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Evidence--Witnesses--When Witness Competent as to hand-writing of Decedent

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EVIDENCE—WITNESSES—WHEN WITNESS COMPETENT AS TO HAND-WRITING OF DECEDENT.—In an action upon a note purporting to have been made by a person now deceased, the plaintiff testified that through an extended mutual correspondence carried on with the decedent she had become familiar with the signature and handwriting of the decedent. The plaintiff's evidence that the signature to the note was that of the decedent was excluded on the ground that such evidence involved a personal transaction or communication with the decedent, and was inadmissible under Ch. 130, § 23 of the WEST VIRGINIA CODE (1923). *Held,* that the evidence was admissible, and was sufficient to make out a *prima facie* case for the plaintiff. *Poole* v. *Beller, Executor,* 140 S. E. 534 (W. Va. 1927).

The court followed the test laid down in *Johnson* v. *Bee,* 84 W. Va. 532, 100 S. E. 486, 7 A. L. R. 252 in which the court said: "Whether the witnesses were competent depends upon the means by which they obtained the knowledge of the handwriting of the decedent, constituting the basis of their opinions." One who has received letters or other writings from the supposed writer under circumstances which create a presumption that they were really written by him is competent to give an opinion on the handwriting of such writer, 11 R. C. L. 620. But there is a conflict of authority as to whether knowledge of handwriting acquired in this way is admissible under the statute. See *Johnson* v. *Bee, supra,* and 40 CYC. 2327 for cases supporting both views. The better view is that taken by the court in the principal case that such knowledge does not involve a personal transaction or communication, and evidence based upon it is admissible.

In *Johnson* v. *Bee, supra,* the witnesses obtained their knowledge of the handwriting by reading letters written by the decedent to their mother, and preserved in the family as heirlooms. Clearly this knowledge did not involve a personal transaction or communication with the decedent, as the letters were not written to the witnesses, and the court did not have any difficulty in holding that evidence based upon knowledge obtained in this manner was admissible. In the principal case the witness acquired her knowledge through a mutual correspondence carried on with the

decedent for a number of years, and while it is not so clear that this knowledge does not involve a personal transaction or communication, this was held to be sufficient to make the evidence admissible and make out a *prima facie* case. This is a liberal construction of the statute, and the result is desirable, for the rule laid down in the statute is generally thought to be unsound and is open to all the arguments which have done away with the common law rule making interest a disqualification of all witnesses. WIGMORE on EVIDENCE, p. 707, § 578; p. 699, § 576. Virginia has practically abolished the rule excluding evidence of a personal transaction or communication with a decedent, VIRGINIA CODE (1924) § 6208, but § 6209 takes the view that cross examination alone would not be a sufficient safeguard for the estate of the decedent, and requires that the witness's sole testimony be corroborated, and if such witness testify, all entries, memoranda, and declarations by the decedent relative to the matter in issue are admissible. While West Virginia retains the rule, it places upon it a liberal construction, and holds that evidence admissible under this liberal construction makes out a *prima facie* case, without corroboration. While no doubt it would be better if the rule were abolished, this liberal construction by the court does not cause the hardships which would result from a strict construction of the statute.

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PRACTICE AND PROCEDURE—GARNISHMENT—WHO EXEMPT THEREFROM.—A, clerk of the county court, died leaving funds unaccounted for, collected by him but belonging to the county. His administrator was sued by the county court and the depositary was garnished. *Held*, that property in the hands of the personal representative of the decedent is not subject to garnishment by the creditors of the estate. The county is not a preferred creditor. The funds are not impressed with a trust in its favor. *State* v. *Whyte*, 136 S. E. 860 (W. Va. 1927).