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Some Statutory Modifications of the Hearsay Rule

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results is desirable. The forms of modification are several: 1. The replacement of county jails by centralized district institutions; 2. by a permissive statute granting discretion to committing magistrates or county commissioners. The first proposal will appeal to those who see the coordination of governmental functions and the reduction of governmental units as the only fundamental step to the reduction of governmental costs. To those unwilling to make so extensive and initially expensive change the removal of the mandatory provision of the present law would accomplish the reduction in costs that taxpayers demand. West Virginia can draft a satisfactory plan from the experience of other states.

—CHARLES H. HADEN.

SOME STATUTORY MODIFICATIONS OF THE HEARSAY RULE

The persistent strictness of the law of evidence has been relaxed in West Virginia in regard to certain exceptions to the hearsay rule. The business entries doctrine is illustrative.¹ According to the generally accepted view, a business entry is admissible when, among other things, the entrant is unavailable; but the orthodox view only recognizes, as forms of unavailability, death,² insanity,³ and absence from the jurisdiction.⁴ West Virginia has added to this list, commercial unavailability,⁵ that is, the entry is admissible where the commercial inconvenience in calling the witness outweighs its utility. In this instance West Virginia has brought the law into accord with business practice without the aid of statutory enactment.

¹ For a general discussion of the business entries doctrine see 2 WIGMORE, EVIDENCE (2d ed. 1923) § 1517 ff.

² The general principles of admissibility of business entries were first laid down in this state in *Vinal v. Gilman*, 21 W. Va. 301, 309 (1883). See also *Deitz v. McVey*, 77 W. Va. 601, 87 S. E. 926 (1916) and *DiBacco v. Benedetto*, 82 W. Va. 84, 95 S. E. 601 (1918).

³ *Vinal v. Gilman*, *supra* n. 2.

⁴ *Vinal v. Gilman*, *supra* n. 2, at 310; *Bourn v. Dobbins*, 92 W. Va. 263, 269, 115 S. E. 424 (1922); *State v. Martin*, 102 W. Va. 107, 134 S. E. 599 (1926) (Holding the entries admissible without producing the entrants, when their whereabouts were unknown). For comments see (1927) 33 W. VA. L. Q. 305, (1927) 25 MICH. L. REV. 305.

⁵ *W. Va. Architects and Builders v. Stewart*, 68 W. Va. 506, 514, 70 S. E. 113 (1911); *State v. Larue*, 98 W. Va. 677, 690, 128 S. E. 116 (1925).

The problem of the parties' own account book is different — the necessity of its admission arose from the parties' disqualification for interest, rather than from their unavailability.⁶ After the bar of interest was removed,⁷ where it was completely removed, the hearsay problem was no longer significant, for the account book was admissible as "past recollection recorded".⁸

But the statutory provision in West Virginia,⁹ and in most states,¹⁰ does not remove the bar as to a transaction with a person deceased or insane. It is held, however, that this does not prevent the use of a shop book in such a case. The shop-keeper may take the stand and vouch for the accuracy of the book; this is "identifying" not "testifying".¹¹

In spite of the liberal construction placed by the courts on such legislation,¹² there still remain many cases directly within the exclusionary principle of the statute.¹³ Only legislative action can relieve the situation. The legislature should repeal the "dead man's" statute for it bars honest claims of the living more often

⁶ See n. 1, *supra*.

⁷ By general statutory enactment the disqualification of parties has been removed. See 1 WIGMORE, EVIDENCE (2d ed. 1923) § 488 ff. Cf. W. VA. REV. CODE (1931) c. 51, art. 3, § 1; Crothers v. Crothers, 40 W. Va. 169, 174, 20 S. E. 927 (1895); Anderson v. Snyder, 21 W. Va. 632, 643 (1883).

⁸ For a discussion of the theory of "past recollections recorded", see, 1 WIGMORE, EVIDENCE (2d ed. 1927) § 745; and, in relation to this particular exception, 2 WIGMORE, EVIDENCE (2d ed. 1923) § 1559.

⁹ See, W. VA. REV. CODE (1931) c. 57, art. 3, § 1: "But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf, nor as to which the testimony of such deceased person or lunatic shall be given in evidence."

¹⁰ See n. 7, *supra*.

¹¹ See, 2 WIGMORE, EVIDENCE (2d ed. 1923) §§ 1530, 1561.

¹² See n. 7, *supra*.

The West Virginia court, however, in *Seabright v. Seabright*, 28 W. Va. 412, 462 (1886), said that it would construe the qualifying clause of the section "liberally with a view to suppress the evil which this exception to the removal of the common law disabilities was designed to avoid" but it recognized that "the object of the section was to widen, not to narrow, the competency of witnesses" *Accord*: *Crothers v. Crothers*, *supra* n. 7; *Gilmer v. Baker*, 24 W. Va. 72, 84 (1884). Cf. *Sayre v. Whetherhold*, 88 W. Va. 542, 107 S. E. 293 (1921); *Brown v. Click*, 59 W. Va. 172, 174, 53 S. E. 16 (1906). And see, *Board of Education v. Harvey*, 70 W. Va. 480, 481, 74 S. E. 507 (1912), where a party to the suit was held competent to testify in his own behalf against a board of education in relation to a personal transaction between himself and a deceased member of the board. Cf. *Smith v. Guaranty Co.*, 109 W. Va. 280, 286, 153 S. E. 584 (1930); *Stansbury v. Bright*, 109 W. Va. 651, 156 S. E. 62 (1930). (The statute does not apply to agents who testify on behalf of their principals against decedent estates).

¹³ For an example, see *Gardner v. Gardner*, 166 S. E. 112 (W. Va. 1932).

than it protects the estates of the dead.¹⁴ Estates in jurisdictions where such evidence is admissible have not been robbed by the perjury of the living.¹⁵

Should not West Virginia adopt a statute similar to that recommended by the committee on reform of the law of evidence? The proposed statute reads as follows:

“No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.

“In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased, whether oral or written, shall not be excluded as hearsay provided that the trial judge shall first find as a fact that the statement was made by the decedent, and that it was made in good faith and on decedent’s personal knowledge.”¹⁶

Likewise, all declarations of deceased persons should be receivable in evidence if in the opinion of the court they were made in good faith before the commencement of the action and on the personal knowledge of the deceased. Any skepticism concerning the evidence should go to its weight and should not be a ground for its exclusion. A statute of this character has been given a thorough trial in Massachusetts.¹⁷ There the court has liberally construed the statute so as to enlarge rather than restrict its benefits.¹⁸ The statute has met with the general approval of the Massachusetts bench and bar.¹⁹

¹⁴ In *Owens v. Owens*, 14 W. Va. 88, 95 (1879), the court said that the disqualification “was intended to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affair, or expose the omission, mistakes or perhaps falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered too great, to allow the surviving party to testify in his own behalf. Any other view of this subject . . . would place in great peril the estates of the dead, and would in fact make them an easy prey for the dishonest and unscrupulous.”

¹⁵ These fears have not been realized. I WIGMORE, *EVIDENCE* (2d ed. 1923) § 578; Coleman, *Suggested Lines of Activity for the West Virginia Bar Association*, (1932) 38 W. VA. L. Q. 274, 276; Taft, *Comments on Will Contests in New York* (1921) 30 YALE L. J. 593, 605.

¹⁶ THE LAW OF EVIDENCE (1927 Yale University Press) 35.

¹⁷ MASS. GEN. LAWS (1921) c. 233, § 65. “A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.”

¹⁸ See *Buckley v. Boston El. Ry. Co.*, 215 Mass. 50, 55, 102 N. E. 75 (1913); *Tenny v. Foss*, 268 Mass. 69, 167 N. E. 280 (1929).

¹⁹ THE LAW OF EVIDENCE, *supra* n. 16, at 40-49; Cf. Brown, *The Massachusetts Declarations of Deceased Persons Statute* (1932) 12 B. U. L. REV. 396, 411-413.

Statutes for the admission of evidence of persons deceased or insane might be extended by analogy to the business entries rule to the admission of all evidence of persons actually unavailable in court.²⁰ It is thought, however, that there is greater reason for, and would be less opposition to the admission of the evidence of only those dead or insane.²¹ Consequently the adoption of the following uniform statute is urged:

“A declaration, whether written or oral, of a deceased or insane person shall not be excluded from evidence as hearsay if the court finds that it was made and that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.”²²

The adoption of these proposals would make available much relevant evidence; but it would give no advantage to any group or interest — it would merely permit the jury to know that which it must now only surmise. These provisions have been found workable in other states. May West Virginia gain the same advantages.

—TRIXY M. PETERS.

SHOULD COMMENT BY THE TRIAL JUDGE BE AUTHORIZED IN WEST VIRGINIA?

Whatever else familiarity may breed, with lawyers it has bred opposition to all change in the customs and practices of their profession. But some (and perhaps often, much) opposition to change is inevitable in a profession founded on tradition. Thus the return of the common law power of judicial comment has been long delayed. Only a few leading lawyers¹ and jurists² have sponsored its return.

²⁰ THE LAW OF EVIDENCE, *supra* n. 16, at 49.

²¹ So long as a witness is competent and living there is at least a possibility of getting a deposition.

²² THE LAW OF EVIDENCE, *supra* n. 16.

¹ Judge Ritz, in speaking of judicial comment said, “I think it is true in this state, that we have a system that does not allow our judges in the state courts to intelligently try a case,” (1928) PROC. W. VA. BAR ASS’N 70. Judge McClintic, at the same meeting said that in 1921 when he was a member of the legislature, he introduced a bill permitting the circuit judge to comment if both parties agreed. Of the twenty-three lawyers in the House of Delegates, twenty-one opposed the bill. Three circuit judges lobbied against it because, as they stated, it would make them pay too close attention during the trial, (1928) PROC. W. VA. BAR ASS’N 162.

² “The . . . rule (which obtains by Constitution or statute in almost