130 A.2d 143
Supreme Court of Pennsylvania

# Hendrickson's Estate

*1957*

OPINION BY MR. JUSTICE BENJAMIN R. JONES, March 18, 1957:

This appeal from a final decree of the Orphans' Court of Lackawanna County involves a dispute between a daughter of decedent and decedent's estate concerning the ownership of a diamond ring. Basically, the determination of the inquiry herein presented depends on the applicability of the so-called "dead man's rule" to appellant's testimony upon which her claim principally, if not solely, depends.

Forest F. Hendrickson died, testate, June 27, 1954, survived by 7 daughters and 2 sons. After decedent's death the executor found a 3 stone diamond ring, valued at $900, in decedent's safe located on the 3rd floor of his home.

Blanche Reid — a daughter of decedent and the appellant — excepted to the inclusion in the executor's account of the diamond ring, alleging the ring belonged to her, not to decedent. After hearing, Judge BRADY on May 3, 1956 disallowed appellant's claim and dismissed her exception. Exceptions filed to this adjudication were finally dismissed by the court below on October 8, 1956 and this appeal was taken.

Appellant's position is that sometime prior to 1938 decedent purchased and gave this diamond ring to his wife, Eva Hendrickson (appellant's mother) and that she, shortly before her death in March, 1938, gave the ring to appellant. In support of her claim, appellant presented her own testimony and that of H.V. Cutler: (1) Mr. Cutler, a jeweler, testified that, at the decedent's instruction, he made up this ring, that decedent gave the ring to his wife and she wore the ring up until the time of her death; (2) appellant's testimony — received over appellee's objection — was that approximately 2 or 3 months prior to her mother's death, her mother gave her some jewelry to be distributed among her sisters, stating that the diamond ring was for appellant; after her mother's death and at decedent's request she gave decedent the ring and the other jewelry and decedent kept the ring until his death.

It is urged that the court below erred in two respects: (1) in concluding that the unexplained possession by the decedent of the ring for 16 years following his wife's death was sufficient to infer ownership of the ring by decedent and his estate; and (2) in concluding that appellant's testimony was incompetent under the Act of 1887, supra.

An examination of appellant's statement of the first question involved in this appeal indicates her misunderstanding of the lower court's conclusion of law on the question of possession. The court below did not find that the mere possession of the ring by the decedent raised a presumption that the decedent owned the ring. On the contrary, the court found that the unexplained possession of the ring for 16 years by the decedent was sufficient to establish a prima facie case of ownership which cast upon the appellant the burden of going forward with the evidence. The executor having proven possession in the decedent at the time of his death, the burden shifted to the appellant to establish facts essential to the validity of her claim of ownership as a donee of the ring. In *Carr Estate*, supra, at p. 523, it was stated: "The burden of proof is on anyone who claims property in the possession of another to establish facts essential to the validity of his claim of ownership: Henes v. McGovern, 317 Pa. 302, 176 A. 503; Weaver v. Welsh, 325 Pa. 571, 191 A. 3; Commonwealth Trust Company of Pittsburgh v. Hugo, 328 Pa. 116, 194 A. 904. It is true that in each of the above cited cases the property was in the hands of claimant and the claim was made by the estate. But the same principle applies where the situation is reversed. Where, however, the claim of ownership is based upon an alleged *gift* of property found in *decedent's* possession, claimant's burden of proof is greatly increased." See also: *Watkins, Exr. v. MacPherson*, 348 Pa. 467, 470, 471, 35 A. 2d 256; *Ryan v. MacDonald et al.*, 151 Pa. Superior Ct. 607, 609, 30 A. 2d 662; *Tradesmen's National Bank and Trust Company v. Farshey*, 162 Pa. Superior Ct. 71, 74, 56 A. 2d 329.

In *Rogers Estate*, 379 Pa. 494, 495, 108 A. 2d 924 (quoted in appellant's brief), this court held that a function and object of an inventory is to fix presumptively the existence of property in the fiduciary's possession, and, while the listing therein does not affect "true ownership", it is "prima facie evidence of ownership". Listing of the ring in the inventory and the account was prima facie evidence of ownership. Such listing, coupled with 16 years of unexplained possession by the decedent, certainly sufficed to cast upon the appellant the burden of proof that she had become the owner of the ring by a donation from her mother. Cf: *Henes v. McGovern*, 317 Pa. 302, 176 A. 503. As against decedent's possession of this ring over a long period of time it was incumbent upon the appellant to produce evidence that she was the real owner and that she was entitled to recover on the strength of her own title, not upon any weakness in decedent's title.

Unfortunately for appellant proof of her title depended principally, if not solely, on her own testimony. The court below held that her testimony was incompetent under the Act of 1887, supra, and the propriety of this ruling is now questioned. Appellant contends the testimony is competent because the decedent had no right to the ring which passed to his executor, a party of record.

Competency of a witness is the rule and incompetency the exception: *Gumbes Estate*, 172 Pa. Superior Ct. 59, 63, 92 A. 2d 265; *Allen's Estate*, 207 Pa. 325, 327, 56 A. 928; *Bates v. Carter Construction Co.*, 255 Pa. 200, 205, 99 A. 813; 2 Penna. Evidence (Henry), § 762, p. 187. At common law in Pennsylvania and until the Act of April 15, 1869, P.L. 30, *any* interest in the subject matter of litigation disqualified witnesses and parties alike: *Miller v. Frazier*, 3 Watts 456; *Dalbey's Estate*, 326 Pa. 285, 192 A. 129; 5 Pitts. L. Rev. 125 et seq. The act of 1869, supra, followed by the Act of 1887, supra, created a change whereby competency of witnesses became the rule and incompetency the exception.

Section 4 of the Act of 1887, supra, 28 PS § 314, states the general rule that no "interest, or policy of law, . . . shall make any person incompetent as a witness". To this rule the statute makes four exceptions, with only the last of which we are concerned in this appeal. This fourth exception — so far as pertinent herein — disqualifies as a witness a "surviving" or "remaining" party or "other person" whose interest is adverse to one who is dead and proscribes any testimony by such party or person against the deceased as to matters which occurred before death if the deceased had any right in the subject matter which has passed to a party of record. This disqualification extends to two classes of witnesses (surviving parties to a transaction and any other person) whose interest is adverse to deceased: *Groome's Estate*, 337 Pa. 250, 254, 255, 11 A. 2d 271; *Broderick Co. v. Emert*, 110 Pa. Superior Ct. 327, 332, 168 A. 512.

Under this exception three conditions must exist before any such witness is disqualified: (1) *the deceased must have had an actual right or interest in the matter at issue*, i.e. an interest in the immediate result of the suit; (2) *the interest of the witness — not simply the testimony — must be adverse*; (3) *a right of the deceased must have passed to a party of record who represents the deceased's interest.*

The application of these criteria to appellant's testimony clearly indicates its incompetency. The present controversy is between decedent's personal representative and decedent's daughter, each asserting ownership of the ring. Decedent — the purchaser and long time possessor of the ring when he died — had at least a prima facie interest in the ring. Claimant's interest is adverse to decedent, i.e. she claims the ring belonged to her, not to decedent. Applying the test in *Dillon's Estate*, supra, if appellant's exception were sustained and her claim allowed, she would gain as the "direct legal operation and effect of the judgment" by receiving ownership and possession of the ring. Whatever right decedent had in the ring passed to his executor who represents his interest as a party of record. Appellant's testimony was properly excluded and such exclusion related not only to testimony as to transactions between appellant and her deceased father, but also as to any matter occurring before her father's death which had any bearing on the ring transaction: *Sutherland v. Ross*, 140 Pa. 379, 386, 21 A. 354; *Swieczkowski v. Supniewski*, 294 Pa. 323, 328, 144 A. 141; *Uhl v. Mostoller*, 298 Pa. 124, 128, 129, 148 A. 61; *Weaver v. Welsh*, 325 Pa. 571, 577, 191 A. 3.

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The learned court below correctly and properly dismissed the claim of Blanche Reid.

Decree affirmed at appellant's costs.