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Evidence—Per Curiam

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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).