1926

Competency of the Surviving Party

Edward W. Hinton

conception of the common law rule is that rights of action for injuries to *person or property* do not survive. Starting with this premise, he contends that "business" is not "property," as the two terms are used in the Sherman Act, and consequently that an injury to business is not an injury to property. Therefore, he concludes, the right of action for an injury to business, as in the case before the court, survives.

Whether business is property, in the sense that a tort which causes loss of trade is an injury to property, depends upon the meaning that is given to the term "property." Judge Hough dissented in the case under comment on the ground that the distinction attempted by Judge Rogers is unreal. "Much property is not business," he says, "but all business is property." On the other hand, the Supreme Court of Illinois has held that a right of action "for damages to one's business" is not within a statute providing for the survival of actions to recover damages "for an injury to real or personal property."[9] But in the case under comment, it is submitted, the question is irrelevant. The fundamental fault in the reasoning of the learned judge who wrote the prevailing opinion lies in his major premise. The common law rule is not that rights of action for injuries to person or property do not survive; but that *no* right of action for tort survives, except the quasi-contractual right of action to recover the value of property or other benefit obtained from the plaintiff by the defendant, the retention of which is unjust. It makes no difference, therefore, whether the injury complained of is an injury to property or to business; it matters not whether business is property; so long as the plaintiff alleges only an injury and not an unjust enrichment, the right of action does not survive.

It may be added that the United States District Court, E. D. Louisiana, held, a few years ago,[10] that the right of action to recover damages under the Sherman Act does not survive the death of the person injured. This decision is not referred to in the case under comment, though obviously inconsistent therewith.

FREDERIC C. WOODWARD.

WITNESSES — COMPETENCY — TRANSACTIONS WITH THE OPPOSITE PARTY.—[Illinois] In a recent case[1] the Supreme Court of Illinois was called on, apparently for the first time, to construe the term "transaction" in that provision of the statute qualifying the interested survivor to testify on his own behalf in an action by or against the administrator of a deceased person, where such administrator or some person interested in the estate testifies to a conversation of *transaction* with such adverse party.

9. *Jones* v. *Barmm* (1905) 217 Ill. 381, 75 N. E. 505. And see *Chattanooga Foundry* v. *Atlanta* (1906) 203 U. S. 390.

10. *Caillouet* v. *American Sugar Refining Co.* (1917) 250 Fed. 639.

1. *Van Meter* v. *Goldfarb* (1925) 148 N. E. 391.

The first section of the statute[2] removes the general common law incompetency of parties and others directly interested in the action.

The second section provides, however, that the foregoing provision shall not authorize a party or person directly interested to testify on his own behalf where the adverse party sues or defends as the executor or administrator, etc., of a deceased person, except in the following cases:

"Third.—Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any person having a direct interest in the event of such action, etc., 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."

While this provision is unnecessarily cumbersome and complicated, and presents many problems of construction, the general legislative intent is fairly clear, viz.: First, that in general parties and interested persons shall be competent to testify on their own behalf. Second, that where one party sues or defends as the representative of a deceased person, neither the opposite party, nor any person adversely interested shall be admitted to testify on his own behalf against such executor or administrator. Third, that where the administrator, or some person beneficially interested in the estate, testifies to a conversation or transaction with the opposite party, then such opposite party shall be competent to give his version of the same conversation or transaction.

The term 'conversation' seems fairly easy to define, but 'transaction' presents more difficulties.

It was not a word of art at common law,[3] but rather an elastic popular expression which legislatures have embodied in a variety of statutes dealing with widely different subjects.

The facts involving a construction of this term as used in the Illinois evidence statute were these:

Two brothers, both under age, were crossing an alley in Chicago, when one of them was struck and killed by an automobile driven by the defendant. The administrator of the deceased brought an action under the statute for the alleged negligent killing of his intestate. At the trial the surviving brother, who was one of the statutory beneficiaries and therefore directly interested, was called as a witness for the administrator, and testified to the accident and the conditions under which it happened. On the theory that this involved testimony on behalf of the administrator by an interested person to a "transaction" with the opposite party, thus bringing the case within the exception in the statute, the trial court

2. Hurd's Revised Statutes ch. 51 sec. 1.

3. Apparently this term was used in the civil law in the sense of an agreement. See comments by Judge Baldwin in *Craft Refrigerating Co.* v. *Quinnepiac Brewing Co.* 63 Conn. 551.

admitted the defendant to testify on his own behalf as to his version of the accident.

There was a verdict and judgment for the defendant, which was affirmed by the Appellate court. When the case reached the Supreme Court it was argued that the term "transaction" could not be applied to a mere occurrence or accident, but must be limited to some matter of negotiation or dealing between the parties. The court rejected this limited meaning, and held that the accident was a transaction with the defendant, in the sense that he took part in it, and hence that the testimony of one of the beneficiaries as to this occurrence qualified the defendant to testify on the same subject. The result seems clearly sound, but the process by which it was reached might easily lead to error in a different case. The court found that the New York Code, and a number of other codes derived from it, contained a provision authorizing the plaintiff to join in the same complaint several causes of action arising out of the same transaction, and that a tort might be regarded as a transaction for this purpose,[4] and on this supposed analogy construed this term in the statute in question.

It so happens that a broad and liberal construction of this term in both statutes is desirable. But the more or less accidental use of the same word in two statutes on widely different subjects would not ordinarily make the construction given in one any very satisfactory guide or test for the construction to be applied in the other. The wording of the statute in question is unusually complicated, and the writer has been unable to find a statute on the same subject exactly like it in any of the other states, so that decisions on the precise point are wanting. An examination, however, of a number of the typical statutes on this subject discloses that the various legislatures have struggled with the same problem, namely, how to remove the common law disqualification of witnesses without giving an undue advantage to one side or the other. The common law produced a theoretical equality of disadvantage, because all interested persons, whether as parties or otherwise, were excluded as witnesses to support their own interests. An absolute removal of the interest disqualification might give a decided advantage to the interested survivors in a contest with the representative of a dead man, because they would thus be enabled to give their version as to all sorts of occurrences in which the deceased had taken part, while his version of the matter could never be known. Practically all of the statutes have attempted to guard against this rather obvious danger.

If interested survivors should be unqualifiedly excepted from the enabling act where they were engaged in litigation with the representatives of an estate another inequality would arise. Persons interested in the estate, who would have been disqualified at common law, could, by virtue of the general enabling act, testify

4. *Lamming* v. *Galusha* 135 N. Y. 239; *Craft Refrigerating Co.* v. *Quinnepiac Brewing Co.* 63 Conn. 551; *Metropolitan Casualty Co.* v. *Lehigh Ry. Co.* 94 N. J. L. 236; *McArthur* v. *Moffett* 143 Wis. 564.

to all sorts of occurrences involving the survivor, without fear of contradiction by him.

One set of interested persons would be competent while their adversaries would be incompetent. The Illinois statute offers a partial solution of the difficulty by disqualifying interested survivors except where a witness interested in the estate testifies to transactions with such survivors, in which event they may give their version of the same matter. This solution leaves a substantial inequality, because the persons interested in the estate are competent as to any and all facts, while the interested survivors are generally incompetent and only contingently qualified to a limited class of facts.

In New York, the solution adopted appears to have avoided this discrimination. Section 828 of the Code, like section 1, of the Illinois act, removed the interest disqualification. Section 829 disqualifies persons adversely interested from testifying in their own favor concerning a *personal transaction* with the deceased, except where the representative of the deceased, or some person deriving an interest from the deceased, is examined as a witness on his own behalf concerning such transaction. Here are two statutes dealing with the same subject matter and designed to accomplish substantially the same result, and hence the construction by the New York courts of the term transaction in their statute may well furnish a satisfactory definition for that term in the Illinois statute.

In New York it is abundantly established that a "transaction" for this purpose is not limited to contractual matters, negotiations or business dealings, but includes all sorts of acts and occurrences in which the deceased personally took part, whether actively or passively. Thus, in an action by an administrator for the death of his intestate as the result of an attempted illegal arrest by defendants, the arrest and its attending circumstances was held to be a personal transaction with the deceased, and hence the defendants were disqualified to give their version of it.[5] It must be remembered that under the New York statute, interested survivors are not disqualified except as to personal transactions with the deceased. In a later case[6] where an administrator sued a dentist, alleging that the death of his intestate was caused by negligence in performing a dental operation, it was held that the operation was a personal transaction with the deceased which would have disqualified the defendant to testify on that subject, but for the fact that the administrator testified concerning it, and thus qualified the defendant to testify to the same transaction. Under a similar statute in Kentucky, a surgical operation was held to be a personal transaction with the patient, thus disqualifying the surgeon in an action by the administrator.[7]

5. *Abelein* v. *Porter* (1899) 61 N. Y. S. 144.
6. *Minns* v. *Crossman* (1922) 193 N. Y. S. 714.
7. *Burnett's* Admin. v. *Brand* (1915) 165 Ky. 616. This is the only case referred to in the principal case where the construction of the term transaction was involved in a statute dealing with the competency of witnesses.

In a later Kentucky case involving a wrongful shooting resulting in death, the difficulty was held to be a personal transaction with the deceased, disqualifying the interested survivor from testifying on that subject.[8] Under a similar statute in Wisconsin it was held that testimony by one of the contestants in a proceeding to probate a lost will, that witness got a pan for the testator in which he burned the will when the two were alone, involved a personal transaction with the deceased.[9]

In a very late case[10] on this subject the New York Court of Appeals gave as a reason for a broad and liberal construction of the term 'transaction,' that otherwise an inequality would result if interested survivors could testify to any acts or conduct on the part of the deceased which he might have contradicted in his life time. It was accordingly held in a contest between the alleged widow and the heir of the deceased where the marriage was in dispute, that the heirs were disqualified under the personal transaction clause from testifying to conduct on the part of the deceased tending to show that no marriage had taken place.

An equally liberal construction is necessary to prevent gross inequality under the Illinois statute, otherwise interested persons could support the administrator's claim or defense by their testimony as to non-contractual acts and conduct of the opposite party and exclude his testimony on the same point. It might have proved helpful if the court in the principal case had gone into the reasons supporting a liberal construction, rather than rested its decision on a definition applied in the pleading cases, where the court was dealing with a radically different problem.

E. W. HINTON.

8. *Souther* v. *Belleau* (Ky. 1924) 262 S. W. 619.
9. In re *Oswald's* Will (Wis. 1920) 178 N. W. 463.
10. In the matter of the Estate of *Kelly* (1924) 238 N. Y. 71.