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TESTIMONY AS TO TRANSACTIONS OR COMMUNICATIONS WITH DECEASED PERSONS.

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The questions which have arisen under Section 4069 of the Wisconsin Statutes are many and various. In *Dilger vs. McQuade*, 158 Wis. 328, 333, Mr. Justice Barnes says:

> "We have few statutes that the bench and bar have found it so difficult to understand and apply as sec. 4069."

It is not the purpose of the writer to consider all such questions. Indeed, a reasonably adequate discussion of them would fill a good-sized volume. This article will be confined to one question arising under the statute, namely—Who is entitled to claim the protection of the statute?

Our answer to this question is not intended to be a statement of the law as established by the Supreme Court of the state but only what appears to us to be the proper answer. So far as our reading has led us, we have found no actual decision of the Supreme Court of this state contrary to the views here expressed, although it is apparent from a few of the opinions, which will be referred to later, that the court has not always applied them.

For the convenience of those who may not have the exact wording of the statute in mind, we are printing herewith so much of the statute as is necessary to a determination of the question:

> "No person * * * in his * * * own behalf or interest nor any person, * * * through or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with a deceased person * * *, in any civil action or proceeding in which the opposite party derives his title, or sustains his liability, to the cause of action from, through or under such deceased person * * * unless such opposite party shall first be examined or examine some other witness in his behalf concerning some transaction or communication between the deceased * * * and such party or person, * * *"

Evidence as to transactions or communications with a deceased or insane person is not *per se* incompetent. The restriction goes to the competency of the witness, not to the competency of the evidence, and one is not an incompetent witness as to transactions with a deceased person no matter how interested he may be in the action unless the "opposite party derives his title, or sustains his liability, to the cause of action from, through or under such deceased person."

Some doubt has been expressed among attorneys and by the courts as to who is meant by the "opposite party." We believe there can be little room for difference of opinion as to this. The "opposite party" is the one whose interests are adverse to those of the party testifying; or, if the witness be not a party to the action but the assignor or grantor of the party, the "opposite party" is the one whose interests are adverse to the party on whose behalf the testimony is offered.

The questions which seem to have perplexed counsel and the courts more, are: What is meant by "derives his title" to the cause of action from a deceased person? What is meant by "sustains his liability" to the cause of action through a deceased person? For example:

> If an action of ejectment is brought against an occupant of land who holds under a deed from one who has since died, can the occupant invoke the statute against the plaintiff? Does he sustain his liability through or under the deceased?
>
> Can one who demands of the personal representative of a deceased person a savings bank pass book as a gift *inter vivos* from the deceased, object to the competency of the personal representative as a witness to transactions or communications with the deceased bearing on the question of the gift? Does the alleged donee derive his cause of action from the deceased?
>
> Where an alleged creditor of a deceased person attempts to establish a claim against the estate of the deceased person, may the executor testify against the claimant as to transactions or communications with the deceased person?
>
> In a proceeding to probate a will, may the legatees or heirs of the deceased testify as to transactions with the deceased?

To answer these questions, we must look to the history and purpose of the section.

At common law a party was not entitled to testify in his own behalf under any circumstances. His self-interest disqualified him. After a long period of time, statutes were passed removing such disqualification. It was realized, however, that if after the death of a person another could sue the heirs or legal representatives of such deceased person or could defend in an action brought by such heirs or legal representatives to enforce a right belonging to the deceased, and in either of such actions could testify in his own behalf as to conversations or transactions had with the deceased, it would afford great opportunity for persons to make unjust claims or defenses against the estates of decedents. So the right given to testify in one's own behalf was limited by providing that such right might not be exercised where the opposite party derives his title to the cause of action or sustains his liability from, through or under the deceased as administrator, heir or other representative of the deceased.

This accounts for the arrangement of Sections 4068 and 4069 in the statutes. Section 4068 provides that one shall not be disqualified to testify by reason of his interest. Section 4069 provides that one cannot testify in his own interest as to transactions with a deceased person where the opposite party derives his cause of action or sustains his liability from, through or under the deceased. That Section 4069 is intended only as an exception to the right conferred by Section 4068 is shown even more clearly by Taylor's Statutes of Wisconsin (1871), page 600, page 74:

> "A party to any civil action or proceeding * * * may be examined as a witness on his own behalf or in behalf of any other party in the same manner and subject to the same rules of examination as any other witness; provided that the assignor of the thing in action shall not be examined on behalf of said party nor shall a party to an action be examined in his own behalf in respect to any transaction or communication had personally by said assignor or said party respectively with a deceased person against parties who are executors, administrators, devisees, heirs at law, next of kin, or assignees of such deceased person * * *"

Section 4069 therefore creates no new disabilities but is merely a survival of the common law rule relating to testimony by an interested party. To this extent the common law has not been abrogated. Any testimony in behalf of a party which was competent at common law is competent now.

Hanf vs. Northwestern Masonic Assn., 76 Wis. 450.

The section as quoted from Taylor's Statutes is also interesting as showing that at least originally the persons who could invoke the protection of the statute were only the personal representatives, devisees, heirs, next of kin, or assignees of the deceased.

The purpose of the statute is well expressed by Mr. Justice Dixon in *Lawrence vs. Vilas*, 20 Wis. **381, *386:

> "The object of the legislature is plain enough. It was to prohibit a living party from testifying in behalf of himself, when, by reason of death, the other party to the transaction, having had the same knowledge or means of knowledge, cannot be present in court to confront him or make his statement of the transaction."

The purpose is even more tersely expressed by Mr. Justice Winslow in *Boyd vs. Gore*, 143 Wis. 531, 535:

> "* * * because the mouth of one party is closed by death, it is only fair that the mouth of the other should be closed by the law."

With the history and purpose of the statute in mind, we wish to refer to a few cases for the purpose of applying the statute.

Two cases—*In re Valentine's Will*, 93 Wis. 45, and *Anderson vs. Laugen*, 122 Wis. 57, are instructive particularly when taken together. Both were proceedings to establish wills of deceased persons. In the first case the residuary legatee under the will was not permitted to testify as to transactions with the deceased. In the latter case one of the proponents, an executor, but having no interest in the estate, was permitted to testify to such transactions. In both cases the "opposite party"—the heirs of the deceased—claimed under the deceased, but in the first case the legatee had a financial interest in the estate which disqualified her, while in the latter case the executor had not. In both cases it was held, or assumed, that the heirs are "opposite parties" from

those claiming under the will and as both the heirs and the legatees or devisees under the will claim under the deceased, neither can testify against the other. This is manifestly sound in proceedings for probate of a will, but it has apparently created an impression that where an action is brought by or against an estate of a deceased person a legatee or even an executor is incompetent to testify as to transactions with the deceased.

Schultz vs. Culbertson, 125 Wis. 169, was an action against the executrix of one James Culbertson for the conversion of certain logs which the plaintiff claimed to have obtained by virtue of contract with Culbertson. The action was originally commenced against Culbertson, but he having died, the executrix was substituted as the defendant. The lower court refused to permit the executrix, who was also the widow of Culbertson, to testify as to the conduct and conversations of the deceased for the purpose of proving mental incapacity. The Supreme Court held that the executrix could have testified to acts, conduct or transactions had by the deceased within her observation, if wholly unparticipated in or uninfluenced by her. The defendant in this case was not only executrix, but also had a financial interest in the estate of the deceased.

In *Will of Klehr,* 147 Wis. 653, which involved a claim against the estate of the deceased based on a note which a sister claimed was given to her by the deceased as a gift, attorneys for the claimant objected to the competency of the executor to testify on behalf of the estate as to declarations of the deceased affecting the validity of the gift. The court did not decide the question saying, at page 656:

> "The members of this court are not in accord upon this question, and since the judgment below must be reversed on other grounds we will not pass upon the competency of the executor to testify."

Weissman vs. Weissman, 156 Wis. 26, was an action of replevin brought by the administratrix of the estate of her husband. She was also sole heir of the deceased. The administratrix was permitted by the lower court to testify, over the objection of the defendant, that the defendant brought the property in question to their farm, and said he gave it to them and they could do what they liked with it. This was assigned as error.

The court indicated that if it had been shown that the witness participated in the conversation she would have been incompetent to testify thereto.

It will be observed that in two of the above cases the court assumed that the executrix was incompetent to testify as to transactions with the deceased in which she took part, and in the other case the court could not agree as to whether the executor was incompetent to testify.

In our view of the law, the executor or executrix in each of the cases was competent to testify fully as to transactions with the deceased. Why should not the executrix in *Schultz vs. Culbertson* testify as to conversations with the deceased? The plaintiff (the opposite party), the one whose interests were adverse to the witness, did not derive his title to the cause of action from the deceased so the statute does not apply. The plaintiff may have obtained title to the property from the deceased, but not to the cause of action. The cause of action arose out of the acts of the deceased in converting the logs. If one violates the rights of another, thus giving rise to a cause of action, it cannot well be said that the other derived his title to the cause of action from the one who violated his rights.

In *Will of Klehr* it did not appear that the executor had any interest in the estate. It is difficult to perceive, therefore, why he should be deemed an incompetent witness under Section 4069. But even if the executor had an interest in the estate, what reason is there for disqualifying him? It may be true that the plaintiff received the chose in action, which was the basis of the suit, from the deceased, but the chose in action is quite a different thing from the cause of action. The cause of action did not arise until there was a failure to pay the chose in action in accordance with its terms. When the deceased failed to pay, in accordance with the terms of the instrument, a cause of action arose, but it was a cause of action which never belonged to the deceased but was rather a cause against him. The cause of action from the time of its creation was the property of the claimant. It cannot be said, therefore, that she derived her title to the cause from the person against whom it existed from the beginning.

So also with reference to *Weissman vs. Weissman*—Why should not the administratrix, although she was sole heir of the

deceased, testify that the defendant had given the property to her husband, at least insofar as the objection thereto was based on the provisions of Section 4069?

It is true, the court did not hold that the testimony was incompetent, but it implies very strongly that if the decedent were present at the time of the communication or transaction, the testimony would have been incompetent.

The court says:

> "Although the plaintiff claimed title under or through the deceased it was not shown that the decedent was present at the time this admission was made or that the admission was part of any communication or transaction between the defendant and the deceased or between witness and deceased. Counsel should have brought out the fact, if it was a fact, that the decedent was present, or that the alleged admissions were part of a communication or transaction between defendant and deceased. This he neglected to do."

The fact that the plaintiff claimed title under the deceased should not disqualify her. The statute does not disqualify one who claims under the deceased. It disqualifies one only where the "opposite party" claims under the deceased. The statute recognizes that the one who does derive his title to the cause of action from the deceased may testify, for it provides, in substance, that if the opposite party who derives his title to the cause of action or sustains his liability thereto be examined, or examine some other witness in his behalf, then the one who is adverse to the representative of the deceased may introduce testimony. If the one who claimed title through or under the deceased could not introduce testimony, there would be no reason for the last half of the section.

Furthermore, let us apply the reason for the statute as announced by the Supreme Court, namely—It was to prohibit a living party testifying in behalf of himself when by reason of death the other party to the transaction cannot be present in court to make his statement of the transaction.

In the *Weissman* case why should not the administratrix testify that the defendant had given the property to herself and her husband? The defendant's mouth was not closed by death.

If he did not give the property to the deceased and his wife, he could so testify. The statute was not designed to close the mouth of the representative of the deceased, but of one making a claim against him.

We submit for consideration this test: Who stands in the shoes of the deceased? If the deceased were alive and such action should be brought, would the testimony offered be to his financial interest? Would the witness be testifying in behalf of deceased? If he would be, then the witness is competent to testify as to the transactions with the deceased. If the testimony offered would be contrary to the financial interests of the deceased, were he alive, then the witness is incompetent.

In most cases, the opposite party, against whom the testimony cannot be given, will be found to be the personal representative, heir, legatee, or devisee of the deceased, and the party disqualified from testifying will be the one having a claim against the estate of the deceased. Under our construction of the statute we cannot conceive of a case brought against or by the estate of a deceased person in which the executor or administrator of the estate would not be a competent witness to testify as to transactions with the deceased person, even though he be also a legatee or devisee under the will, or an heir of the deceased. This, we believe, was the purpose of the statute. The result of any other construction is, that not only is the mouth of the deceased closed by death, but also the mouth of those who act for him is closed by law. The manifest purpose of the law was to afford protection for the estates of deceased persons, not to deprive them of all protection. Our answer to the question under consideration therefore is that the personal representatives, heirs, legatees and devisees are the ones who are entitled to claim the protection of the statute and, except in proceedings to probate a will, the statute cannot be invoked against them. As stated in the beginning, we do not know of an actual decision in a case in this state which is contrary to the construction given, though the inference to be drawn from the three cases cited seems to be at variance therewith.