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COMMENTS

APPLICATION OF DEAD MAN'S STATUTE TO WIFE IN COMMUNITY ACTIONS BROUGHT BY HUSBAND

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The controversial Dead Man's Statute[1] stands as a remnant of our common law heritage in the law of evidence regarding witnesses. This "safeguarding" statute has become so limited in scope and so frequently undermined by fine semantical distinctions that it is now but a slim sentinel upon the legal horizon. Most all of the statute's ramifications with regard to the substantive and procedural law have been thoroughly dissected with scientific empiricism and certainty. However, California courts have not squarely decided upon one intriguing facet: The possible effect that Civil Code section 161a, declaring in itself to give the wife a present, existing, and equal interest in the community property, has had upon the Dead Man's Statute.

The Rule Before Civil Code Section 161a

Prior to 1927, the wife had no present and existing rights in the property held or acquired by the marital community.[2] Hence, in the leading case of *Badover v. Guaranty Trust and Savings*,[3] where the husband sued a decedent's estate on a lost promissory note, the court allowed his wife to testify, even though this was a community claim. The court based the wife's competency to testify on the ground that as she did not have an existing and present interest in the cause of action her plaintiff husband was asserting, the Dead Man's Statute had no application. The pertinent part of this statute is as follows:[4]

> The following persons cannot be witnesses:
>
> . . . .
>
> (3) Parties or assignors of parties to an action or proceeding, *or persons in whose behalf an action or proceeding is prosecuted,* against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased. (Emphasis added.)

The effect of the *Badover* case was that even though a community claim was being pursued, the wife did not have such an interest as would label her a person upon whose behalf the action was brought, thereby precluding her from testifying.

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1 CAL. CODE CIV. PROC. § 1880(3).

2 Crocker First Nat'l Bank v. United States, 183 F.2d 149 (9th Cir. 1950); Spreckels v. Spreckels, 172 Cal. 775, 158 Pac. 537 (1916). See also United States v. Robbins, 269 U.S. 315 (1926) (excellent discussion of pre-1927 California community property).

3 186 Cal. 775, 200 Pac. 638 (1921).

4 See note 1 *supra.*

The court cited *Uhlhorn v. Goodman*,[5] which held that one having a joint interest in a contract with the plaintiff was an incompetent witness as the action was against a decedent's estate. The obvious reason was that the witness would be a person upon whose behalf the action was brought. Although this is clearer case of a witness falling under the Dead Man's Statute, it might serve to illustrate, by way of dicta, the judicial thought in the *Badover* case.

The 1927 Legislative Enactment

In 1927 Civil Code section 161a was enacted.[6] This section reads as follows:

> The respective interests of the husband and wife in community property during continuance of the marital relation are *present, existing, and equal interests* under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property. (Emphasis added.)

Although the language used seems to show a clear intent to give the wife a present, existing interest, the exact effect of this section has not been precisely determined, with the cases merely assuming the wife's interest to be present and equal with that of her husband.[7] For example, the wife is deemed to have a present, existing interest for federal tax purposes.[8] In *Odone v. Marzocchi*,[9] where the wife had effected a gift of her interest in community property to a long-time friend, the court declared the wife's interest to be "present, existing, and equal, although the management and control of the community are in the husband." In *Estate of Kelley*,[10] the District Court of Appeal declared in regard to the wife's rights to half of the community property acquired after 1927 that it "never did belong to the husband." However, it has been held that the wife's trustee in bankruptcy can not force a division of the community assets acquired after 1927 for the payment of the wife's debts.[11] Most writers feel that Civil Code section 161a accomplished what it purported to do; that is, it gave the wife a present, existing interest in community property.[12] The judicial opinions have uniformly held that Civil Code section 161a does not affect the re-

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[5] 84 Cal. 185, 23 Pac. 1114 (1890).

[6] Cal. Stat. 1927, c. 265, p. 484.

[7] Strong v. Strong, 22 Cal. 2d 540, 140 P.2d 386 (1943); Horton v. Horton, 115 Cal. App. 2d 360, 252 P.2d 397 (1953); Estate of Cushing, 113 Cal. App. 2d 319, 248 P.2d 482 (1952); Cooke v. Cooke, 65 Cal. App. 2d 260, 150 P.2d 514 (1944); Colden v. Costello, 50 Cal. App. 2d 363, 122 P.2d 959 (1942); Mosesian v. Parker, 44 Cal. App. 2d 544, 112 P.2d 705 (1941).

[8] United States v. Malcolm, 282 U.S. 792 (1931).

[9] 34 Cal. 2d 431, 211 P.2d 297 (1949).

[10] 122 Cal. App. 2d 42, 264 P.2d 210 (1953).

[11] Smedberg v. Bevilockway, 7 Cal. App. 2d 578, 46 P.2d 820 (1935); Comment, 23 So. CALIF. L. REV. 237 (1950).

[12] Kirkwood, *The Ownership of Community Property in California*, 7 So. CALIF. L. REV. 1 (1933); Comment, 22 CALIF. L. REV. 404 (1933).

spective interests of the husband and wife in community property acquired before 1927.[13]

Manford v. Coats,[14] decided in 1935, was the first case to provide an opportunity for an appellate court to apply the new Civil Code section to the Dead Man's Statute. The trial court had allowed the wife to testify in a suit brought by her husband on a community claim inasmuch as she attested solely to events which had transpired *before* 1927. The District Court of Appeal, in affirming, held that there was enough other evidence to support the finding, and chose not to discuss what the result would have been had the wife been allowed to testify to matters occurring after 1927. The court noted that prior to 1927, the wife was clearly a competent witness for her plaintiff husband in a community action against a decedent's estate, citing the *Badover* case as controlling.

"Relinquishment" Doctrine

After seven years of suspense, a more ideal fact situation was presented in *Roy v. Salisbury*.[15] This was an action against an estate for the keeping and caring for the decedent's Doberman Pinscher at the plaintiff's kennel. Six months after the decedent's death, Mrs. Roy, wife of the plaintiff, executed an agreement to the effect that any claim against the estate of the deceased and all the proceeds that might be recovered therefrom were to be the separate property of her husband. At the trial an objection was made that Mrs. Roy was incompetent to testify under the Dead Man's Statute, as she was an assignor of the party bringing the action in having bestowed her half-interest upon her plaintiff husband. This objection was overruled and the trial court found an oral contract and awarded the decision to the plaintiff, Roy. On appeal the appellants argued that Civil Code section 161a prevented the wife from testifying in such an action. They urged that before the husband-wife agreement, the wife had a present, existing interest in the claim now being asserted, and therefore was either an "assignor" or a "party upon whose behalf the action was prosecuted."

The respondents maintained that the wife can "relinquish" her rights to the husband to obviate the effect of an assignment, citing *Perkins v. Sunset Tel. and Tel. Co.*[16]

The Supreme Court of California held that Mrs. Roy's testimony, even if it had been admitted erroneously because of the combined effects of the Dead Man's Statute and Civil Code section 161a, still was not prejudicial so as to constitute reversible error. There was enough competent evidence to support the decision. The *Perkins* case was cited as controlling on the "relinquishment" doctrine, whereby the wife might give her half-interest

[13] Stewart v. Stewart, 204 Cal. 546, 269 Pac. 439 (1928); Spanfelner v. Meyer, 51 Cal. App. 2d 390, 124 P.2d 862 (1942); Level v. Metropolitan Life Ins. Co., 118 Cal. App. 426, 5 P.2d 430 (1931).

[14] 6 Cal. App. 2d 743, 45 P.2d 395 (1935).

[15] 21 Cal. 2d 176, 130 P.2d 706 (1942).

[16] 155 Cal. 712, 103 Pac. 190 (1909).

to her husband that he might hold such as his separate property.[17] The opinion was neither clear on whether under the Dead Man's Statute a "relinquishment" was to be treated in effect as an assignment, nor precise as to the possible effect of Civil Code section 161a.

Justice Traynor delivered a persuasive dissenting opinion,[18] maintaining that Mrs. Roy should have not been allowed to testify under the combined effects of Civil Code section 161a and the Dead Man's Statute. He distinguished the *Perkins* case on the ground that it in no way concerned an action against a decedent's estate. He felt that any change in the Dead Man's Statute is the function of the legislature, not the court. And that under the present Dead Man's Statute construed in terms of Civil Code section 161a, the trial court erred in allowing Mrs. Roy to testify as a witness for her plaintiff husband.

In August of 1957 the question as to the competency of the wife to testify in such a situation arose again in *Williams v. Security-First National Bank*.[19] This suit was brought by the husband against a decedent's estate. The recovery if any would be community property. The Appellate Department of the Superior Court of Kern County intimated that error was committed by allowing the wife's testimony in the trial court. However, the three-judge court held the evidence other than that founded upon the testimony of the wife would support the judgment. This followed the well-established mode of avoiding the issue of the wife's competency which started in the *Manford* case.

The Problem Unsolved

It would seem that the problem above presented concerning the competency of the wife in community actions brought by her husband against a decedent's estate should have been rather summarily disposed of by California courts. When Probate Code sections 201 and 202 were amended in 1923,[20] giving the surviving wife one-half of the community property by succession,[21] one justice intimated that even this might give the wife enough of an interest so as to make her subject to the provisions of the Dead Man's Statute in suits upon community claims brought by her husband against a decedent's estate.[22] For example, if the community recovered $100.00, the surviving wife could take one-half of this by succession. Even a cursory examination would seem to reveal that the wife could hardly be classed as a "disinterested" witness in such an action. She might well fall within the Dead Man's Statute, being a "person on whose behalf an action is prosecuted." No case has been found that seriously considered this argument

[17] See Kesler v. Pabst, 43 Cal. 2d 254, 273 P.2d 257 (1954).

[18] 21 Cal. 2d at 187, 130 P.2d at 712.

[19] 153 Cal. App. 2d 900, 314 P.2d 1020 (1957).

[20] Cal. Stat. 1923, c. 18, p. 29. These were formerly Civil Code sections 1401 and 1402.

[21] See *In re* Moffitt, 153 Cal. 359, 95 Pac. 653 (1908); Cunha v. Hughes, 122 Cal. 111, 54 Pac. 535 (1898); Estate of Burdick, 112 Cal. 387, 44 Pac. 734 (1896).

[22] Cutting v. Bryan, 206 Cal. 254, 274 Pac. 326 (1929).

except *Cutting v. Bryan*,[23] and that court concluded that the wife was at that time a competent witness. Rather, the courts have been content to observe that these Probate Code sections do not give the wife any present interest, thus seemingly requiring a present, existing interest before she would be subject to the narrow construction usually given the Dead Man's Statute.[24]

In the *Badover* case, there was an important dictum by the court in regard to a present interest affecting the wife's competency as a witness in a community action pursued by her husband against a decedent's estate which could have served as a judicial predetermination of the entire problem.[25]

> . . . [A]n action against an executor or administrator, on a claim against a deceased person is one brought "on behalf of" any person not a party to the action who, nevertheless, has *an existing property right in the claim.* (Emphasis added.)

Civil Code section 161a states that the respective interests of the husband and wife in community property are present, existing, and equal interests. Viewing this dictum in the light of this section, a near compelling conclusion is reached that section 161a should squarely place the wife within the California Dead Man's Statute where community actions against a decedent's estate are brought by the husband. Furthermore, in *Coffer v. Lightford*[26] the District Court of Appeal held that a divorcee could not utilize her former spouse as a witness in an action brought against his father's estate. The divorcee had acquired the former community claim through the provisions of Civil Code section 146, which provides substantially for an assignment upon dissolution of the community from one spouse to the other, according to the court's decree. By way of dicta, the court concluded that at the time the claim was one of the community, the husband clearly would have been an incompetent witness in an action brought by his wife against his deceased father's estate. Thus it seems that the courts would not hesitate in holding that the husband was subject to the Dead Man's Statute in community actions brought by his wife against a decedent's estate on the theory that he is a person on whose behalf the action is prosecuted. At least it seems that the court in the *Coffer* case would not hesitate. Why should not the wife occupy the same position when her husband is bringing the community action against a decedent's estate?

Other Jurisdictions Compared

Other jurisdictions having both community property and a somewhat similar Dead Man's Statute reach sure-footed results, but these states have

[23] *Ibid.*

[24] Travelers Ins. Co. v. Fancher, 219 Cal. 351, 26 P.2d 482 (1933); Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933).

[25] 186 Cal. at 781, 200 Pac. at 640.

[26] 129 Cal. App. 2d 191, 276 P.2d 618 (1954).

not had any modifications of their community property law; that is, the wife has always had a present, existing interest in the property held by the marital community.[27]

In 1954, the case of *Boettcher v. Busse*[28] was argued in the courts of the state of Washington. In a code section substantially the same as the California Dead Man's Statute,[29] the court held squarely that the wife could not testify as to an alleged oral conversation between the decedent and her plaintiff husband. Any recovery would be community property. The Washington courts have apparently been consistent in the above result for a long time. The basis for their holding has been that the wife was equally interested in the outcome of the action and, therefore, a party on whose behalf the action is brought.[30]

In *Tannehill v. Tannehill*,[31] a Texas case, the court would not permit the husband to testify as to an alleged gift made to his wife by her deceased brother. The theory was that although the property itself would be the wife's separate property, the rents received therefrom under the existing Texas law would be community property. This was held to be enough of an interest so as to place the husband within the prohibition of the Dead Man's Statute and render him incompetent as a witness for his wife.

Conclusion

Essentially there appear to be two solutions to this dilemma. One would be to abolish the California Dead Man's Statute through legislative means. Many writers and practitioners have favored this course of action. The other method would be to establish a line of judicial determinations in the light of the existing statutes, common sense, fair play and logic, and decisively hold that the wife is an incompetent witness through the operation of the Dead Man's Statute in community actions pursued by her husband against a decedent's estate. Preciseness and clear definition are two goals that should be of prime importance to the bench and bar alike.

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[27] Poe v. Seaborn, 282 U.S. 101 (1931) (Washington); Hopkins v. Bacon, 282 U.S. 122 (1931) (Texas).

[28] 45 Wash. 2d 579, 277 P.2d 368 (1954).

[29] WASH. REV. CODES § 5.60.030 (1951).

[30] Andrews v. Andrews, 116 Wash. 513, 199 Pac. 981 (1921); Whitney v. Priest, 26 Wash. 48, 66 Pac. 108 (1901).

[31] 171 S.W. 1050 (Tex. Civ. App. 1914).