Evidence–Incompetency of Witnesses–Time of Objection

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Evidence — Incompetency of Witnesses — Time of Objection. — In a suit for the wrongful death of the plaintiff's decedent, the defendants were permitted to testify as to the circumstances and as to the conduct of the plaintiff's decedent at the time of the accident. The plaintiff raises the question of the incompetence of these witnesses for the first time on writ of error. Held, that although these witnesses were incompetent, the question of their incompetence could not be raised for the first time in the appellate court but that the objection must first be raised and passed upon in the trial court. Willhide v. Biggs.1

The principal case is primarily noteworthy because it expressly overrules a long line of West Virginia decisions which have been unquestioned law in West Virginia since 1872,2 holding that objection to the competency of a witness might be made for the first time on appeal. This rule was laid down first in the case of Middleton's Ex'r v. White,3 in which case the court cited as authority Beverley v. Brook4 and Fant v. Miller,5 both Virginia decisions. The rule was stated next in Hill v. Proctor,6 wherein the court based its decision upon Fant v. Miller alone, completely ignoring or overlooking their former decision. The West Virginia court continued to follow this rule7 until the principal case, while the Virginia court has refused to follow it since 1880,8 having then

11 Wright v. Vinton Branch of the Mountain Trust Co. of Roanoke, Va., 57 S. Ct. 556 (1937).

1 188 S. E. 876 (W. Va. 1936).
2 Middleton's Ex'r v. White, 5 W. Va. 572 (1872).
3 Id.
4 2 Leigh 425 (Va. 1830).
5 17 Grat. 187 (Va. 1867).
6 10 W. Va. 59 (1877).
8 Simmons v. Simmons' Adm', 33 Grat. 451 (Va. 1880).
reversed their former decisions. In two West Virginia cases, prior to 1872 the court laid down the rule stated in the principal case, which cases, however, apparently were overlooked in these later cases which blindly followed one after another with little regard to the principle involved.

The West Virginia court in the principal case has adopted the majority rule, and, it is submitted, the better rule. This rule is supported by the principle of waiver, that is, the disqualification of witnesses, found in the rules of evidence, is primarily for the protection of litigants, of which they may or may not avail themselves; consequently, if they fail to object in the trial court they waive the right to do so. Further it is fairer to compel such objections to be raised in the lower court, because it gives the opposing party opportunity to substitute other testimony in the event that the objection is sustained.

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LANDLORD AND TENANT — HOLDING OVER — IMPLIED TENANCY. — Before the expiration date of a three year lease, T, lessee, notified L, that he would be unable to continue as lessee at the stipulated rental, but suggested a reduction of rent on a monthly basis, without a yearly lease. L, the landlord bank, through its conservator, wrote T: "We have discussed this matter in person several times and on yesterday we agreed that the rental should be $60.00 per month for a period of six months, with an option to you to extend it for another six months at the same rate per month." T agreed to this arrangement to become effective July 1, 1933. T tendered and L accepted the rents for twenty-two months until May 1, 1935. On April 29, 1935, L gave T written notice to vacate June 1, 1935, and thereafter refused the monthly rentals tendered by T. T, contending he was a tenant for six months and thereby entitled to three months notice, held over. L brought an action of unlawful detainer. Judgment for L. Held, that T by holding over

9 Detwiler v. Green, 1 W. Va. 109 (1865); Cunningham v. Porterfield, 2 W. Va. 447 (1868).
10 (1915) 3 C. J. § 740 and cases cited thereunder; 1 Wigmore, Evidence (2d ed. 1923) §§ 18, 526.
11 Id. § 18.
12 Simmons v. Simmons’ Adm’t, 33 Gratt. 451, 460 (Va. 1880).

1 W. Va. Rev. Code (1931) c. 37, art. 6, § 5.