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Witnesses--Personal Transactions With Persons Deceased At Time of Trial

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WITNESSES—PERSONAL TRANSACTIONS WITH PERSONS DECEASED AT TIME OF TRIAL.—In an action of trespass on the case against the administrator of decedent for injuries alleged to have been inflicted on *P* by decedent, *P* testified that she was shot while attempting to leave decedent's home. *Held*, that the trial court erred in admitting the testimony, as it was in violation of the dead man's statute. *Clark v. Douglas*, 81 S.E.2d 112 (W. Va. 1954).

The dead man's statute, W. VA. CODE c. 57, art. 3, § 1 (Michie, 1949), reads in part: "No person offered as a witness . . . shall be excluded by reason of his interest in the event . . . or because he is a party thereto, except as follows: . . . in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, insane or lunatic. . . ." By abolishing the incompetency existing at common law on account of interest in the event or action, it was intended to remove and not create disabilities. *Gilmer v. Baker*, 24 W. Va. 72 (1883). But it is becoming more a restriction to the introduction of evidence. As stated in 1 WIGMORE, EVIDENCE § 578 (1923), "Can it be more important to save dead men's estates from false claims than to save living men's estates from loss by lack of proof?"

The West Virginia court has given the words "personal transaction" a broad construction. *Owens v. Owens's Adm'r*, 14 W. Va. 88 (1878). As to what constitutes a personal transaction, the tests of admissibility have been said to "include every method whereby one person may derive impressions or information from the conduct, condition, or language of another." *Freeman v. Freeman*, 71 W. Va. 307, 76 S.E. 657 (1912); *In re Cristie's Estate*, 167 Misc. 484, 4 N.Y.S.2d 484 (1938). It has also been described as "an action participated in by witness and decedent, or something done in decedent's presence, to which, if alive, he could testify of his own personal knowledge." *Freeman v. Freeman, supra; Myers v. Phillips*, 197 Ga. 536, 29 S.E.2d 700 (1944).

Many of the courts do not give "personal transaction" as broad a meaning as the West Virginia court. In *Seligman v. Orth*, 205 Wis. 199, 236 N.W. 115 (1931), it was held that a party to a suit can testify as to the actions and movements of the deceased preceding and subsequent to a motor accident, in an action by or against the personal representative for damages arising out of the accident. *Contra: Willhide v. Biggs*, 118 W. Va. 160, 188 S.E. 876 (1936); *Southern Natural Gas Co. v. Davidson*, 225 Ala. 171, 142 So. 63 (1932). It has been held that where the transaction is between decedent and a third person even though the witness forms his

impression by seeing the decedent perform the act, it is not a "transaction" within the meaning of the statute. See, e.g., *Simmons v. Sisson*, 26 N.Y. 264 (1863), cited in *Owens v. Owens's Adm'r*, *supra*. But cf. *Trombly v. Deso*, 235 App. Div. 15, 256 N.Y. Supp. 225 (1932) (testimony that *D* and deceased were drinking ale preceding the accident excluded). In *re Meyer's Estate*, 163 Misc. 743, 297 N.Y. Supp. 605 (1937) (that initials on bag containing gold were in writing of testatrix excluded); *Gurski v. Sapowitch*, 276 App. Div. 821, 93 N.Y.S.2d 159 (1949) (action of *P* in placing cedar box and its contents in deceased's trunk to which *P* had no key excluded). In *re Benso's Estate*, 165 Kan. 709, 199 P.2d 523 (1948), it was held that testimony by a widow that her husband had torn and burned an antenuptial contract in her presence was not a transaction with the deceased, but referred to what the widow had observed.

However, where the survivor is testifying, the following situations have been held inadmissible as "transactions" within similar statutes: genuineness of handwriting of deceased based upon seeing the decedent write, *Johnson v. Bee*, 84 W. Va. 532, 100 S.E. 486 (1919); work done by *P* for *D*'s decedent, *Owens v. Owens's Adm'r*, *supra*; a beating allegedly administered by a sheriff and his deputies to the decedent, *Maciejczak v. Bartell*, 187 Wash. 113, 60 P.2d 31 (1936); widow's testimony as to insured's physical condition during period antedating his discharge, *Aetna Life Ins. Co. v. Prater's Adm'r*, 259 Ky. 665, 83 S.W.2d 17 (1935); that husband was on fire, *Pyramid Life Ins. Co. v. Miller*, 289 Ky. 249, 158 S.W.2d 427 (1942); resumption of marital relations between husband and wife after execution of separation agreement, *Smith v. Smith*, 187 Ga. 743, 2 S.E.2d 417 (1939); alleged common law marriage, *Catlett v. Chestnut*, 107 Fla. 498, 146 So. 241 (1933); that *P* was a child of decedent, *Crumley v. Worden*, 200 Ill. 105, 66 N.E. 318 (1903).

For a suggested legislative revision of the existing dead man's statute in West Virginia, see Donley and Funt, *Personal Transactions with Persons Deceased at Time of Trial—An Analysis of Cases and a Suggestion for Statutory Change*, 41 W. VA. L.Q. 256 (1935).

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