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Evidence - Waiver - Dead Man's Act

RECENT DECISIONS

EVIDENCE—Waiver—Dead Man's Act—Answering of interrogatories filed by decedent's representative constitutes a waiver of protection afforded by Dead Man's Act even if not used at trial.

Perlis v. Kuhns, Adm'r., 202 Pa. Super. 80, 195 A.2d 156 (1963).

Appellee, plaintiff, filed suit for the recovery of damages for personal injuries arising out of an automobile collision with appellant's decedent. Following institution of the suit, appellant filed written interrogatories, in accordance with the Pennsylvania Rules of Civil Procedure, to be answered under oath by the appellee. The Board of Arbitrators[1] found for the appellee and on appeal to the Court of Common Pleas, the jury similarly found for the appellee. At the trial the court permitted the appellee to testify to occurrences which took place before the death of appellant's decedent over the objection of appellant based on the so-called Dead Man's Act.[2] The lower court held that

> ... appellee was competent to testify because the filing of the interrogatories by the appellant which had been answered by the appellee precluded the operation of the "Dead Man's Act".[3]

An appeal was taken to the superior court which affirmed the judgment of the lower court.

In its decision the superior court relied principally on the proposition that the taking of a deposition of an opponent constituted a waiver of the objection of incompetency and that interrogatories are the equivalent of depositions under the Pennsylvania Rules of Civil Procedure.[4] The court in its rationale chose to follow the minority view which prevails in the States of Alabama, Arkansas, Kentucky,

1. PA. STAT. ANN. tit. 5 § 30 (1959) provides for arbitration in all cases where the amount in controversy shall be $2000 or less.

2. PA. STAT. ANN. tit. 28 § 322 (1887); For a general discussion of the Act see, Henry, *Competency of Survivor or Person With Adverse Interest to Testify in Event of Death or Lunacy of the Other Party*, 5 U. PITT. L. REV. 125 (1938-39).

3. Perlis v. Kuhns, Adm'r., 202 Pa. Super. 80, 81, 195 A.2d 156, 157 (1963).

4. Pa. R. Civ. P. 4004, PA. STAT. ANN. tit. 12 Appendix (1951).

and West Virginia,[5] and declined to follow the majority of courts which hold that the incompetency of a witness is not removed unless the protected party introduces such testimony into evidence.[6]

The court quoted with approval the statement made in *Cox v. Gettys*[7] that

> Any other construction of the statute would enable one party to search the conscience of his adversary, drag to light his private papers and other evidence, and then repudiate the result, if the experiment proved unsatisfactory.[8]

The court indicated that the taking of depositions or the filing of interrogatories requires the adverse party to give testimony under oath sanctioned by the Pennsylvania Rules of Civil Procedure and this is the equivalent of placing the party on the witness stand at the trial.

The difficulty with the court's decision lies in the fact that it failed to differentiate between what the attorney for the decedent should be permitted to know and what should be admitted into evidence for consideration by the jury.

The primary purpose of the discovery rules as permitted by statute are to aid a party in preparing and pleading his case. The use of depositions and interrogatories in evidence at the trial is only incidental to this primary purpose, and are not considered ipso facto evidence on any matter at the trial.[9] As a result of the liberal rules

5. The court stated: "The rule as to waiver of incompetency of the adverse party has also been applied where the examination was by means of interrogatories." Nolty v. Fultz, 277 Ky. 49, 125 S.W.2d 749 (1939); Jones v. Jones, 245 Ala. 613, 18 So.2d 365 (1944); Woodyard, Adm'r. v. Sayre, 90 W. Va. 547, 111 S.E. 313 (1922); Smith, Adm'x. v. Clark, 219 Ark. 751, 244 S.W.2d 776 (1952).

6. Depositions: Arizona: Starkweather v. Conner, 44 Ariz. 369, 38 P.2d 311 (1934); Colorado: Gottesleben v. Luckenbach, 123 Colo. 429, 231 P.2d 958 (1951); Florida: Herring v. Eiland, ... Fla. ....., 81 So.2d 645 (1955); Illinois: Pink v. Dempsey, 350 Ill. App. 405, 113 N.E.2d 334 (1953); Michigan: Banoskiewicz v. Baun, 359 Mich. 109, 101 N.W.2d 306 (1960); Nebraska: O'Neal v. First Trust Company, 160 Neb. 469, 70 N.W.2d 466 (1955); Ohio: In re Renee, 159 Ohio St. 37, 110 N.E.2d 795 (1953); U.S.: Duling v. Markun, 231 F.2d 833 (7th Cir. 1956); Stricker v. Morgan, 268 F.2d 882 (5th Cir. 1959); McCargo v. Steele, 160 F.Supp. 7 (D.C. Ark. 1958).

Interrogatories: Idaho: Thomas v. Thomas, 83 Ida. 86, 357 P.2d 935 (1960); Wyoming: Slover v. Harris, 77 Wyo. 295, 314 P.2d 953 (1957).

7. 53 Okl. 58, 156 P. 892 (1916).

8. Perlis v. Kuhns, Adm'r., *supra.* note 3 at 84, 195 A.2d 159.

9. Slover v. Harris, *supra.* note 6 at 298, 299, 314 P.2d 954; GOODRICH-AMRAM, STANDARD PENNSYLVANIA PRACTICE, *Depositions and Discovery,* § 4007a (16) (1962).

of discovery, the attorneys come to trial thoroughly prepared and familiar with both sides of the case. Surprise no longer is a big element in the trial of a lawsuit. The most important function of the liberal rules is that they tend to bring about a just decision on the merits. A secondary consideration being that because the attorneys are permitted to acquire a thorough familiarity with the case, the rules tend to shorten the actual time spent at trial, and bring about the speedy justice that is constantly a goal of the judiciary.[10] Henry, in his book on Pennsylvania evidence, states the purpose of the rules to be

> . . . the discovery of facts relevant to a pending action necessary for a party to prepare his pleadings or to prove a prima facie claim or defense. . . .[11]

An examination of the relevant rules pertaining to discovery is necessary for a complete understanding of this field. Rule 4007 of the Pennsylvania Rules of Civil Procedure provides that

> . . . the deponent may also be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the action and *will substantially aid in the preparation of the pleadings or the preparation or trial of the case.* (Emphasis added.)

Written interrogatories are to be utilized for the same purpose and are also limited in scope by this rule.[12] Rule 4020 which applies equally to the use of written interrogatories or depositions at the trial states that

> . . . any part or all of the deposition, *so far as admissible under the rules of evidence, may be used against any party* who was present or represented at the taking of the deposition . . . . (Emphasis added.)

Rule 4020(c) holds further that

> Subject to the provisions of Rule 4016(b), *objections may be made at the trial* or hearing *to receiving in evidence* any deposition or part thereof *for any reason* which would require the exclusion of the evidence if the witness were then present and testifying. (Emphasis added.)

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10. See generally HON. ALEXANDER HOLTZOFF, *A Judge Looks At The Rules*, RULES OF CIVIL PROCEDURE AND JUDICIAL CODE, West Publishing Company (1963), at p. 9-12.

11. 1 HENRY, PA. EVIDENCE, § 221 (4th ed. 1953).

12. Pa. R.Civ. P. 4005(c), PA. STAT. ANN. tit. 12 Appendix (1951).

The provisions of Rule 4016(b) referred to above are simply that

> Objections to the competency of a witness or to the competency, relevancy, or materiality of the testimony *are not waived* by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which was known to the objecting party and which might have been obviated or removed if *made* at that time. (Emphasis added.)

Since this rule is identical with Rule 32(c)(1)[13] of the Federal Rules of Civil Procedure, except for a substitution of the word "presented" for "made", an interpretation of the Federal rule, from where it was copied, should shed some light on the most likely interpretation of the state rule. Barron and Holtzoff, noted authorities on federal practice state:

> . . . that the examination should not be unduly lengthened or obstructed by interposing objections of this type, since they are not waived by failure to make them.[14]

Finally Rule 4020(d) provides that

> A party *shall not* be deemed to make a person his witness *for any purpose* by taking his deposition. The *introduction in evidence* of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent *makes the deponent the witness of the party introducing* the deposition. . . . (Emphasis added.)

From the preceding, it should be clear that the Rules do permit the admission into evidence of a deposition or answers to interrogatories, nonetheless reserving to the opposing party any objections which he might have at this time under Rules 4020(a) and (c). Objections grounded in the fundamental rules of evidence may still be raised at the trial stage. The fact that any or even all of the testimony produced during discovery will not be admissible at the trial stage should not prevent discovery since the question of the admissi-

13. Fed. R. Civ. P., 28 U.S.C.A. (1948); Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

14. 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 753 (1961). It could be argued here that since the objection was known to the objecting party at the time of the taking of the deposition, he waives it; however, the better interpretation would seem to be that the waiver should pertain only to the taking of the deposition and not to any objections which may be interposed at the trial.

bility of testimony at the discovery stage is irrelevant.[15] Under Rule 4020(d), one can readily see that the only time a deponent becomes the witness of the party who takes his deposition is when *the testimony is introduced at the trial,* by the one who took the deposition, and not by the mere taking of the deposition itself. There obviously are many things which the attorney should be and is permitted to learn under our liberal discovery rules before the actual trial, which could not and are not permitted to be revealed at trial. The attorney can sift the testimony and determine its evidentiary value, while a jury should be and is only permitted to hear that evidence which is relevant and competent at the time of the trial.

The court in its decision quotes with approval a statement taken from 2 HENRY ON PENNSYLVANIA EVIDENCE,[16] that

> Calling an opponent to testify makes him competent for himself in any subsequent trial of the same proceeding providing the issues and the parties are the same. The rule applies also where depositions of an opponent have been taken. . . .[17]

The problem with the court's utilization of such a cite is that the court obviously failed to review the two cases from which Henry drew his conclusion. Neither of these two cases will support the broad general statement which Henry and the court now attribute to them. In *Stiles v. Bradford,*[18] the court held simply that a reading into evidence of a deposition perhaps might be deemed an admission of the competency of the witness by the party reading it, but they never referred to the effect of a mere taking of a deposition. In *Bennett v. Williams,*[19] the court held only that depositions that are taken to be used as evidence on the trial of the cause, would constitute a waiver of incompetency, but never mentioned the modern discovery depositions, as they are popularly known today.

The superior court also chose to cite the case of *Rosche v. McCoy,*[20] which held that a surviving party was competent to testify once the

15. GOODRICH-AMRAM, STANDARD PENNSYLVANIA PRACTICE, *Depositions and Discovery,* § 4007(a) (25) (1962). "In the discovery stage, the question of admissibility is irrelevant. What the inquirer wants is information; he wants discovery in its true sense. He does not necessarily care whether the form in which he receives it permits it to be admitted in evidence at a trial."

16. § 765; This statement was utilized in a previous lower court decision: Sanoskie v. Beadling, 28 Pa. D. & C.2d 1 (1961).

17. Perlis v. Kuhns, Adm'r., *supra.* note 3 at 82, 195 A.2d 158.

18. Stiles v. Bradford, 4 Rawle 394, 401 (1834).

19. Bennett v. Williams, 57 Pa. 404, 405 (1868).

20. 397 Pa. 615, 156 A.2d 307 (1959).

representative of the decedent offered in evidence the deposition of the deceased. The supreme court by inference in that case pointed out that even there the deposition of the decedent had to be offered into evidence before the survivor became competent to testify. In this case the deposition of the surviving plaintiff had also been taken; yet the court held that if the representative did not offer into evidence the deposition of his decedent, then the plaintiff could

> . . . but that would not thereby make the oral testimony of the minor plaintiff admissible.[21]

Here then is one case where the competency of the minor plaintiff was in issue at the time of the taking of the deposition, both as to his age and the Dead Man's Act, once the defendant died. The former of these objections was known to the defendant at the time of the taking of the deposition; the latter was known only after the death of the defendant; however, the court ruled that the trial judge still had to determine the competency of the plaintiff at the time of the trial. The court held further that even had he been ruled competent as to the former objection at the time of trial, he was precluded from testifying unless the defendant did one of two things: either introduce into evidence the deposition of the deceased or offer the testimony of a living witness to the relevant matter.[22] The superior court however chose to stray outside the State of Pennsylvania and follow the minority view adhered to in other states.

It is rather obvious that the court's dissatisfaction is with the Dead Man's Act itself. As one lower court Pennsylvania case involving the precise issue states:

> We fail to see any reason why waiver should result except for the reason plaintiff has so clearly urged, dissatisfaction with the deadman's rule itself.[23]

However this court, which was not mentioned in the present case, stated in denying that any waiver took place that

> The bench and bar have expressed widespread dissatisfaction with the rule, and *the remedy is to eliminate the rule, not to make bad law* in order to avoid the application of the rule.[24] (Emphasis added.)

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21. *Id.* at 626, 156 A.2d 312.

22. *Id.* at 618, 156 A.2d 313. Minor plaintiff was five years old when the accident happened; he was seven years, nine months old when his deposition was taken. The deposition of the minor plaintiff was taken during the lifetime of the decedent, who died shortly before the trial.

23. Campbell v. Bennett, 24 Pa. D. & C.2d 716, 718 (1961).

24. *Ibid.* See also Covert v. Cingolani, 1 Butler County Leg. J. 65 (Pa. 1956) where the court in considering the same question of waiver held that no

The superior court apparently chose rather to make "bad law", and additionally, indulged in a bit of judicial legislating. It simply interpreted away the Dead Man's Act. If the Dead Man's Act is so unfair (which this paper does not attempt to decide), then such a time-honored rule and Statute should be changed by the legislature and not by the courts.

What will be the eventual outcome of such a decision?[25] One might argue nevertheless that the rule still prevails so long as no discovery is utilized by the representative of the deceased. However what are the practical results of such a course as is forced on the representative? His attorney must do nothing by way of any discovery; he must simply sit back and wait. He must then go into court totally unprepared to meet any testimony which his adversary presents on the hope that the slim and only objection which he raises will be sustained, and the case will be thrown out of court. He will not have the benefit of knowing in advance if any witnesses other than the parties exist since his deceased cannot tell him; he will not have the amount of expenses which his opponent will be presenting; he will have the benefit of none of the opponent's hospital records since he cannot determine even which of the hospitals he has been confined to; and he certainly cannot prepare any adequate defense on the merits should his objection be overruled. The chances of ever settling such a case before the actual trial are certainly reduced to an impossible minimum.

Possibly the best way of illustrating the injustices brought about by such a decision would be by two of many hypothetical examples which could be conceived:

ILLUSTRATION 1. P., Administrator of a decedent's estate brings an action for the wrongful death of the deceased against the driver of the other car involved in an accident. The collision took place on a deserted road, with only the two drivers present. P. relying on the police report after the accident, the presumption of due care afforded a deceased, and not wishing to waive the protection of the Dead Man's Act, does nothing in the way of discovery. The Statute of Limitations for Death Actions passes. At the trial, a me-

waiver was intended by the rules, but rather that the rules were promulgated to aid a person precisely in this situation.

25. *Cf.* Hughes v. Bailey, 202 Pa. Super. 263, 195 A.2d 281 (1963) where the court cites the noted case on a point which is not relevant to this discussion.

chanic testifies for D. that the brakes were defectively repaired by G. garage the day of the accident. The jury finds for D. on the basis of this unexpected defense, which P. had no knowledge of before the actual trial.

Since the Statute of Limitations has now run, no action can be brought for the death of P.'s decedent against the negligent garage.

ILLUSTRATION 2. D., Administrator of the estate of the deceased driver of an automobile which collided with P., under the same set of facts as in Illustration 1., is sued by P., *except* that P., who is living, is the only person who knows of a witness who saw the entire incident and places the blame on the deceased. This witness shows up at the trial to testify for P. and hence D.'s objection is defeated; yet D. had no advance notice of the witness and therefore no time to prepare to meet this testimony.

Essentially then the trial is limited to one issue: Will the objection be sustained or not? If not, the element of surprise is surely put back into the trial of a lawsuit; justice will many times be abused; and the settlement of death actions will surely cease to occur.

FEDERAL ESTATE TAX — Marital Deduction — Effect of Revenue Procedure 64-19 on the use of the marital deduction under Pennsylvania law — Methods of preservation of the marital deduction.

Revenue Procedure 64-19, 1964 INT. REV. BUL. 19.

At least as viewed by the Internal Revenue Service, estate planners have heretofore apparently been capable of effecting a reduction in the total Federal estate tax payable from the combined estates of a decedent and his spouse by using language in the dispositive instrument providing for a pecuniary formula marital deduction bequest,[1]

1. INT. REV. CODE OF 1954, §2056 indicates in part:

"(a) Allowance of Marital Deduction — For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the adjusted gross estate an amount equal in value to the value of any interest in property which passes or has passed from