Washington University Law Review

Volume 10 | Issue 2

January 1925

A Knotty Problem

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Is the testimony of an agent for a corporation, or a living party to a contract, and which agent conducted all of the negotiations with the party, now deceased, admissible in evidence in a suit on the contract?

The question can be answered both in the affirmative and the negative with different lines of decisions of the Supreme Court of Missouri as authorities. There is a curious confusion in these contradicting opinions, resulting somewhat from Missouri having three Supreme Courts: Division No. 1; Division No. 2 and Court in Banc. However, some of the confusion exists in the opinions in the same divisions, and it would also appear that Division Nos. 1 and 2 both have overruled Court in Banc.

The last three cases decided in 1923, which might have cleared up the situation, have, instead, had the opposite effect. These cases are *Lawhon vs. St. Joseph Laboratories,*[1] decided May 22, by Court in Banc; *Allen Estate vs. Boeke,*[2] decided July 14, by Division No. 2, and *Curtis vs. Alexander,*[3] December 31, by Division No. 1.

These cases are in conflict. The Lawhon case holds that the agent of the survivor is an incompetent witness, while both the Allen Estate and Curtis cases, rendered by different divisions, hold that the agent is competent.

It will be noted that the Lawhon case was decided by the Court in Banc, while the later decisions are by different divi-

1. 252 S. W. 44.
2. 254 S. W. 858.
3. 257 S. W. 432.

sions. Under the authority of *State ex rel. vs. Reynolds,*[4] the divisional opinions count for naught as authority when opposed by a decision in banc, except in the case decided. That case was on certiorari from the Court of Appeals. Court in Banc had ruled one way on a question, but a later decision, in a division held to the contrary. The Court of Appeals felt bound under the law to follow the latest decision in point of time. The Supreme Court, however, ruled that the opinion in banc was superior to that of a decision saying:

> "When a divisional judgment becomes final it is final despite any conflict between the decision upon which it rests and decisions of court in banc. So far as concerns the law in principle, however, the decision of court in banc is still the law, and is in no wise modified or affected by a conflicting divisional decision. It is apparent that if a conflicting divisional decision does not and cannot overrule or displace or affect a principle established by a decision of court in banc, then the court in banc decision remains the law and remains the live decision on the question. To say a divisional decision conflicting with a decision of court in banc is 'the last previous rulings of the Supreme Court' within the meaning of Section 6, art. 6, Const. Mo., p. 101, R. S. 1919, would be equivalent to holding that a division had overruled court in banc; i. e. that a part is greater than the whole."

Under this ruling the Lawhon case is the law. But what will the law be when Court in Banc next receives the question for determination? It would seem from an analysis of

4. 278 Mo. 554.

the prior and subsequent cases that the Lawhon case will be overruled and the later cases followed.

This, however, is not the first time that the decisions on this point of the law of evidence have been in confusion. Rather they have been so ever since 1896 when the case of *Banking House vs. Rood,*[5] was decided. Prior to that time it was thought that it was the established rule that the agent of the surviving party to a contract was a competent witness, for in 1867 such was the ruling in the case of *Stanton vs. Ryan.*[6] In that case the wife of the survivor, who, as agent for her husband, had let the contract, was offered as a witness but was excluded. As to this the court said, l. c. 515:

> "In support of the decision in the court below, it is contended that as the husband was incompetent on account of the death of the adverse party, with whom the contract purported to be made, the wife could not be admitted to testify to prove a contract when the deceased party was powerless to be heard on the other side. This view of the question might furnish excellent reasons for changing or modifying the law; but if the statute declares differently, we are not warranted by judicial legislation in perverting the plain meaning of the statute to conform to what we might consider sound policy. It cannot be gainsaid that if the defendant had given a full delegation of power to an ordinary agent to make a contract for and superintend the building, that such agent would have been competent to prove the contract when a dispute arose concerning the same, whether the person with whom he contracted was dead or not."

5. 132 Mo. 256.
6. 41 Mo. 510.

Then came the first element of discord, Banking House vs. Rood, supra. That involved a suit upon a note. The president and the cashier of the bank, both stockholders, were permitted to testify that they had seen the other party (since deceased) sign his name to the note. After a general discussion of the subject Division No. 1, held, l. c. 263:

> "Our conclusion, therefore, is that the stockholders of a corporation are not incompetent, on account of interest, to testify as witnesses in a case involving a contract with the corporation, though the other party to the contract be at the time dead. His competency depends upon the character of the evidence offered. He will be incompetent to testify in regard to transactions and negotiations between himself as agent of the corporation and deceased. In regard to independent facts he will be competent.
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> "It follows that the witnesses were competent to testify to the genuineness of the signature from their knowledge of it, or as experts.
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> "Whether they were competent to testify that they saw deceased sign the note, would depend upon the circumstances. Signing the note by deceased was a part of the transaction which resulted in the contract in issue and the agent of the corporation who conducted the negotiations, whether a stockholder of not, could no more testify to that fact than to any other fact connected with the negoiation."

The Rood case was followed in 1898 by *Green vs. Ditsch*,[7] a decision also by Division No. 1.

7. 143 Mo. 1.

The wind veered again in 1903 when the point came up for determination once more, this time in Division No. 2; *Clark vs. Thias.*[8] There the facts were one Martin, a clerk for a firm, with which the deceased had traded, and who acted for the firm in taking a note from the deceased, was permitted to testify. On appeal the clerk was held a competent witness, the court quoting with approval from *Baer vs. Pfaff,*[9] as follows, l. c. 645:

> "The test to be applied is, would the plaintiff's clerks have been competent witnesses at common law? They certainly would. They had no interest in the suit and there is no rule, that we are aware of, that would have disqualified them. Our statute was only intended to modify the common law so as to permit a party in interest to testify in his own behalf, provided the other party to the contract in issue and on trial is alive, or is not shown to be insane. If either party to the contract is dead or shown to be insane, the statute has no application, and the common-law rule must govern.
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> "The case of Banking House v. Rood, relied upon by the appellants, is not in conflict with the cases herein referred to. On the contrary, the case of Stanton v. Ryan, supra, is quoted approvingly by nearly all the cases upon the questions involved in this particular contention. Martin was not a party in interest, either in the note or suit, hence, we are of the opinion that he was a competent witness."

It is curious to note that in this Clark vs. Thias case the court relied upon Stanton vs. Ryan, supra, and then said that

8. 173 Mo. 628.
9. 44 Mo. App. 35.

there was nothing in the Rood case to the contrary. This can hardly be understood as this decision and the Ryan case seem to be in direct conflict with the Rood case, as was later held by both Divisions Nos. 1 and 2.

The rule was in a fair way to be firmly established when it next came up and Division No. 1, agreed with the Thias case of Division No. 2, and also held that the agent was competent. It looked like the question was also set "at rest," by reason of the fact that this time, in *Wagner vs. Binder,*[10] decided January 1, 1916, the court expressly overruled Banking House vs. Rood, supra. Judge Woodson there reviewed all of the authorities cited in the Rood case as sustaining it, distinguished them and held that they really did not support it. His criticism of the Rood case was severe. He explained the situation as follows:

> "That statute in plain and unambiguous terms provides that, when one party to the contract is dead, the other party thereto shall not be permitted to testify, etc. This language in no sense refers to the agent of the real party to the contract; and especially may that be affirmed when viewed in the light of the common law and public policy which permitted agents, brokers, etc. to testify in behalf of their principals, and the further fact that said statute is an enabling statute as practically all of the authorities hold.[11] In other words, the first clause of said statute was designed to remove the common law interest disability of

10. 187 S. W. 1128.

11. Weismueller v. Scullin, 203 Mo. 466, loc.cit. 471, 101 S. W. 1089. Southern Bank v. Slattery, 166 Mo. loc. cit. 633, 66 S. W. 1066. Lynn v. Hockaday, 162 Mo. loc. cit. 122, 61 S. W. 885, 85 Am. St. Rep. 480.

all parties to a contract or cause of action to testify in their own behalf, while the second and third provisions thereof were designed to limit the first to cases where both parties were living, by retaining said common-law disability in full force where one of the parties was dead."

He further held:

"If, as contended for by counsel for appellants, and as decided in the Banking House vs. Rood Case, that said statute disqualified both the surviving party and her agent, then there is not a bank in the state, which holds the note of a deceased person can collect the same, where the execution of the note is denied, or where infirmities are shown to exist, without perchance an outside person might be found who knows the signature, or who happened to be familiar with the transaction out of which the note grew. The same would be true of merchants, who sell goods on credit, and subsequently the purchaser should die, as was clearly shown by Judge Fox on the case of Thias v. Clark, supra. Had the ruling in the latter case been the same as announced in the Banking House vs. Rood Case, then clearly neither Thias nor his clerk could have testified to the execution of the note, nor to the sale of the goods out of which the note was given."

This case was subsequently approved by Court in Banc in *Signaigo vs. Signaigo,*[12] in 1918 and *Rauch vs. Metz,*[13] in 1919.

Division No. 2 continued in the line of its own decision in Clark vs. Thias, supra, and the Wagner vs. Binder case when

12. 205 S. W. 23.
13. 212 S. W. 357.

it handed down the opinion in *Allen vs. Jessup,*[14] February 2, 1917. There it held that the husband, who had acted as the agent of his wife, was competent to testify as to the contract he had made with the deceased, and cited the Wagner vs. Binder case with approval. This carried with it the ratification of the overruling Banking House vs. Rood, (the root of the evil).

Two years later, July 5, 1919, Division No. 2, returned to its old doctrine notwithstanding the Wagner and Allen cases. In *Edmonds vs. Scharff,*[15] it held the agent incompetent. Here the division, which had decided the Allen case, failed to notice it and also failed to notice the Wagner case. And it based its decision on the case of Banking House vs. Rood, which had been twice overruled, one of the times by this same division. There the Commissioner held:

> "The party to the contract is the person who negotiated the contract, rather than the person in whose name and interest it was made.[16]

Two years more elapsed when, November 19, 1921, Division No. 2, delivered the opinion in *Orthwein vs. Nolker.*[17] In that it again fell into line with Division No. 1, holding the agent an incompetent witness and discrediting the case of Edmonds vs. Scharff, supra. It practically overruled that case when it said that the supporting value of it "is destroyed by the language of (the) commissioner." It relied upon the

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14. 192. S. W. 720.

15. 279 Mo. 78.

16. Banking House v. Rood, 132 Mo. loc. cit. 262, 33 S. W. 816. Meier v. Tieman, 90 Mo. loc. cit. 442 and 443, 2 S. W. 435.

17. 290 Mo. 284.

Wagner vs. Binder and Allen vs. Jessup cases. Judge D. E. Blair, in delivering the opinion said of the Wagner case:

> "In that case Judge Woodson very ably and fully distinguished the Missouri cases from other states on the question and directly overruled Banking House vs. Rood."

The opinion further states that practically all of the cases prior to the Wagner case, cited as authority for the disqualification of an agent, had been distinguished by Judge Woodson.

The next case went to Division No. 1; *Darby vs. Life Ins. Co.*,[18] and was decided March 14, 1922. The court followed the Wagner, Thias and Allen cases, holding the agent a competent witness.

With this line of cases, Stanton vs. Ryan, decided before there were divisions of the Supreme Court; Clark vs. Thias, Wagner vs. Binder and Darby vs. Ins. Co., in No. 1; and Allen vs. Jessup and Orthwein vs. Nolker in No. 2; and with Banking House vs. Rood overruled three times; and with Edmunds vs. Scharff overruled once, certainly the question seemed stare decisis, res judicata and de mortuis. Not so however. Came the decision May 22, 1923, of Lawhon vs. St. Joseph Laboratories, from Court in Banc, in which every Judge on the Supreme Bench concurred, one in the result. And the strangest part of the whole decision is that in holding the agent incompetent the court cites only one opinion of the Supreme Court, that of the often discredited case, Banking House vs. Rood. How that decision got by the judges, who had written the opinions overruling the Rood case, is an enigma. This is the language, l. c. 48:

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18. 293 Mo. 1.

"Dr. Frederick W. Holkenbrink was incompetent to testify to the arrangement he made with Lawhon for digging the sewer. Notwithstanding he was acting for defendant, he was 'one of the original parties to the contract * * * in issue and on trial' under the statute as we have construed it.[19] Nothing in the record suggests the disqualification of either Crane or Fisher as a witness. Nor was Will Holkenbrink incompetent to testify as to the transaction between Dr. Holkenbrink and Lawhon, as he was in no way a party to it. But he was not competent to testify to conversations or transactions which he, as defendant's acting manager, had with Lawhon with respect to the prosecution of the work, if there were any such conversations or transactions."

Under the ruling in State ex rel vs. Reynolds, mentioned above, the decision in the Lawhon case, being the last decision of Court in Banc, is the law for all inferior courts to follow. But what is to be said of the case of Allen's Estate vs. Boeke, decided by Division No. 2, July 14, 1923, less than two months after the Lawhon ruling; and Curtis vs. Alexander decided by No. 1, December 31, 1923, about seven months after? The same judges who participated in the Lawhon case were in these two divisions, and no mention is made of the Lawhon case.

In the Allen Estate case the court quoted liberally from Wagner vs. Binder and Darby vs. Ins. Co. and discusses Clark vs. Thias, holding that the agent is a competent witness.

19. Banking House v. Rood, 132 Mo. 256, 262, 33 S. W. 816. Taylor v. George, 176 Mo. App. 215, 161 S. W. 1187.

In the Curtis case the court said, l. c. 436:

> "But admitting the father was the son's agent, he was not disqualified as a witness by said statute. It is only the party himself, and not his agent or any one acting for him, that is so disqualified from testifying by said statute, when the other party is dead. *Wagner vs. Binder*[20] (Mo. Sup.) opinion by Woodson, J., where the authorities in this state are all collected and reviewed. Also Signaigo vs. Signaigo (Mo. Sup.) following the Wagner case."

The decisions of the several Courts of Appeals are not discussed here for the reason that they are not controlling. The Supreme Court alone can untangle this knot.

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20. 187 S. W. 1128, loc. cit. 1151 to 58.