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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED
Clerk, Supreme Court, Utah

SOUTHEAST FURNITURE COMPANY, a corporation,
Plaintiff and Respondent,

— vs. —

GRANITE HOLDING COMPANY, a corporation,
Defendant and Appellant.

Case No. 9175

REPLY BRIEF OF APPELLANT

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The brief of respondent sets forth some matters of purported law and fact which appellant hereto replies.

Point I

Section 78-24-2(3) U.C.A. 1953, the so-called Dead Man's Statute, does not Pertain to or Render any of Appellant's Witnesses Incompetent to Testify in this Action.

Respondent contends in its Point I that the executed Oral Agreement creating the joint and reciprocal right

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of way over the adjoining lands of the parties is proved in the record by testimony of witnesses incompetent to testify under the Dead Man's Statute. The respondent in support of its contention does not attempt to point out what witnesses are incompetent nor what testimony from such witnesses was inadmissable. Further, respondent cites no cases or authorities in support of the applicability of the Statute.

There are several reasons why appellant's witnesses and their testimony were not excludable under the Dead Man's Statute. In discussing these reasons, it should be remembered that the Oral Agreement was negotiated by and between the appellant corporation and the respondent corporation acting through their respective officers. The two principal officers involved in negotiating the contract, Nephi Hansen for the appellant and S. E. Sorenson for the respondent, were both deceased sometime before this action was initiated.

1. Where both parties to a contract are dead, the Statute excluding testimony of transactions with the decedent is not applicable. Since both parties to the contract are deceased, the inequality of positions to which the Statute is directed does not exist. (97 C.J.S., *Witnesses,* Sec. 203, page 646, *Atkin's Estate v. Atkin's Estate,* 37 A. 746, 69 Vt. 270).

2. Appellant's witnesses in this action do not come within the class of those intended to be silenced by the statute. The decease of one who entered into a transaction with a corporation does not prevent the officer

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of such corporation who negotiated the transaction from testifying concerning the transaction entered into. The rule in this regard is stated in 58 Am. Jur., *Witnesses,* Section 313, page 191, as follows:

> "In the majority of cases statutes making persons who are parties to or interested in a suit against the estate of one deceased or a lunatic incompetent to testify concerning a personal transaction had with him have been construed as not rendering the officers of the corporation incompetent to testify as to transactions or communications with the decedent. Accordingly, it is held that the directors of a corporation, its general manager, cashier, agents, or employees, even when liable over to the corporation are competent to testify."

A similar rule as to agents and employees in general is stated at 58 Am. Jur., *Witnesses,* Sec. 309, p. 189, as follows:

> "A statute prohibiting the 'parties' to a suit against the estate of a decedent or a lunatic from giving evidence is construed not to include the agents of parties who are not made parties to the action; it is said that to hold that agents are also barred from giving evidence by the statute would obviously be adding to its terms. So, too, under statutes disqualifying a 'party in interest' or 'person interested in the event' it is held that the agent is not rendered incompetent as a witness for his principal by the death of the party with whom he dealt." (See also 21 A.L.R. 928)

3. The respondent does not come within the class of persons who are protected by the statute. The case

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of *Beaston, et al. vs. Portland Trust and Savings Bank,* 80 W. 627, 155 P. 162, also involved the establishment of a right growing out of a transaction entered into by officers of two different corporations, one of whom was deceased at the time of the action. The case in applying a statute almost identical with the Utah statute held as follows:

> "Rem. & Bal. Code, Sec. 1211 providing that, in an action or a proceeding where the adverse party sues or defends as deriving right or title by, through, or from any deceased person, a party in interest shall not be permitted to testify in his own behalf as to any transaction had by him with the deceased, *does not* exclude the testimony of an officer and stockholder of one corporation from testifying as to a transaction had by him, as such officer, with an officer and stockholder, since deceased, of another corporation, from which the witness' corporation derives a right or title which it seeks to assert."

The express terms of the Utah statute refers only to natural persons and not to corporations. The Washington court in the above referred to *Beaston* case acting under a similar statute points out that the exclusion of the Statute does not pertain to a corporation. The Court in that case states as follows:

> "Our statute, it will be observed, applies, in its terms, only in the case of the death of a natural person who is a principal in the contract. It makes no reference to corporations, or to agents of corporations, or even to agents of deceased natural persons, and to read into it, this further exception would be, we believe, an unwarranted extension of its terms."

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A similar rule is stated in the Colorado case of *Garden of the Gods Village v. Hellman,* 294 P. 2d, 597. This was an action against a corporate defendant for damages from blasting where the corporate president who directed the work died prior to the action, and the court held that admitting testimony of statements made by the president during the course of the operations and after plaintiffs discovered their damages did not violate the Dead Man's Statute.

It seems clear that the sole purpose of the language of the Utah Statute is to prevent the proving by false testimony of claims against the *estate* of a deceased or incompetent person. In other words, it is directed at conserving the estate of a deceased or incompetent person and, therefore, it is applied only in cases where an estate of a deceased or incompetent person is involved. The Statute expressly lists the class of persons protected by the Statute using the following designations: guardian, executor or administrator, heir, legatee, or devisee of any deceased person or assignee or grantee of any of them. All of these designations contemplate the involvement of an estate. Therefore, under the Utah Statute at least, unless the estate of a deceased or incompetent person is involved in the action, the Statute would not apply. The following excerpts from the majority opinion and concurring opinions in the Utah case of *Maxfield vs. Sainsbury,* 172 P. 2d 122 support this contention:

> "The statute's sole purpose is to prevent the proving of false testimony of claims against the estate of a deceased person."

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"To extend this statutory disqualification to include a party not suing or opposing the executor . . . would be to totally disregard the wording of the statute and its past application by this court."

"The central and starting point of the inquiry (as to the disqualification of the witness) being whether one of the class to be protected, i. e. guardian, executor, administrator, heir, legatee, devisee, or assignee or grantee of any of them, is suing or defending."

Appellant's witness, Clyde F. Hansen, does not come under any aspect of the Dead Man's Statute. Clyde F. Hansen was secretary of the Appellant Corporation up to sometime in 1945 (R. 88), and was personally present at the time the agreement as to the right of way was negotiated between the appellant corporation, Nephi Hansen, acting for it, and the respondent corporation, S. E. Sorenson, acting for it, during the period of about 1941 and 1942 (R. 85), both of whom are deceased, but he has not been an officer of nor had any pecuniary interest in the appellant corporation since about 1945 (R. 88, 89). In view of this, he cannot be classified as an interested person, and he would be a competent witness for the appellant even if he were not competent under the rules discussed above. The interest that would disqualify a witness must exist at the time that the person is produced and used as a witness. The rule in this regard is stated at 58 Am. Jur., *Witnesses*, Section 280, page 178, as follows:

"As a general rule, the existence of the disqualifying interest, within the meaning of the

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dead man statute, is to be determined as of the time the testimony sought to be excluded is offered.''

Further, appellant's witness, Mr. Richards, could not be classified as a directly interested party or person under the statute. He was merely a witness to a transaction between *both* of the now deceased officers of the parties. (R. 114, 117, 120)

Point II

Counterclaim not Required to be Served as a Summons.

Respondent's argument under its Point VIII that appellant's counterclaim was required under Rule 5(a) to be served as a Summons in order to be effective and controlling in this action is not only specious but novel. This contention is against the universal interpretation and practice. Respondent cites no cases or authorities in support of its interpretation of this rule. Further, Respondent admits that it was actually served and received a copy of the Answer and Counterclaim.

Under Rule 13, it is compulsory that a counterclaim which ''arises out of the transaction or occurrence that is the subject matter of the opposing party's claim'' must be included with the answer if such counterclaim is to be asserted at all. Such a counterclaim has always been considered as part of the answer to be served with it and in accordance with the procedure provided for the service of an answer. A careful search by counsel has failed to disclose any case or authority with a dif-

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ferent interpretation or holding. The only reasonable interpretation to attach to the exception set out in Rule 5(a) "that pleadings asserting new or additional claims for relief . . . shall be served . . . in the manner provided for service of summons in Rule 4" is that a plaintiff in asserting new or additional relief such as might be included in an amended or supplemental complaint would have to serve such pleading in the manner provided for a summons.

While a compulsory counterclaim asserts a separate cause in the action and seeks affirmative relief, it is only asserted if the cause "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim". Therefore, since the cause in such a counterclaim is responsive to, grows out of, and is limited by the subject matter of the complaint, it does not assert such a new or additional claim as is contemplated by Rule 5(a). It is appropriate to treat it as part of the answer and require only such service as is required for an answer.

Further, respondent never appeared specially to challenge the jurisdiction of the court to proceed on the Counterclaim. The respondent filed a reply to the Counterclaim and appeared generally in response to it throughout the entire proceedings in this case. In fact, it was the only pleading before the court for trial after the respondent voluntarily dismissed its complaint at the beginning of the trial. No objection was made to the jurisdiction of the court to proceed with the trial on

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the Counterclaim, and the respondent proceeded to defend against the Counterclaim.

The respondent having made a general appearance to the Counterclaim, he is bound by all of the consequences which followed from the time of the filing and serving of the Counterclaim, including a default judgment that had been entered on the Counterclaim.

Point III

Appellant's Motion to Amend Counterclaim and Prayer to Conform to the Evidence was Granted.

Respondent on page 3 in its Statement of Facts and again on page 19 in its argument under its Point X states that the court denied Appellant's Motion to Amend its Counterclaim and Prayer to Conform to the Evidence. This statement by Respondent is not correct. The Court's Order dated October 29, 1959, and appearing on page 57 of the record unequivocally states that "the motion to conform to proof is granted". The Court, therefore, had before it, in advance of making its findings of facts and conclusions of law and before entering judgment, all of the material issues asserted in this appeal. The record, therefore, supports the contentions of appellant in Points X and XI of its brief that it was prejudicial for the Court not to make findings which were responsive to and which covered all of the material issues raised by the pleadings, and that the findings and judgment are contrary to the evidence.

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CONCLUSION

For the reasons set forth in appellant's principle brief and supplemented herein, it is respectfully requested that the judgment of the trial court be reversed and the case remanded with instructions to enter judgment for appellant, giving appellant and those claiming by, through, or under it, the right to use the right of way referred to herein in accordance with the detailed provisions of the default judgment in the record (R. 17) or a judgment that such right of way is a public way.

Respectfully submitted,

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