a degree as to be unable to understand that if he jumped or stepped through the window, such act might cause his death. Appeal from judgment for plaintiff; judgment affirmed. *Held,* death as a result of the insured's own act committed while intoxicated is not "suicide" or death "by his own hand", so as to pre-