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New York Practice--Evidence--Testimony Given at Lunacy Inquest by Deceased Witnesses Held Inadmissable in Probate Proceedings (Matter of White, 2 N.Y.2d 309 (1957))

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planation.[32] Judge Burke, in *Excelsior Pictures Corp. v. Regents*,[33] maintained that "indecency" was clearly defined, for the purpose of the instant case, by reference to Section 1140b of the Penal Law [34] which makes a misdemeanor any exposition by a person of his private parts in the presence of two or more persons of the opposite sex, whose private parts are similarly exposed. That a term in one statute can satisfy the requirement of a "clearly drawn" statute by reference to an entirely different statute is questionable. In any case, the definition is insufficient as a full definition of "indecent," since, as conceded by Judge Burke, it is applicable only to facts similar to those of the instant case.[35] Since licensing statutes will be subject to close examination by the Supreme Court [36] some revision of the New York statute seems necessary. It is unfortunate, therefore, that Judge Desmond's opinion is not too helpful to the legislators who will be faced with the task of defining and clarifying so nebulous an area.

NEW YORK PRACTICE — EVIDENCE — TESTIMONY GIVEN AT LUNACY INQUEST BY DECEASED WITNESSES HELD ADMISSIBLE IN PROBATE PROCEEDING. — Decedent was declared insane in 1930, approximately nine months after executing a will. When she died in 1952, the will was denied probate on the basis of testimony given by two witnesses at the lunacy proceeding. These two witnesses were themselves deceased at the time of probate, but their prior testimony was admitted under Section 348 of the New York Civil Practice Act.[1] The Court of Appeals, by a divided court, *held* that the testimony

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[32] N.Y. EDUC. LAW § 122a (Supp. 1957) defines those terms previously held unconstitutional (see note 31 *supra*), but gives no definition of "obscene" or "indecent."

[33] 3 N.Y.2d 237, 253, 144 N.E.2d 31, 41 (dissenting opinion).

[34] N.Y. PEN. LAW § 1140b (1951).

[35] Excelsior Pictures Corp. v. Regents, 3 N.Y.2d 237, 253, 144 N.E.2d 31, 41 (1957) (dissenting opinion).

[36] "[A]ssuming that a state may establish a system for the licensing of motion pictures . . . our duty requires us to examine the facts of the refusal of a license in each case to determine whether the principles of the First Amendment have been honored." Burstyn v. Wilson, 343 U.S. 495, 506 (1952) (concurring opinion). See also Times Film Corp. v. Chicago, 244 F.2d 432 (7th Cir.), *rev'd*, — U.S. — (Nov. 12, 1957).

[1] The statute provides that ". . . the testimony of the decedent . . . taken or read in evidence at the former trial or hearing . . . may be given or read in evidence . . . upon any subsequent trial or hearing . . . of the same subject-matter in the same or another action or special proceeding between the same parties to such former trial or hearing, . . . by either party to such subsequent action or special proceeding. . . ." N.Y. CIV. PRAC. ACT § 348.

was properly admitted in the probate proceeding because the parties and subject matter in that proceeding were the same as those in the lunacy inquest. *Matter of White,* 2 N.Y.2d 309, 141 N.E.2d 416 (1957).

The operation of the hearsay rule has usually been suspended in cases of necessity where the evidence offered would otherwise be impossible to obtain,[2] and in cases where there is a high probability that the statement offered is trustworthy.[3] Common instances of testimony admitted under the above rationale include spontaneous declarations,[4] and declarations against interest.[5]

The circumstances surrounding such exceptions to the hearsay rule are deemed sufficient to outweigh the principal objections to the use of hearsay: lack of opportunity to cross-examine the witness, to hear his testimony under oath, or to observe his conduct on the stand.[6] The admission of testimony given in one proceeding at a later proceeding is permitted by common law when the parties and issues are the same in both proceedings.[7] A statute in New York provides for the admission of such prior testimony when the parties and "subject-matter" are the same.[8] All such admissions are, of course, subject to the other normal rules of evidence.[9]

In cases involving such former testimony, some authorities say the requirements of the hearsay rule have been satisfied at the first proceeding.[10] Others feel the admission of former testimony constitutes an exception to, and not a satisfaction of, the hearsay rule.[11]

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[2] United States v. Wescoat, 49 F.2d 193 (4th Cir. 1931); Southern Underwriters v. Boswell, 141 S.W.2d 442 (Tex. Civ. App. 1940), *aff'd,* 138 Tex. 255, 158 S.W.2d 280 (1942).

[3] United States v. Wescoat, note 2 *supra;* Lebrun v. Boston & M.R.R., 83 N.H. 293, 142 Atl. 128 (1928); Raymond v. Shell Oil Co., 165 Ore. 11, 103 P.2d 745 (1940); 5 WIGMORE, EVIDENCE § 1420 (3d ed. 1940).

[4] See, *e.g.,* Froman v. Banquet Barbecue, 284 Mich. 44, 278 N.W. 758 (1938); Rudisill v. Cordes, 333 Pa. 544, 5 A.2d 217 (1939); Collins v. Equitable Life Ins. Co., 122 W. Va. 171, 8 S.E.2d 825 (1940).

[5] See, *e.g.,* Wirthlein v. Mutual Life Ins. Co., 56 F.2d 137 (10th Cir. 1932); Kittredge v. Grannis, 244 N.Y. 168, 155 N.E. 88 (1926); Republic Iron & Steel Co. v. Industrial Comm'n, 302 Ill. 401, 134 N.E. 754 (1922); Rudisill v. Cordes, note 4 *supra.*

[6] See Donnelly v. United States, 228 U.S. 243, 273 (1913); Ellicott v. Pearl, 35 U.S. (10 Pet.) 179 (1836); Appalachian Stave Co. v. Pickard, 266 Ky. 565, 99 S.W.2d 472 (1936); 5 WIGMORE, EVIDENCE § 1362 (3d ed. 1940).

[7] Jackson v. Lawson, 15 Johns. R. 539, 544 (N.Y. Sup. Ct. 1818); RICHARDSON, EVIDENCE § 278 (8th ed. 1955). See Varnum v. Hart, 47 Hun 18, 25 (N.Y. Sup. Ct. Gen. T. 1888), *rev'd on other grounds,* 119 N.Y. 101, 23 N.E. 183 (1890) ("same questions"). *But see* Cohen v. Long Island R.R., 154 App. Div. 603, 139 N.Y. Supp. 887 (1st Dep't 1913) (the cause of action need not be the same in both cases if the same "subject-matter" is involved).

[8] N.Y. CIV. PRAC. ACT § 348.

[9] *Ibid.*

[10] RICHARDSON, EVIDENCE § 275 (8th ed. 1955); 5 WIGMORE, EVIDENCE § 1370 (3d ed. 1940).

[11] George v. Davie, 201 Ark. 470, 145 S.W.2d 729 (1940); MCCORMICK, EVIDENCE § 230 (1954).

It is settled, however, that the opportunity for cross-examination afforded at the first trial need not have been exercised to satisfy the hearsay rule. As long as such opportunity was presented, the requirements of the hearsay rule have been met.[12]

In dealing with the admission of former testimony, the common-law term "identity of issues" has been changed in New York to require only that the "same subject-matter" be involved in both proceedings.[13] The identity of issues has historically been regarded as more important than the requirement of identity of parties.[14] This latter requirement can be relaxed where the parties involved in the two proceedings, while not exactly identical, have the same interest or motive in the conduct and outcome of the proceedings.[15] This similarity of interests is usually found where the evidence of the parties in both cases has the same bearing on, and relation to, the issues presented.[16] A second example of such relaxation is provided where the difference in parties is only nominal. The omission of parties once interested in the testimony will not preclude its use in a later proceeding, provided the parties in the later proceeding are otherwise substantially identical with those in the earlier action.[17]

In the instant case, the majority admitted that the lunacy and probate proceedings had "technically different" purposes. It held, however, that there was no "substantial difference" between them because the decree in either case hinged on the fact of mental incompetency. Therefore it held that the "subject-matter" in both proceedings was sufficiently alike to satisfy the statute. The Court also held the parties to be the same in both proceedings within the purview of the statute and said that an opportunity for cross-examination had been afforded in the first proceeding but had been waived.

The dissent equated the statutory term "subject-matter" with the common-law term "identity of issues." It stressed that the *issues* of testamentary capacity and insanity are not the same and said therefore

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[12] Bradley v. Merick, 91 N.Y. 293 (1883).

[13] N.Y. CODE CIV. PROC. § 830, as amended by Laws of N.Y. 1899, c. 352, forms the basis of New York Civil Practice Act § 348.

[14] *In re* Durant, 80 Conn. 140, 67 Atl. 497 (1907); 5 WIGMORE, EVIDENCE § 1388 (3d ed. 1940).

[15] McCORMICK, EVIDENCE § 232 (1954).

[16] See, *e.g.*, Stephens v. Hoffman, 263 Ill. 197, 104 N.E. 1090 (1914); Industrial Comm'n v. Bartholome, 128 Ohio St. 13, 190 N.E. 193 (1934); Lyon v. Rhode Island Co., 38 R.I. 252, 94 Atl. 893 (1915).

[17] See, *e.g.*, Philadelphia W. & B.R.R. Co. v. Howard, 54 U.S. (13 How.) 512 (1851); Allen v. Chouteau, 102 Mo. 309, 14 S.W. 869 (1890); McCORMICK, EVIDENCE § 232 (1954); 5 WIGMORE, EVIDENCE § 1388. See also Bartlett v. Kansas City Pub. Serv. Co., 349 Mo. 13, 160 S.W.2d 740 (1942), where testimony given by two witnesses in an action brought by a husband for loss of his wife's services was admitted in a later personal injury action brought by the wife against the same defendant, the wife's claim being based on the identical assignment of negligence as the husband's. The court said the testimony was admissible because there was not only an identity of issue in the two cases but also a "complete identity of interest between Mr. Bartlett and his wife."

that the statutory requirement of "same subject-matter" had not been met. Moreover, the dissent reasoned that there was no adequate opportunity for cross-examination in the first proceeding because there was no motive or incentive to examine witnesses on the issue of testamentary capacity. It did not appear that the parties in the lunacy proceeding even knew a will existed. Without a motive to cross-examine, the dissent said, the spirit of the hearsay rule was violated.

The decision is illustrative of the judicial tendency to liberalize the application of the hearsay rule.[18] Implicit in the majority's opinion would seem to be a construction of "subject-matter" that carries a broader meaning than "issue" as used in the dissent. But the limits of the term "subject-matter" are never explained. It would seem that in the absence of any knowledge of the will's existence at the time of the lunacy proceeding, the opportunity afforded to parties who were to become proponents of the will to cross-examine on the question of testamentary capacity was more illusory than real. There could be no effective cross-examination in the absence of any motive which could give a purposeful direction to the questioning.[19]

The relevancy of such questioning would also be open to objection.[20] Nor does the statement of the Court that the decrees in lunacy and probate proceedings both ". . . depend on the fact of mental incompetency . . ." [21] make the issues identical. A lunacy proceeding is constituted to ". . . inform the conscience of the court as to a particular fact, for a special purpose . . . ," [22] *i.e.*, does mental incapacity to manage himself or his affairs exist.[23] A person may be

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[18] See United States v. Wescoat, 49 F.2d 193, 196 (4th Cir. 1931); Standard Oil Co. v. Johnson, 299 Fed. 93, 98 (1st Cir. 1924); MCCORMICK, EVIDENCE § 238 (1954). In this connection it is interesting to note Matter of First Nat'l Bank & Trust Co., 198 Misc. 919, 103 N.Y.S.2d 491 (Surr. Ct.), *aff'd mem.*, 277 App. Div. 1158, 101 N.Y.S.2d 1018 (4th Dep't 1950), which foreshadowed the *White* case. The court there denied a motion made pursuant to § 295 of the Civil Practice Act, to perpetuate testimony given in a lunacy proceeding by two witnesses of advanced age. A will contest was anticipated upon the death of the lunatic who had executed a will prior to the lunacy inquest. In denying the motion, the court made no mention of the possibility that such testimony would be admissible in the probate proceeding under § 348 of the Civil Practice Act.

[19] *Cf.* UNIFORM RULES OF EVIDENCE, Rule 63(3), which states that testimony given in a prior proceeding is admissible in a subsequent action when ". . . the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an *interest and motive* similar to that which the adverse party has in the action in which the testimony is offered. . . ." (emphasis added). On the importance of motive in cross-examination generally, see MCCORMICK, EVIDENCE § 233 (1954); 5 WIGMORE, EVIDENCE § 1386 (3d ed. 1940).

[20] See N.Y. CIV. PRAC. ACT § 1371 (which states that a lunacy proceeding is confined to the issue of sanity *at that time*).

[21] Matter of White, 2 N.Y.2d 309, 313, 141 N.E.2d 416, 418 (1957).

[22] Hughes v. Jones, 116 N.Y. 67, 77, 22 N.E. 446, 449 (1889).

[23] See N.Y. CIV. PRAC. ACT § 1356 which extends the jurisdiction of the Supreme Court ". . . to the custody of the person and the care of the property

incapable of managing himself or his affairs and still have the ability to execute a valid will.[24]

An adjudication of insanity is not regarded as a conclusive finding of testamentary incapacity,[25] raising instead only a presumption to that effect.[26] It is difficult to see how this could be possible if there were not some fundamental difference in issue between mental incompetency and the ability to make a valid will.

The decision in the instant case opens the way to the introduction of collateral issues into insanity proceedings. Since the testimony offered as to a person's sanity at the time of a lunacy inquest may later be introduced in a probate proceeding, relatives of the testator will certainly have a *motive* to cross-examine witnesses on the issue of testamentary capacity at a lunacy inquest. Whether they can do so and stay within the rules of relevancy is questionable.[27] Whether they can do so intelligently so as to protect their interests is highly dubious. Without knowing the terms of the will, or whether a will even exists, ignorance of the facts may prevent prospective beneficiaries from adequately protecting their interests.

Existing discovery statutes [28] would not permit them to look for a will. Legislation to allow discovery of a will in lunacy proceedings would be in accord with the purposes of discovery statutes [29] but may be in conflict with a person's privilege of keeping his testamentary intentions private. To fulfill the purpose of such an enactment, the will would have to be opened before the testator had actually been declared insane. However, since the legislature has full power to regulate the testamentary privilege,[30] this conflict could easily be overcome.

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of a person incompetent to manage himself or his affairs in consequence of lunacy. . . ." *Ibid.*

[24] See Keely v. Moore, 196 U.S. 38 (1904); Lucas v. Parsons, 27 Ga. 593 (1859); Lewandowski v. Zuzak, 305 Ill. 612, 137 N.E. 500 (1922); McLoughlin v. Sheehan, 250 Mass. 132, 145 N.E. 259 (1924); *In re* Draper's Estate, 215 Pa. 314, 64 Atl. 520 (1906); Tate v. Chumbley, 190 Va. 480, 57 S.E.2d 151 (1950).

[25] Keely v. Moore, note 24 *supra;* Matter of Charap, 4 M.2d 627, 140 N.Y.S.2d 92 (Surr. Ct.), *aff'd mem.,* 286 App. Div. 1000, 145 N.Y.S.2d 311 (1st Dep't 1955); *In re* Drapers Estate, note 24 *supra;* Western State Hospital v. Wininger, 196 Va. 300, 83 S.E.2d 446 (1954); *cf.* Wadsworth v. Sharpsteen, 8 N.Y. 388, 396 (1853).

[26] Matter of Widmayer, 74 App. Div. 336, 77 N.Y. Supp. 663 (1st Dep't 1902); Matter of Coe, 47 App. Div. 177, 62 N.Y. Supp. 376 (3d Dep't 1900); Matter of Rice, 173 Misc. 1038, 19 N.Y.S.2d 602 (Surr. Ct. 1940).

[27] N.Y. Civ. Prac. Act § 1371.

[28] N.Y. Civ. Prac. Act §§ 1377-a, 1377-b; N.Y. Surr. Ct. Act § 137.

[29] See Matter of Johnson, 253 App. Div. 698, 3 N.Y.S.2d 837 (2d Dep't 1938).

[30] Irving Trust Co. v. Day, 314 U.S. 556 (1942); Rubin v. Irving Trust Co., 305 N.Y. 288, 113 N.E.2d 424 (1953); Matter of del Drago, 287 N.Y. 61, 38 N.E.2d 131 (1941), *rev'd on other grounds sub nom.* Riggs v. del Drago, 317 U.S. 95 (1942); Matter of Hills, 264 N.Y. 349, 191 N.E. 12 (1934).

Perhaps the most significant problem raised by the present case is the interpretation to be given the words "subject-matter." If "subject-matter," as used in the statute, has a broader meaning than "issue," as used in the common law, possible applications of the statute are proportionately increased. The relation of lunacy proceedings to probate proceedings is only one aspect of the problem. The relations between other actions which may at first blush seem to be distinctly different in "issue" may be similar in "subject-matter" and testimony may be carried over from one to the other. The exact content and limits to be given "subject-matter" will, however, have to await further judicial pronouncements.

STATUTE OF LIMITATIONS — SECTION 21 OF NEW YORK CIVIL PRACTICE ACT HELD APPLICABLE TO SUSPEND TWO-YEAR PERIOD OF LIMITATIONS IN WRONGFUL DEATH ACTION.—Plaintiff-administratrix brought a wrongful death action against defendant-administrator two years and nine months after the death of plaintiff's intestate. Defendant claimed that the two-year period of limitation under Section 130 of the New York Decedent Estate Law was a bar to the action. Plaintiff relied upon Section 21 of the New York Civil Practice Act which provides that in the case of the death of a person who would have been liable if he had lived, a period of eighteen months is not a part of the period of limitation for the commencement of an action against his executor or administrator. The Appellate Division *held* that Section 21 was applicable and suspended the running of the statute of limitations for eighteen months. *McDonough v. Cestare,* 3 A.D.2d 201, 159 N.Y.S.2d 616 (2d Dep't 1957).*

When the legislature, which has the power to create a new right otherwise unknown to the law, does so, and in the statute of creation imposes a limitation, such limitation is part of the grant of power. The time within which such action may be instituted is subject to such limitation and to no other limitation.[1] A contrary view holds that the problem is basically one of statutory construction and the fact that the limitation is contained in the statute of creation is but *one* factor to consider in interpreting the legislative intent.[2]

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* *Motion for leave to appeal denied,* 3 A.D.2d 861, 163 N.Y.S.2d 376 (2d Dep't 1957).

[1] Engel v. Davenport, 271 U.S. 33 (1926); The Harrisburg, 119 U.S. 199 (1886); Cimo v. New York, 306 N.Y. 143, 116 N.E.2d 290 (1953); Gatti Paper Stock Corp. v. Erie R.R., 247 App. Div. 45, 268 N.Y. Supp. 669 (1st Dep't), *aff'd mem.,* 272 N.Y. 535, 4 N.E.2d 724 (1936).

[2] ". . . [T]he fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a