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Evidence—Deceased Witness-Prior Testimony Admissable in Subsequent Proceeding

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Deceased Witness—Prior Testimony Admissible In Subsequent Proceeding

Section 348 of the Civil Practice Act permits testimony of a deceased witness given at a former action or proceeding to be introduced as evidence in a subsequent action or proceeding as long as it is between the same parties and involves the same subject matter although the action or proceeding may be different.

The Court in *In Re White's Will*[18] was faced with the problem of determining whether evidence given against testatrix in a lunacy proceeding could be used as evidence in a proceeding to contest testatrix's will for lack of testamentary capacity. The majority of the Court (4-3) held that the subject matter was the same in both proceedings, that is, the issue of the mental incompetancy of the testarix. The requirement that the proceedings be between the same parties was met because the present proponent (appellant) of the will was joined as a respondent in the prior lunacy hearing.

The New York statute is an embodiment of the common law rule[19] that testimony of a deceased witness may be given if the parties and issues are the same. This was not an exception to the hearsay rule but rather it did not fall within the proscription of heresay.[20] A reason for the exclusion of hearsay is the inability to bring to the forefront the truth as tested by cross examination.[21] From this it follows that when the issues and the parties are the same, cross examination, would be directed at the same material points, thus should be an adequate test for exposing falsehoods.[22] No longer would there then be a reason for excluding the testimony of a deceased witness in a subsequent trial.

The dissent takes issue with the majority's determination that the subject matter was the same in the lunacy proceeding and in this proceeding to contest the will of the testatrix. The ultimate issue in the lunacy hearing was the incompetency at *that* moment and not one year prior when the will was made although testimony could be introduced as to the individual's condition for a period two years prior to the hearing.[23] Furthermore, the dissent continues, even though one may be incapable of handling his own business affairs because of insanity or lunacy, he still may be capable of devising his property during a lucid interval, or if he is suffering delusions, the will may still be valid if the

18. 2 N.Y.2d 309, 160 N.Y.S.2d 841 (1957).
19. Varnum v. Hart, 47 Hun 18, 25 (N.Y. Sup. Ct. 1888).
20. 5 WIGMORE, EVIDENCE §1370 (3d ed. 1940).
21. Coleman v. Southwick, 9 Johns. 50 (N.Y. 1812); 5 WIGMORE, EVIDENCE §1362 (3d ed. 1940).
22. 5 WIGMORE, EVIDENCE §1386 (3d ed. 1940).
23. N.Y. CIV. PRAC. ACT §1371.

devise is not a product of the delusion.[24] This is true even after the appointment of a committee.[25]

It appears to this writer that the Court of Appeals has adhered to Wigmore's admonitions for liberality[26] in a case not properly calling for the invocation of section 348 of the Civil Practice Act. It is submitted that the *underlying* reason for the necessary admission of this type of testimony is that when the parties and the issue are the same, the motive for cross examination is allegedly the same in both proceedings.[27] In the instant case, although the proponent of the will was a party respondent in the lunacy proceedings, was he moved to cross examine the testimony in regard to the mental incompetency of the testatrix? It might well be that the proponent of the will agreed that the testatrix could not handle her own business affairs and that a committee should have been appointed. This however does not mean that one year prior, when the will was made, that the testatrix was incompetent to so do, nor does it mean that if the testatrix was incompetent that she did not have lucid intervals. There was no evidence that the proponent knew of the will in his favor at the time of the lunacy hearings. There was no motive, or at least not the same type of motive, for the appellant here to cross examine at the first trial. He was not appraised that it was to his interest to attack the testimony. There was no occasion "to inquire into whether . . . [testatrix's inability to handle ordinary affairs of business] . . . had deprived her of testamentary capacity at the time of the inquiry let alone during the previous year."[28] Because the motivations at the two proceedings were different, the opportunity for cross examination at the lunacy proceeding was not really adequate. It therefore should be said that the spirit of section 348 was not met and not as the majority stated that there was an adequate opportunity and the failure to take advantage constituted a waiver.

Per Curiam

Improper Cross-examination—In *Smith v. Majestic Iron Works*,[29] a personal injury action against plaintiff's employer, defense counsel's questioning whether plaintiff had any pains or aches when he cashed his compesation checks was held to constitute reversible error, especially in view of the trial court's failure to instruct the jury that plaintiff would be required to repay such compensation out of any money damages awarded to him.

24. Dobie v. Armstrong, 160 N.Y. 584, 55 N.E. 302 (1899).
25. Wadsworth v. Sharpsteen, 8 N.Y. 388 (1853).
26. 5 WIGMORE, EVIDENCE §1387 (3d ed. 1940).
27. For examples of existing similarity of motivation for cross examination at both trials see, *Shaw v. New York Elevated Ry.*, 187 N.Y. 186, 79 N.E. 984 (1907); *Taft v. Little*, 178 N.Y. 127, 70 N.E. 211 (1904).
28. In Re White's Will, 2 N.Y.2d 309, 321, 160 N.Y.S.2d 841, 851 (1957).
29. 2 N.Y.S.2d 544, 161 N.Y.S.2d 425 (1957).