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Practice and Procedure--Garnishment--Who Exempt Therefrom

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decendent 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.

—JOSEPH G. CONLEY.

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*, 133 S. E. 860 (W. Va. 1927).

The principal case represents the great weight of authority in this country and suggests the inquiry as to who is exempt from garnishee process, 12 R. C. L. 814, 28 C. J. 77. In West Virginia it has been held that garnishee process will not issue against the personal representative of a decedent, *Parker v. Donnelly*, 4 W. Va. 648; administrator or debtor of an estate, *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81; a city collector, *Aumann v. Black*, 15 W. Va. 773; a trustee of a bankrupt, *M. Weisenfeld & Company v. M. Mispelhorn*, 5 W. Va. 46; county officers, *Brown v. Gates*, 15 W. Va. 131, 160; the debtor of a partnership by an individual creditor of one of the partners, *Gwynan v. Egbert*, 44 W. Va. 79; accord while the firm accounts remain unsettled and unpaid, *Lacy v. Greenlee*, 75 W. Va. 517, 84 S. E. 921; a debtor whose liability is enforceable only in a court of equity, *Swann v. Summers*, 19 W. Va. 115; a railroad which has contracted with the defendant debtor and the contract is still executory and conditions in the contract make it possible that defendant would have nothing owing him after a possible indemnification of the railroad, *Strauss v. Chesapeake & Ohio Railroad Company*, 7 W. Va. 368; the maker of a negotiable note; an insurance company while it has the option to rebuild burned property or pay its value; the debtor of a sailor for wages while his voyage is incomplete; the debtor of one contracting to complete work within a specified time which may not be done, *Webster Wagon Company v. Insurance Company & Peterson*, 27 W. Va. 314, 336; public officers and public corporations, in the instant case a municipality and its treasurer, even though the city has directed its treasurer to pay over the funds. The exemption is on the ground of public policy and cannot be waived. *Leiter v. Fire Engine Company*, 86 W. Va. 599, 104 S. E. 56; *Welch Lumber Company v. Carter Brothers*, 78 W. Va. 11, 88 S. E. 1034. But special commissioners holding funds arising out of a chancery cause, which funds have been decreed to be paid over to the owner, may be garnished. This on the ground that the funds are no longer in the hands of the court and there is no longer cause for the court to be jealous of interference with its processes. *Boylan v. Hines*, 62 W. Va. 486, 30 S. E. 81. In jurisdictions outside West Virginia there are three views as to whether

public corporations may waive their exemption, *viz.*, (1) the exemption is jurisdictional and cannot be waived, therefore the process is absolutely void, (2) the exemption is for the benefit of the garnishee and he may waive it, (3) it is for the benefit of the defendant and cannot be waived without his consent. 2 A. L. R. 1583n., 28 C. J. 62-3. A non-resident may not be garnished unless when garnished he has property of the defendant in his possession within the state or is bound to pay the defendant money or deliver to him property within the state. Then he must be personally served. He cannot accept or waive service or voluntarily appear. This also applies to corporations. *Pennsylvania Railroad Company v. Rogers*, 52 W. Va. 450, 44 S. E. 300. But a railroad chartered in another state but *doing business* in this state is a resident for purposes of garnishment, though the debt was contracted and payable in another state. *Baltimore & Ohio Railroad Company v. Allen*, 58 W. Va. 388, 52 S. E. 465. One having legal custody of property cannot be garnished. Money, credits and property are in *custodia legis* when held, by executors, administrators, guardians and like quasi officers in their representative and administrative capacities. *Brewer v. Hutton*, 45 W. Va. 106, 30 S. E. 81. Where the legislature empowers one corporation to take charge of a part of the property and franchise of another corporation, and is directed to account to an equity court for its acts, a creditor of the corporation, a part of whose property is thus taken over, who has issued a *fiery facias* against its property, cannot enforce his claim by process of garnishment against the corporation so taking charge and its debtors. *Swann v. Summers*, 19 W. Va. 115. Foreign cars cannot be seized under an attachment against the company owning the cars, so as to defeat the rights under the agreement of the company receiving and entitled to use the cars, and a garnishment of the receiving company cannot affect its rights by reason of its possession of such cars. *Wall v. Norfolk & Western Railway Company*, 52 W. Va. 485, 44 S. E. 294. No decree can be had against a garnishee in a suit in chancery, who is not made a party to the suit and who does not appear and answer. *Chillicothe Oil Company v. Hall*, 4 W. Va. 703. A contingent liability is not subject to garn-

ishment under an order of attachment. *Minotti v. Brune*, 94 W. Va. 181, 118 S. E. 149.

—ARLOS JACKSON HARBERT.

MUNICIPAL CORPORATIONS — POWER TO PROHIBIT POOL ROOMS.—In a recent West Virginia case, a mandamus proceeding, it was found that the city council, after impartial examination and consideration had refused to issue to the relator, a license to operate a certain pool and billiard room. The reasons for this refusal were that relator had previously operated a pool room on the location in question, such operation not being in conformity with the law; and that relator had proved himself incapable of conducting such business in conformity with the law. *Held*, in such case, the court will not disturb the discretionary judgment of the council. *State ex rel. Smith v. Town of Ravenswood et al.*, 140 S. E. 680 (W. Va. 1928).

To remedy defects occasioned by the repeal of an earlier pertinent statute, ACTS 1919, ch. 102, § 130, in 1921 the following amendment was made to ch. 47, § 28 of the WEST VIRGINIA CODE:

“The council of such city, town or village shall have plenary power and authority therein * * * * to license or prohibit the operation of pool and billiard rooms, and maintaining for hire pool and billiard tables, and in event any such business is licensed, to make and enforce reasonable ordinances regulating the same.” ACTS 1921, ch. 143.

This amendment expressly confers on the council absolute power to license or prohibit the operation of pool and billiard rooms. WEBSTER'S NEW INTERNATIONAL DICTIONARY “plenary: full, entire, complete, absolute.” In two subsequent cases the court, without mentioning this statute apparently does away with its effect. *State ex rel. Hamrick v. County Court of Pocahontas County et al.*, 92 W. Va. 222, 114 S. E. 519, and 92 W. Va. 618, 115 S. E. 583, 29 A. L. R. 37. A third case, subsequently decided, while mentioning the statute, arrives at the same conclusion as the preceding two