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Personal Transactions with Persons Deceased at the Time of Trial--An Analysis of Cases and a Suggestion for Statutory Change

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PERSONAL TRANSACTIONS WITH PERSONS DECEASED AT THE TIME OF TRIAL—AN ANALYSIS OF CASES AND A SUGGESTION FOR STATUTORY CHANGE

In a recent West Virginia case a personal representative instituted an action to recover for the wrongful death of his decedent, growing out of an automobile wreck. The court held that the defendant motorist and his wife were incompetent to testify as to the actions and movements of the deceased, because such actions and movements came within the statute barring "personal transactions or communications" with a person deceased at the time of trial.[1] The far-reaching possibilities of the decision are best illustrated by an example given in the dissenting opinion by Judge Maxwell: "To illustrate: A man, alone, is carefully and lawfully driving his automobile on a highway when another automobile carrying a group of drunken rowdies collides with his. One of them is killed and his personal representative sues the one driver. The survivors of the hoodlum car may all testify; the solitary driver may not. Where is the justice of such an absurd result? Why place a law-abiding citizen at such extreme disadvantage?"[2] This case raises a query as to how near the place of collision the approaching cars must come before the occupants of each can be said to be engaging in a "personal transaction" Such an interpetation of the statute is very likely to lead to harsh results.

The statute[3] and decisions construing it have long been

[1] Strode v. Dyer, 177 S. E. 878 (W. Va. 1935). Judge Hatcher joined in the dissent.

[2] There are a few cases in other jurisdictions which are in accord with the majority opinion: Boyd v. Williams, 207 N. C. 30, 175 S. E. 832 (1934); So. Natural Gas Co. v. Davidson, 225 Ala. 171, 142 So. 63 (1932); Miller v. Walsh's Adm'x, 240 Ky. 822, 43 S. W. (2d) 42 (1931); Van Meter v. Goldfarb, 317 Ill. 620, 148 N. E. 391 (1925); Hallowach v. Priest, 113 Me. 510, 95 Atl. 146 (1915); Hudson v. Houser, 123 Ind. 309, 24 N. E. 243 (1890).

[3] W. VA. REV. CODE (1931) c. 57, art. 3, § 1. "No person offered as a witness in any civil action, suit or proceeding, shall be excluded by reason of his interest in the event of the action, suit or proceeding, or because as a party thereto, except as follows: no party to any action, suit or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such person, or the assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next

criticized by the courts and the profession as unsatisfactory, uncertain of application and consequently unjust.[4] An examination of the cases will demonstrate some of these faults.

Perhaps the most common type of case is that involving a contract for the furnishing of materials, or services in return for a promised price or compensation. The promisor dies and the party furnishing such services attempts by his own testimony to support an action against the personal representative of the decedent. The leading case in West Virginia is *Owens v. Owens' Adm'r*,[5] an action of assumpsit to recover for work done by plaintiff as housekeeper for the defendant's decedent, and for nursing, furnishing of supplies, and out-door labor. The court held that plaintiff could not testify in her own behalf that she performed such services. Even at this early date the court admitted that it was impossible to specify in advance what facts and circumstances would constitute a "personal transaction", and that "each case must to some

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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: provided, however, that where an action is brought for causing the death of any person by a wrongful act, neglect or default under Article 7, Chapter 55 of this Code, the physician sued shall have the right to give evidence in any case in which he is sued; but in this event he can only give evidence as to the medicine or treatment given to the deceased, or to operation performed, but he cannot give evidence of any conversation had with the deceased.

"In any suit or proceeding in which a county is interested, no person shall be incompetent as a witness by reason of his being an inhabitant of the county or liable to county levies, or a member of the County Court."

[4] 1 WIGMORE ON EVIDENCE (1923) 707, § 578. "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?"

"(1) That the supposed danger of interested persons testifying falsely exists to a limited extent only; (2) That, even so, yet, so far as they testify truly, the exclusion is an intolerable injustice; (3) That no exclusion can be so defined as to be rational, consistent, and workable; (4) That in any case the test of cross-examination and the other safeguards for truth are a sufficient guaranty against frequent false decision. Every one of the first three objections applies to the present rule as amply as to the old and broader rule. The fourth applies with less apparent force, because the opponent's testimony is lacking in contradiction. And yet, upon what inconsistencies is based even this support for the rule! For its defenders in effect declare the lack of this opposing testimony to be the sole ground for an exceptional rule adapted to that particular situation; and yet, since the deceased opponent is a party, he would have been by hypothesis a potential liar equally with the disqualified survivor; so that the rule rests on the supposed lack of a questionable species of testimony equally weak with that which is excluded. There never was and never will be an exclusion on the score of interest which can be defended as either logically or practically sound. Add to this, the labyrinthine distinctions created in the applications of the complicated statutes defining this rule; and the result is a mass of vain quiddities which have not the slightest relation to the testimonial trustworthiness of the witness."

[5] 14 W. Va. 88 (1878).

extent be decided, as it shall arise." The rigor of this decision was apparently relaxed in *Fouse v. Gilfillan*,[6] in which the promisee was permitted to testify as to his furnishing of labor on and material for a building in performance of a contract to which the deceased person was a party. The court expressly refused to follow *Owens v. Owens*"[7] to the full extent of its implications, and held that the testimony of the plaintiff "could in no possible way tend to prove what the transaction was" between the parties. This case was approved in *Poling v. Huffman*,[8] in which the contract was in writing. An effort was made to distinguish the *Owens* case upon the ground that there the contract was not in writing, but was to be implied in fact from the circumstances. Therefore, the testimony as to furnishing the materials and services proved not only the *performance* of the contract, but the very *formation and existence* of the contract itself. It is submitted that there is no foundation for this distinction in the policy of the statute. The temptation to perjury would seem to be equally great when the party is testifying to performance as when testifying to the formation of the contract—and equally incapable of contradiction.

In other cases of similar character the court has permitted theoretically "disinterested" witnesses, not parties to the action, to testify concerning the rendition of services to the decedent. For example, an emancipated infant's father was permitted to testify in her behalf.[9] In another case a plaintiff's wife was excluded from testifying in an action to recover for one-half of the sums expended in the care and maintenance of a horse and buggy owned jointly by the plaintiff and the decedent. There being no written contract, the court relied on the *Owens* case. However, a daughter of the plaintiff was permitted to testify as to the facts, and another witness as to the reasonable value of services. The testimony of these witnesses was held sufficient to justify submission of the case to the jury, which could have found a verdict upon a *general* claim against the estate of the decedent, without reference to the particular items listed in the plaintiff's statement of account.[10] A plaintiff's son was permitted to testify as to conversations had with the deceased person.[11] Again, a lessor cannot testify as to a verbal agreement with his deceased tenant fixing the amount of the

[6] 45 W. Va. 213, 32 S. E. 178 (1898).
[7] *Supra* n. 5.
[8] 48 W. Va. 639, 37 S. E. 526 (1900).
[9] Weese v. Yokum, 62 W. Va. 550, 59 S. E. 514 (1907).
[10] Barrett v. Andrew, 81 W. Va. 283, 94 S. E. 144 (1917).
[11] Hollen v. Crim and Peck, 62 W. Va. 451, 59 S. E. 7 (1907).

rent, in an action against the tenant's administratrix.[12] Upon the other hand, in an action by the assignee of a note against the administrator of the assignor, alleging a redelivery of the instrument to the assignor for collection, to recover the proceeds of such collection, the maker of the note was held competent to testify on behalf of the plaintiff that the instrument was so assigned and that he (the maker) had paid it.[13]

Another common type of case involves an issue as to the mental capacity of a deceased person. Thus, it is said that one who would inherit an interest in the land if the deed of the deceased grantor should be set aside, is incompetent to testify *originally* as to the mental capacity of the grantor. However, if the grantee testifies as to such capacity, the interested heir may testify in rebuttal. The court stated broadly that "if one of the parties testifies in regard to such communications or transactions under the exception contained in [the statute] the other interested party is authorized to give his version."[14] Similarly, the husbands of contestants of a will were held incompetent to testify as to the mental capacity of the decedent to make a will. The court said that the words "personal transaction" include personal contact with and observations of the deceased's conduct, upon which an opinion as to his mental condition was formed.[15] Expressions to the same effect are found in a case in which suit was instituted by the administrator to set aside a deed executed by the decedent, upon the ground of lack of mental capacity. The court permitted the scrivener of the deed and the attesting notary public (not parties to the suit) to testify as to such mental capacity. In fact, their testimony is said to be entitled to peculiar weight.[16] It is submitted that this again demonstrates the fallacy in the reasoning which purports to be the foundation of the statute: the temptation to falsify. Clearly, the scrivener and the notary would not relish admitting that they participated in the execution of a deed by a person whom they believed to be mentally incompetent. Their professional reputations would certainly suffer by such an admis-

[12] Martufi v. Daniels, 99 W. Va. 673, 129 S. E. 709 (1925). See also Hurst's Adm'r v. Hite's Adm'r, 20 W. Va. 183 (1882).

[13] Sayre v. Woodyard, Adm'r, 66 W. Va. 288, 66 S. E. 320 (1909); *cf.* Hollen v. Crim and Peck, *supra* n. 11.

[14] Curtis v. Curtis, 85 W. Va. 37, 41, 100 S. E. 856 (1919).

[15] Freeman v. Freeman, 71 W. Va. 303, 309, 76 S. E. 657, 659 (1912); Anything to the contrary in Hudkins v. Crim, 64 W. Va. 225, 61 S. E. 166 (1908), was overruled.

[16] Dook, Adm'r v. Smith, 93 W. Va. 133, 116 S. E. 691 (1923).

sion, and therefore the motive for false swearing would seem to be equally present.

In an action on behalf of an insane plaintiff, by her next friend, against the heirs of plaintiff's deceased committee, the plaintiff sought to prove that she had rendered services to her committee which had not been credited by him in making his final settlement. The defendants were not permitted to testify that the plaintiff was too weak, mentally and physically, to render services of any value.[17] The court relied again upon the view that opinions as to mental capacity could only be formed as the result of personal contact and observation, constituting "personal transactions" with the plaintiff. *Johnson v. Bee*[18] is an analogous case. The court stated that an opinion as to the genuineness of the handwriting of a deceased person, formed by seeing the deceased person in the *act* of writing, or by means of any other personal transaction, is incompetent. But, if such opinion is formed in other ways, it is competent. Presumably, then, if the interested party were, for example, a bank teller whose familiarity with the decedent's signature was formed as the result of examining checks or other instruments, he could testify. It is difficult to perceive why this perhaps less reliable opinion should be favored, since the temptation to falsification is present in both cases, and (if a legitimate basis for the rule) should be determined by that temptation rather than by reference to the nature of the witness' experiences occuring while temptation was absent. However, the same distinction was made in a later case and seems well established.[19]. It is also settled that if, in an action upon a promissory note against the executrix of the deceased maker, the defendant pleads forgery the plaintiff is incompetent to testify how the note came into his possession; or that the signature remained the same up to the time of trial.[20] In such a case it is, of course, possible that the signature of the deceased person might be forged even after his death. Presumably the court would hold this to be a "personal transaction"!

Other cases turn upon the proof of a written instrument, or its discharge. Harsh and unjust results are achieved. Thus, where the plaintiff executed a bond payable to the defendant's testator, and secured by a deed of trust which did not specifically mention

[17] Trowbridge v. Stone's Adm'r, 42 W. Va. 454, 26 S. E. 363 (1896).
[18] Johnson v. Bee, 84 W. Va. 532, 100 S. E. 486 (1919).
[19] Poole v. Beller, 104 W. Va. 547, 140 S. E. 534 (1927).
[20] Hancock v. Snider, 101 W. Va. 535, 133 S. E. 131 (1926).

the bond, but recited an indebtedness in general terms, plaintiff was not permitted to testify that he had paid the bond, secured delivery of it and subsequently lost or destroyed it. An injunction to restrain sale under the deed of trust was denied.[21] A similar holding was later made where it was sought to establish the terms of a lost agreement.[22] In *Davidson, Adm'x v. Browning,*[23] plaintiff sought to recover money due upon a contract of sale made by her decedent with the defendant buyer. The defense was payment. The defendant was permitted to introduce in evidence checks bearing notations "for cattle" and "on a/c", payable to the decedent and cashed by him, signed with the drawer's name, "The Browning Mines, by J. S. Browning", and to testify that he (defendant) paid his own debts with checks signed in that manner.[24]

The statute has been held not to bar testimony in certain types of cases. In *Gilmer's Adm'r v. Baker's Adm'r,*[25] the witness was not a party to the suit, but he and the deceased person had been joint commissioners. The witness' testimony tended to absolve himself from liability. In view of the fact that the witness could not be bound by the decree and that his testimony could not later be used in his own behalf, the court permitted him to testify as to a personal transaction with the decedent. It is submitted that this type of case demonstrates the correct principle: — that "interest" in the outcome of the suit, whether it be that of a party or of a witness, presents equally the temptation. Would it not be preferable to permit all persons to testify, whether parties or not, letting such interest affect the credibility, rather than the competency of the testimony? Under the exception contained in the statute, if a personal representative himself offers evidence of the transaction, the defendant may then give his version, confined to rebuttal, denial or explanation of plaintiff's own testimony. This was applied in a creditor's suit in which the administratrix of one X sought to establish a claim based upon a note executed by the defendant to the testator. The plaintiff introduced a written agreement signed by the defendant and *X*, reciting various items consolidated into the note. The defendant was then permitted to testify "as an explanation of the circumstances surrounding the

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21 Colwell v. Prindle's Adm'r, 11 W. Va. 307 (1877).
22 Robinson v. James, 29 W. Va. 224, 11 S. E. 920 (1886); *cf.* Paxton v. Paxton, 38 W. Va. 616, 18 S. E. 765 (1893).
23 Davidson, Adm'x v. Browning, 73 W. Va. 276, 80 S. E. 363 (1913).
24 See also Swayne v. Riddle, 37 W. Va. 291, 16 S. E. 512 (1892); Patterson v. Martin, 33 W. Va. 494, 10 S. E. 517 (1890).
25 24 W. Va. 72 (1883).

making of the contract."[26] Conversations or other personal transactions had with a deceased agent of a living party are not within the statute.[27] It is submitted that the policy thereof is not subserved by such decisions. The principal is just as clearly at a disadvantage in combating such testimony as is the personal representative of a deceased person. Why should estates be entitled to greater protection against looting than that accorded to the assets of living persons?

It now remains to consider the application of these principles to the settlement of estates of decedents. It is clearly within the possibility of existing provisions of the Code that every estate can be subjected to administration, whether indebted or not, solvent or insolvent.[28] If no suit is brought, claims can be established before a commissioner only if itemized, accompanied by proper vouchers and verified by affidavit. Allowable claims are limited to those evidenced by books of account, note, bond, bill, writing obligatory, judgment, decree, or other evidence of debt.[29] If such instrument be lost, the claim may be established by "proof of the same." Nothing is stated as to what evidence is admissible for such purposes, or whether it was intended to change the rule of *Colwell v. Prindle's Adm'r.*[30] If the claim is contested by counter-affidavit, the "commissioner shall fix a time and place for hearing evidence for and against such claim", but again nothing is said as to the nature of admissible evidence.[31] Off-sets are to be allowed against any claim.[32] Presumably this does not include recoupment. Suppose the defense is failure of consideration, fraud in the procurement, or forgery of the instrument upon which the claim is based: may the claimant testify that he gave value, did not perpetrate a fraud, or commit a forgery? The statute is silent. Yet, if the commissioner does admit such evidence what remedies are available for the correction of the error, if any? Exceptions may be filed to the report before the county court, which may recommit to the commissioner for the taking of new evidence. However, the appeal to the circuit court is "on the record made before the commissioner and the

[26] Janes v. Felton, 99 W. Va. 407, 411, 129 S. E. 482 (1925).
[27] Hains v. Parkersburg, *etc.*, Ry. Co., 75 W. Va. 613, 84 S. E. 923 (1915); Board of Education v. Harvey, 70 W. Va. 480, 74 S. E. 507 (1912); Voss v. King, 33 W. Va. 236, 10 S. E. 402 (1889).
[28] W. VA. REV. CODE (1931) c. 44, art. 1, § 11.
[29] W. VA. REV. CODE (1931) c. 44, art. 2, § 5.
[30] *Supra* n. 21.
[31] W. VA. REV. CODE (1931) c. 44, art. 2, § 6.
[32] W. VA. REV. CODE (1931) c. 44, art. 2, § 10.

county court".[33] And, no right of appeal is given to the Supreme Court.[34] Further, the commissioner may not allow any claim "barred by any statute of limitations."[35] Again, nothing is said as to the effect of a new promise in writing signed by the decedent or his agent, or of an acknowledgment in writing from which a promise may be implied.[36]

Clearly then, the creditor who has some written obligation for the payment of money has an advantage over one whose claim is oral and for the payment of money, or oral or written calling for some other performance. This conclusion is not based upon the requirement of a counter-affidavit. There is reason to believe that it is largely a formality. Nor upon the "right" to a trial by jury, or conversely the "dangers" of the same (depending upon one's point of view). It is believed, however, that the creditor possessing a written obligation for the payment of money should have this advantage. Mere possession is in itself evidence of value given (performance) by the holder. In other cases, proof of performance must be independently established.

One other statutory provision is of interest.[37] An action of trespass on the case may be maintained by or against a personal representative for the taking or carrying away of any goods, or for the waste or destruction of, or damage to, any estate of or by his decedent. While no cases have been found directly deciding the point, it would seem that the decedent might commit great waste or damage to his neighbor's premises, in the presence of the latter, who would be without a remedy unless he had other witnesses, or was able to secure a trial before the death of the trespasser. In view of the unreasonable and unjust results disclosed by the foregoing case study, it is submitted that the statute[38] should be modified, and to that end, the following revision is suggested:

Section 1. No person offered as a witness in any civil action, suit, motion or proceeding (all hereinafter designated "proceeding"), in a court of law or equity, or before any commissioner, shall be excluded by reason of the fact that he is a party, whether

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[33] W. VA. REV. CODE (1931) c. 44, art. 2, §§ 18 and 19.
[34] W. VA. CONST. art. 8, § 3. Query: does proof of claim, if disallowed, bar creditor from action at law? *Cf.* W. VA. REV. CODE (1931) c. 44, art. 2, § 26.
[35] W. VA. REV. CODE (1931) c. 44, art. 2, § 12.
[36] W. VA. REV. CODE (1931) c. 55, art. 2, § 8.
[37] W. VA. REV. CODE (1931) c. 44, art. 1, § 23.
[38] W. VA. REV. CODE (1931) c. 57, art. 3, § 1.

necessary or formal, thereto, except as stated in Sections 2 to 9 hereof.

Section 2. A party to any proceeding mentioned in Section 1 of this Article who is the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of one who at the time of the trial or hearing is dead, or the committee of one who at the time of the trial or hearing is an insane person, shall be designated as the "opposite party".

Section 3. One or more living parties to any proceeding mentioned in Section 1 of this Article, and opposed in interest therein to such opposite party, shall be designated as the "living party".

Section 4. No living party, whether plaintiff or defendant, shall testify against the opposite party as to the formation, existence, performance or discharge of any:

(1) Oral trust, agreement, or contract express or implied, in fact or in law, to which such person then deceased or insane is a party; or

(2) Express trust, agreement or contract in writing of any character to which such person then deceased or insane is a party, not signed by such person or by his agent; or

(3) Express trust, agreement or contract in writing other than for the payment of money, signed by such person then deceased or insane, or by his agent;

Except that in the cases specified in sub-section (3) hereof, such living party may testify in support and corroboration of the testimony of one or more witnesses offered on his behalf and not a party to the proceeding, or if an opposite party, who testifies against his own interest.

Section 5. No living party, whether plaintiff or defendant, may testify against the opposite party as to the formation, existence, performance or discharge of any contract in writing calling for the payment of money and signed by such person then deceased or insane, or by his agent, except upon the following conditions:

(1) If such written contract be not lost or destroyed, it shall be produced in such proceedings.

(2) If such written contract be lost, destroyed or so mutilated that its terms cannot be read, then its production shall be excused if its terms be first established by the testimony of one or more witnesses not a party to the proceeding, or if an opposite party, who testifies against his own interest.

Book accounts, ledgers and other books of regular entry, made up in the usual course of business and at or about the time of the transaction evidenced thereby, shall be considered as a contract in writing within the meaning of this section, although not signed by such person then deceased or insane, or by his agent.

Section 6. No living party, whether plaintiff or defendant, shall testify against the opposite party as to any of the following acts or omissions by such person then deceased or insane:

(1) Forgery of any writing;
(2) Fraud, duress or undue influence;
(3) Failure of consideration;
(4) Any other act or omission which, but for the death or insanity, would have been available to such living party by testimony in his own behalf, as an equitable defense or as a ground for equitable relief, within the provisions of Section 5, Article 5, Chapter 56 of this Code.

Section 7. No living party who is a physician against whom action is instituted under the provisions of Article 7, Chapter 55, of this Code, for causing the death of the decedent, by wrongful act, neglect or default shall testify against the opposite party as to any conversation had with such decedent.

Section 8. If any opposite party, or any witness offered on his behalf shall testify as to any matter as to which the living party is incompetent to testify as specified in Sections 4, 5, 6 and 7, at any stage of the proceedings, then the living party may testify in his own behalf as to such matter. The living party shall, however, be restricted to testimony in rebuttal or contradiction of the testimony offered by or on behalf of the opposite party.

Section 9. If otherwise competent to testify, the husband or wife of a living party shall be permitted to testify in his or her behalf, as the case may be.

The difficulty encountered in drafting a satisfactory statute is that one must attempt to anticipate its application to the entire body of the law. It is obviously impossible to imagine every conceivable situation which may call for its application. It is believed, however, that the statute should proceed upon the principle that the living party should be permitted to testify except in cases where (a) the temptation to falsify is great, and (b) it is unlikely that the opposite party will be able to secure evidence in contradiction thereof. It would seem, therefore, that testimony as to oral trusts, agreements or contracts should be excluded. The same principle

should apply to purported writings which are not signed by the decedent or by his agent. If, however, such instrument is signed, there is a strong probability that it should be enforced, with the additional safeguard that the testimony of the living party be supported and corroborated by that of a disinterested witness. But this restriction is applied only to obligations not for the payment of money. It also believed that a distinction should be made in the case of notes and other obligations calling for the payment of money. The living party should be required to produce the instrument or explain its non-production and introduce by a disinterested witness satisfactory proof of its terms. If this is done, there is little likelihood that the estate will be victimized by false testimony of the living holder of the obligation, even though uncorroborated by any other witness. Mere possession of such an instrument indicates that the holder (a) gave value and (b) that the decedent has not paid or discharged it. In the case of disputed documents, testimony as to the genuineness of the deceased person's signature is usually available to both parties to the litigation. Consequently there would seem to be slight danger in permitting the living party to testify. The same observation applies to proof of mental incapacity of the deceased person to make a will or other instrument.

With reference to proof of forgery, fraud, duress, undue influence, failure of consideration, or other equitable grounds for relief or defense, it is submitted that the living party should not be permitted to testify that he was the victim of any such wrong or omission which is the result of the act of the deceased party. Upon the other hand, if the opposite parties charge that the living party was guilty of any such act or omission, there would seem to be slight danger in permitting the latter to deny this charge by his own testimony. The reason for the distinction lies in the probability of being able to secure evidence. In the latter case, those opposed to the living party will necessarily be upon the affirmative side of the issue and consequently will have evidence to support it; otherwise they would have no reason to raise the point. In the former case, the living party could take the affirmative and there is no assurance that the opposite party would have any evidence with which to make a successful defense.

The statute as proposed abolishes the archaic unity of husband and wife which was the basis for the rule excluding each in behalf of the other. The provision of the present statute is retained, as applied to the testimony of physicians who are defendants in

actions for wrongful death. With this exception, there is no limitation placed upon either the nature or extent of the living party's testimony in such actions.

The phrase "personal transaction" is eliminated for obvious reasons. In a word, the proposed statute purports to place the living party upon the same plane of competency as in other cases where all parties are alive and sane, except in the instances enumerated.

It is further believed that the provisions for waiver should be somewhat liberalized. It is to be supposed that the object of the proceeding is to discover the truth and to guard against falsification. The mere fact that one of the interested parties testifies in his own behalf affords no assurance that the living party will testify truthfully. Yet the present statute apparently proceeds upon such a theory. Therefore, it would seem that the living party should be permitted to testify at least in denial or rebuttal of the testimony of any witness offered by the opposite party. The proposed statute so provides.

It is hoped that the suggestions here made will at least serve as a basis for discussion to the end that proper revision of the existing statute may be made.

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