NY CLS CPLR R 4517

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Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 45 Evidence (§§ 4501 — 4551)

R 4517. Prior testimony in a civil action

(a) Impeachment of witnesses; parties; unavailable witness. In a civil action, at the trial or upon the hearing of a motion or an interlocutory proceeding, all or any part of the testimony of a witness that was taken at a prior trial in the same action or at a prior trial involving the same parties or their representatives and arising from the same subject matter, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions:

1. any such testimony may be used by any party for the purpose of contradicting or impeaching the testimony of the same witness;

2. the prior trial testimony of a party or of any person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member, employee, or managing or authorized agent of a party, may be used for any purpose by any party who is adversely interested when the prior testimony is offered in evidence;

3. the prior trial testimony of any person may be used by any party for any purpose against any other party, provided the court finds:

(i) that the witness is dead; or

(ii) that the witness is at a greater distance than one hundred miles from the place of trial or is out of the state, unless it appears that the absence of the witness was procured by the party offering the testimony; or

(iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(iv) that the party offering the testimony has been unable to procure the attendance of the witness by diligent efforts; or

(v) upon motion on notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court;

4. the prior trial testimony of a person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances subject to the right of any party to move for preclusion upon the ground that admission of the prior testimony would be prejudicial under the circumstances.

(b) Use of part of the prior trial testimony of a witness. If only part of the prior trial testimony of a witness is read at the trial by a party, any other party may read any other part of the prior testimony of that witness that ought in fairness to be considered in connection with the part read.

(c) Substitution of parties; prior actions. Substitution of parties does not affect the right to use testimony previously taken at trial.

History

Add, L 2000, ch 268, § 1, eff Jan 1, 2001.

Annotations

Notes

Prior Law:

Former § 4517, add as § 4517, L 1962, ch 308; redesignated as Rule 4517, L 1962, ch 315, § 1; amd by Jud Conference; repealed, L 2000, ch 268, § 1, eff Jan 1, 2001 (see 2000 note below).

Earlier statutes: CPA § 348; CCP § 830.

Editor's Notes:

Laws 2000, ch 268, § 2, eff Jan 1, 2001, provides as follows:

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law, and shall apply to actions in which trial commences on or after such date.

2000 Recommendations of the Advisory Committee on Civil Practice:

The Committee recommends that CPLR 4517 be amended to permit the use at trial of the prior trial testimony of: (1) a party, (2) any person who was a party when the testimony was given, or (3) any person who at the time the testimony was given was an officer, director, member, employee, or managing or authorized agent of a party. Such testimony could be used for any purpose by any party who is adversely interested when the prior testimony is offered in evidence.

Where an action is being re-tried for whatever reason, current CPLR 4517 allows testimony taken at the prior trial to be used only in very narrow circumstances. Basically, the prior trial testimony of a witness may be admitted only on the grounds of "true" unavailability of the witness (e.g., death, inability to find the witness, unprocured absence from the jurisdiction).

By contrast, current CPLR 3117 allows prior deposition testimony taken in the action to be admitted in two additional circumstances: 1) unavailability of the witness (e.g., infirmity, distance of more than a hundred miles from the courthouse, witness is a medical doctor), and 2) where

the deposition testimony was by a party (or by the party's agent or employee) and is introduced against the party.

Thus, under our current rules, deposition testimony is more broadly admissible in evidence than is testimony initially taken at a prior trial in the action. This is precisely the opposite of what one might expect.

In sharp contrast to testimony elicited at a trial, deposition testimony often is elicited strictly for informational purposes, and with little or no effort to challenge or impeach the witness. There is no reason why testimony actually given at a prior trial between the parties, necessarily subject to the type of cross-examination available at a trial, should be less admissible than deposition testimony. Yet, that is precisely what CPLR 4517 now provides.

Nor is that the only inconsistency between the way the CPLR treats deposition testimony and the way it treats testimony given at a prior trial. For example, CPLR 3117(b) clearly indicates that one party's use of part of a deposition entitles the other parties to read any other parts thereof "which ought in fairness to be considered in connection with the part read", but current CPLR 4517 does not extend this sensible rule to admission of prior trial testimony. Similarly, CPLR 3117(b) sensibly provides that a party does not vouch for or adopt the testimony of the adversary simply by reading a portion of the adversary's deposition testimony into evidence, whereas CPLR 4517 provides no analogue vis-a-vis use of the adversary's prior trial testimony.

The suggested amendment of CPLR 4517 would, in effect, extend the same rules now applied to admission of deposition testimony to admission or prior trial testimony. The measure has been amended to clarify that it relates only to the use of prior trial testimony in civil proceedings.

Advisory Committee Notes:

This rule is the same as former § 348 with minor language changes designed only to shorten and clarify the provision and with a broadening of the unavailability clause. In view of the latter change the rule has been explicitly restricted to civil actions. The rule for criminal cases, which is broader than the former law but narrower than this rule, remains unchanged. It reads, "where

the defendant has previously been tried upon an indictment or information embracing the same charge, the testimony of any witness who has testified upon such prior trial may be read in evidence upon any subsequent trial of the same indictment or information upon its being satisfactorily shown to the court that the witness is dead or insane, or can not with due diligence be found in the state." Code Crim Proc § 8(3)(d). The wording regarding unavailability is based upon Uniform rules 62(7) and 63(3). The prior testimony exception to the hearsay rule offers the maximum guarantee of trustworthiness since the original statement was made in court, under oath and subject to cross-examination by a party who had the same motive to expose falsehood and inaccuracy as does the opponent in the trial where the testimony is sought to be used. The former statute's distinctions, which recognized that a dead witness was unavailable but that a dying witness was not, and took cognizance of a resident's unavailability if he was outside the state on military service but not if he refused to come back into the state, could be justified only on the ground that they prevented an unscrupulous proponent from arranging to make witnesses unavailable. This result is directly accomplished without any loss of necessary testimony by the provision permitting the judge to exclude prior testimony where the absence of the witness is due to the proponent's procurement or culpable neglect.

The advisory committee decided not to adopt the requirement of Uniform rule 62(7) that the prior testimony be excluded where unavailability is based on absence from the jurisdiction "and the judge finds that the deposition of the declarant could have been taken by the exercise of reasonable diligence and without undue hardship, and that the probable importance of the testimony is such as to justify the expense of taking such deposition." Either side is free to take the deposition if it considers it would be useful. There is no reason to put pressure on a litigant to take a deposition where he believes it probable that the prior testimony will duplicate what can be obtained by a deposition.

The reference to incompetency under the dead man statute in former § 348 is not needed in view of CPLR § 4519 abolishing this incompetency. The word "trial" includes a hearing and special proceeding; "witness" includes a party who testified. The phrase "such testimony,

exhibits and documents proven by oath to have been so previously taken or read in evidence may be so given or read in evidence" is omitted. It repeated the substance of what was previously stated and it was clear that former testimony might have been proved by anyone who heard it, including the stenographer. See McRorie v Monroe, 203 NY 426, 430, 96 NE 724, 725 (1911).

Notes to Decisions

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I. Under CPLR

1. Generally

Former testimony of a deceased witness if it was given under oath, referred to the same subject-matter, and was heard in a tribunal exercising judicial or quasi-judicial functions—not necessarily a court—where the other side was represented and allowed to cross-examine, may be used in a subsequent trial as a common-law exception to the hearsay rule, and the fact that the statute sanctions the admission of testimony previously given in a related “action” or “special proceeding” does not preclude the court from using such testimony under the common-law exception if it complies with these requirements. Fleury v Edwards, 14 N.Y.2d 334, 251 N.Y.S.2d 647, 200 N.E.2d 550, 1964 N.Y. LEXIS 980 (N.Y. 1964).

In Article 78 proceeding to compel issuance of building permit on amended plans, it was error for Special Term to base its decision on the testimony and exhibits of a prior proceeding in the absence of a stipulation of the parties on the conditions set forth in CPLR 4517. Hewlett Developers, Inc. v Frisina, 20 A.D.2d 820, 248 N.Y.S.2d 702, 1964 N.Y. App. Div. LEXIS 4123 (N.Y. App. Div. 2d Dep't 1964).

In a proceeding to review a determination suspending the petitioner’s license to practice medicine, where it was shown that witnesses were residents of a foreign state, that testimony had been taken at a former trial, which involved the same subject matter where the witness had been cross-examined, and that there was an identity between the petitioner in the instant proceeding and the defendant in the former trial, such testimony is admissible. Zimmerman v

Board of Regents, 31 A.D.2d 560, 294 N.Y.S.2d 435, 1968 N.Y. App. Div. LEXIS 2988 (N.Y. App. Div. 3d Dep't 1968), app. denied, 23 N.Y.2d 647, 1969 N.Y. LEXIS 2205 (N.Y. 1969).

Order committing individual to 6-month jail term for wilful disobeyance of a support order was summarily reversed where the court reporter who stenographically recorded the minutes of the hearing had died and no one was available to read the stenographic record for the purpose of transcribing it for review on appeal. Jennings v Jennings, 41 A.D.2d 972, 344 N.Y.S.2d 376, 1973 N.Y. App. Div. LEXIS 4308 (N.Y. App. Div. 2d Dep't 1973).

Under statute providing that prior testimony of witness who is absent beyond jurisdiction of court may be introduced into evidence in subsequent trial of same subject matter in same or another action between same parties, it was not necessary that any efforts be made to secure attendance of such witnesses where adequate foundation was laid with respect to absence. Buffalo v J. W. Clement Co., 45 A.D.2d 620, 360 N.Y.S.2d 362, 1974 N.Y. App. Div. LEXIS 3751 (N.Y. App. Div. 4th Dep't 1974), app. denied, 35 N.Y.2d 645, 1974 N.Y. LEXIS 2392 (N.Y. 1974), app. dismissed, 36 N.Y.2d 713, 1975 N.Y. LEXIS 2652 (N.Y. 1975).

In action brought against plaintiff’s former business partner to recover damages for fraud, plaintiff’s deposition concerning substance of prior conversation between plaintiff and former business partner was not rendered inadmissible as result of death of such former business partner pending trial, in view of fact that such former business partner was not dead when deposition was taken, but was present and was in fact the examiner. Coexistent with statutory rule for admission of prior testimony is a common-law rule which provides that prime and essential requirement for use of former testimony is that it was given under oath, referred to the same subject matter, and was heard in tribunal where other side was represented and allowed to cross-examine. Rationale for retention of dead man’s statute after barrier forbidding any testimony by interested witness in litigation was dropped is that there is no one who can confront and cross-examine a witness as to conversation with deceased party. Siegel v Waldbaum, 59 A.D.2d 555, 397 N.Y.S.2d 144, 1977 N.Y. App. Div. LEXIS 13345 (N.Y. App. Div. 2d Dep't 1977).

Affidavits of personal knowledge by decedent are inadmissible in subsequent trial because they are self-serving hearsay; affidavits which cannot in any sense be considered “testimony” cannot be admitted under exception for former testimony. Friedman v Sills, 112 A.D.2d 343, 491 N.Y.S.2d 794, 1985 N.Y. App. Div. LEXIS 56482 (N.Y. App. Div. 2d Dep't 1985).

Surrogate did not err in refusing to permit witness to read into evidence his deposition previously taken in conservatorship proceeding involving decedent since (1) CLS CPLR § 3117, which governs use of depositions, does not authorize use of deposition where witness later becomes unavailable due to operation of Dead Man’s Statute, (2) CLS CPLR § 4517, which governs use of former testimony by unavailable witness, only applies to former testimony taken at trial, and (3) common-law rule as to admissibility of former testimony did not apply since, at time deposition was taken, decedent had lacked capacity to handle his own affairs, and thus was unable to be present for confrontation purposes. In re Estate of Mead, 129 A.D.2d 1008, 514 N.Y.S.2d 581, 1987 N.Y. App. Div. LEXIS 45706 (N.Y. App. Div. 4th Dep't), app. denied, 70 N.Y.2d 609, 522 N.Y.S.2d 109, 516 N.E.2d 1222, 1987 N.Y. LEXIS 19312 (N.Y. 1987).

Racing and Wagering Board properly found that petitioner had attempted to commit fraud in connection with breeding and racing based on former testimony of petitioner given under oath to counsel of board and prior sworn testimony of petitioner’s manager; petitioner exercised his Fifth Amendment right not to testify at administrative hearing, and thus his former testimony was admissible. DeBonis v Corbisiero, 155 A.D.2d 299, 547 N.Y.S.2d 274, 1989 N.Y. App. Div. LEXIS 14100 (N.Y. App. Div. 1st Dep't 1989), app. denied, 75 N.Y.2d 709, 556 N.Y.S.2d 247, 555 N.E.2d 619, 1990 N.Y. LEXIS 954 (N.Y. 1990), cert. denied, 496 U.S. 938, 110 S. Ct. 3218, 110 L. Ed. 2d 666, 1990 U.S. LEXIS 3280 (U.S. 1990).

Defendant was not unavailable within meaning of CLS CPLR § 4517, and thus his testimony in previous trial of matter was not allowable into evidence, based on his assertion of his privilege against self-incrimination; under circumstances, defendant was proponent of his own prior testimony, and thus statute was inapplicable. National Hotel Management Corp. v Shelton Towers Assocs., 188 A.D.2d 305, 590 N.Y.S.2d 476, 1992 N.Y. App. Div. LEXIS 13666 (N.Y.

App. Div. 1st Dep't 1992), app. denied, 81 N.Y.2d 706, 597 N.Y.S.2d 937, 613 N.E.2d 969, 1993 N.Y. LEXIS 752 (N.Y. 1993).

In abuse and neglect proceeding, Family Court erred during fact-finding hearing in taking "judicial notice" of testimony of 2 witnesses at prior hearing pursuant to CLS Family Ct Act § 1028 without first determining that they were unavailable. In re Christina A., 216 A.D.2d 928, 629 N.Y.S.2d 553, 1995 N.Y. App. Div. LEXIS 7257 (N.Y. App. Div. 4th Dep't 1995).

It was reversible error for Family Court, during child neglect fact-finding hearing, to grant petitioner's motion, over respondents' objections, to incorporate non-hearsay testimony of witnesses at CLS Family Ct Act § 1028 hearing without first determining that such witnesses were unavailable; since court based its factual findings solely on that prior testimony, error could not be deemed harmless, even though court allowed parties to call witnesses for renewed examination and to present additional evidence and testimony. In re Raymond J., 224 A.D.2d 337, 638 N.Y.S.2d 62, 1996 N.Y. App. Div. LEXIS 1472 (N.Y. App. Div. 1st Dep't 1996).

In personal injury action, affidavit submitted by infant plaintiff in opposition to motion for summary judgment was inadmissible where it was directly contradicted by her prior, sworn testimony at examination before trial. Breland v Flushing YMCA, 245 A.D.2d 410, 666 N.Y.S.2d 473, 1997 N.Y. App. Div. LEXIS 13067 (N.Y. App. Div. 2d Dep't 1997).

Court properly imposed conditions on admission of deposition testimony of incarcerated plaintiff in medical malpractice action where plaintiff's counsel did not show that plaintiff was unavailable to testify, and court stated that it would assist counsel in obtaining plaintiff's presence. Marte v Speaker, 273 A.D.2d 37, 708 N.Y.S.2d 398, 2000 N.Y. App. Div. LEXIS 6320 (N.Y. App. Div. 1st Dep't 2000).

In personal injury action, defendant was properly allowed to read into evidence testimony of witness at first trial, without showing what efforts it made to secure witness's attendance, where (1) at time of second trial, company that had employed injured plaintiff was no longer in business, (2) witness, who injured plaintiff's former supervisor, was not within defendant's

control and was residing in Florida, (3) adequate foundation was laid for witness's absence, (4) neither subject matter nor parties had changed since first trial, and (5) plaintiffs had adequate opportunity to cross-examine witness at first trial. Lopez v Kenmore-Tonawanda Sch. Dist., 275 A.D.2d 894, 713 N.Y.S.2d 607, 2000 N.Y. App. Div. LEXIS 9791 (N.Y. App. Div. 4th Dep't 2000).

Excerpts of a prior criminal trial and the transcript of the sentencing of two companions of an adjudged juvenile delinquent, who was also a parole violator, were within the exception to the hearsay evidence rule in an action by the claimant against the state alleging negligence in the state's failure to supervise the adjudged juvenile delinquent who had been sentenced as an incorrigible and subsequently placed on parole in a position to injure the claimant. Wasserstein v State, 56 Misc. 2d 225, 288 N.Y.S.2d 274, 1968 N.Y. Misc. LEXIS 1648 (N.Y. Ct. Cl. 1968), rev'd, 32 A.D.2d 119, 300 N.Y.S.2d 263, 1969 N.Y. App. Div. LEXIS 3873 (N.Y. App. Div. 3d Dep't 1969).

Report of doctor who testified in earlier divorce action between parties regarding custody of their 2 children was admissible in subsequent Family Court custody proceeding as hearsay exception, since financial inability of wife to pay doctor's requested witness fee and court's inability to compel doctor to testify as to his opinions and recommendations rendered him unavailable for purposes of CLS CPLR § 4517. In child custody proceeding, wife's financial inability to pay demanded witness fee of doctor who examined parties at Family Court's request and court's inability to compel doctor to testify as to his opinions and recommendations, rendered doctor "unavailable" for purposes of CLS CPLR § 4517, but were insufficient basis for allowing admission of doctor's reports into evidence under § 4517, since doctor never testified in any action between parties and was never cross-examined. Palma S. v Carmine S., 134 Misc. 2d 34, 509 N.Y.S.2d 527, 1986 N.Y. Misc. LEXIS 3054 (N.Y. Fam. Ct. 1986).

Nonparty's guilty plea to federal racketeering charges were inadmissible in civil action as declaration against penal interest since his unavailability was not established where defendants made no attempt to depose him in prison and failed to request court to compel his attendance at trial. 2641 Concourse Co. v City University of New York, 135 Misc. 2d 464, 515 N.Y.S.2d 994,

1987 N.Y. Misc. LEXIS 2248 (N.Y. Ct. Cl. 1987), aff'd, 147 A.D.2d 379, 538 N.Y.S.2d 446, 1989 N.Y. App. Div. LEXIS 1754 (N.Y. App. Div. 1st Dep't 1989).

In legal malpractice action, plaintiff would not be permitted to introduce entire transcript of trial of underlying action since defendants had placed on record judicial admission of departure from standard of care in conduct of trial of underlying action, thus obviating need for examination of transcript to establish such departure, and plaintiff failed to establish foundation for introduction of transcript under CLS CPLR § 4517. Alva v Hurley, Fox, Selig, Caprari & Kelleher, 162 Misc. 2d 402, 617 N.Y.S.2d 114, 1994 N.Y. Misc. LEXIS 424 (N.Y. Sup. Ct. 1994).

In CLS Ct C Act § 8-b action by claimant whose rape conviction was vacated following CLS CPL § 440.10 hearing at which criminal complainant recanted her story, transcript of her testimony was properly admitted at subsequent trial in Court of Claims over state's objection, where criminal complainant died just weeks before trial, there was substantial identity of parties, and issue in 2 proceedings was so nearly identical that cross-examination in both instances would normally cover same field. But, Court of Claims properly excluded transcript of testimony of doctor who testified for prosecution in criminal trial and was cross-examined by defense counsel, whose purpose was to suggest that no rape occurred, as claimant sought to use doctor's prior testimony against state, while state's motive (had doctor appeared) would have been to show that rape did in fact occur, and motive and interest to cross-examine are opposite. Morales v State, 183 Misc. 2d 839, 705 N.Y.S.2d 176, 2000 N.Y. Misc. LEXIS 60 (N.Y. Ct. Cl. 2000).

Mother and her infant's motion in limine to bar a city and the city's parks and recreation department from referring to the infant's pretrial deposition during opening statements pursuant to N.Y. C.P.L.R. 3115(a), (d), and 4517(a)(1) lacked merit where the infant's statements could properly be used to impeach her trial testimony in her personal injury action, arising from a fall at a playground; accordingly, the statements could be referred to during the city and parks department's opening statements pursuant to N.Y. C.P.L.R. 4016(a). Carrasquillo v City of New

York, 866 N.Y.S.2d 509, 22 Misc. 3d 171, 240 N.Y.L.J. 92, 2008 N.Y. Misc. LEXIS 6003 (N.Y. Sup. Ct. 2008).

Where an eight-year-old was asked competency questions by a notary public prior to her pretrial deposition rather than by a judge, such that there was no judicial determination made as to the child's competency, the deposition was deemed unsworn and could not be used as direct evidence at trial; it could only be used for impeachment purposes under N.Y. C.P.L.R. 4517(a)(1) as prior inconsistent statements. Carrasquillo v City of New York, 866 N.Y.S.2d 509, 22 Misc. 3d 171, 240 N.Y.L.J. 92, 2008 N.Y. Misc. LEXIS 6003 (N.Y. Sup. Ct. 2008).

Father's claim that the Family Court failed to comply with the provisions of N.Y. C.P.L.R. 4517 was not preserved for appellate review because, although the father asserted that the Family Court erred in taking judicial notice of the transcript of the father's criminal trial, the father placed portions of the transcript into evidence during the father's case-in-chief and failed to object to the law guardian's subsequent request to take judicial notice of the entire document. Ward v Jones, 303 A.D.2d 844, 757 N.Y.S.2d 127, 2003 N.Y. App. Div. LEXIS 2474 (N.Y. App. Div. 3d Dep't 2003).

In a custody and family offense proceeding, the trial court granted petitioner's motion pursuant to CPLR § 4517 to admit the criminal trial transcript of her testimony pertaining to respondent; the related criminal matter was relevant to the family offense and to the visitation proceeding given the negative impact of domestic violence on a child's well-being. D.M. v E.C., 70 Misc. 3d 747, 136 N.Y.S.3d 850, 2020 N.Y. Misc. LEXIS 10214 (N.Y. Sup. Ct. 2020).

Testimony of a since deceased witness on a prior arbitration hearing was inadmissible against stock exchange defendant in a subsequent action, where the exchange was not a party to the arbitration proceeding, made no appearance therein and had no opportunity to cross-examine the witness as to his pertinent testimony. Cowen v New York Stock Exchange, 256 F. Supp. 462, 1966 U.S. Dist. LEXIS 10183 (N.D.N.Y. 1966), aff'd, 371 F.2d 661, 1967 U.S. App. LEXIS 7674 (2d Cir. N.Y. 1967).

II. Under Former Civil Practice Laws

A. In General

2. Generally

The testimony of a deceased witness is competent where the parties to the action in which the testimony was offered were parties to the suit in which it was given, that under the issues in each action the testimony went to a material fact, and that the party against whom the testimony was offered had the same opportunity and the same interest to resort to every test to probe the witness. Morehouse v Morehouse, 41 Hun 146, 3 N.Y. St. 790 (N.Y.); see Miller v Zimer, 6 N.Y. St. 229.

3. Construction with “dead man” statute

After plaintiff had given testimony on the trial as to transactions with C, one of the defendants, but before his examination was completed C died, held, that the death of C did not authorize the striking out of the testimony; but § 399 of Code of Proc. [CPA § 347 (§ 4519 herein)], had no application, as the disqualification depended entirely upon the facts existing when the testimony was given, not upon any change subsequently occurring. Comins v Hetfield, 80 N.Y. 261, 80 N.Y. (N.Y.S.) 261, 1880 N.Y. LEXIS 93 (N.Y. 1880).

Where the committee of an incompetent by stipulation waived the provisions of CPA § 347 (§ 4519 herein), and plaintiff’s testimony as to transactions with the incompetent had been admitted in evidence pursuant to such stipulation, such testimony was admissible in evidence on another trial between the parties after the death of the incompetent and the substitution of his administratrix as defendant. Dean v Halliburton, 241 N.Y. 354, 150 N.E. 141, 241 N.Y. (N.Y.S.) 354, 1925 N.Y. LEXIS 558 (N.Y. 1925), reh'g denied, 242 N.Y. 506, 152 N.E. 403, 242 N.Y. (N.Y.S.) 506, 1926 N.Y. LEXIS 1025 (N.Y. 1926).

In view of CPA § 348 it was not error to permit plaintiff in an action on contract to testify respecting conversations with a defendant concerning an alleged modification of the contract, notwithstanding CPA § 347 (§ 4519 herein), where such defendant died after a former trial of the action and pending the second trial thereof. Fulton v Canno, 200 A.D. 253, 192 N.Y.S. 804, 1922 N.Y. App. Div. LEXIS 8163 (N.Y. App. Div. 1922).

Calling of respondent as witness on first trial in administrator's discovery proceeding held not waiver of CPA § 348 on second trial so as to qualify respondent as witness for self. In re Cohen's Estate, 30 N.Y.S.2d 409, 177 Misc. 304, 1941 N.Y. Misc. LEXIS 2280 (N.Y. Sur. Ct. 1941), aff'd, 263 A.D. 938, 33 N.Y.S.2d 812 (N.Y. App. Div. 1942).

The testimony of a party taken before trial at the instance of his adversary is admissible in his own behalf upon the trial, notwithstanding the decease of such adversary before trial. Rice v Motley, 24 Hun 143 (N.Y.).

When both plaintiff and defendant in an action were examined before trial under a stipulation, and defendant thereafter died and action was continued against his executrix, held, that plaintiff's deposition could be read in evidence of the trial although relating to personal transactions with deceased. McDonald v Woodbury, 30 Hun 35, 65 How. Pr. 226, 1883 N.Y. Misc. LEXIS 148 (N.Y. App. Term June 1, 1883).

4. Actions or proceedings in which section applies

CPA § 348 authorized the reading on a second trial of the testimony of a deceased witness in a criminal action of the testimony taken at the first trial, since the word "action," referred to both civil and criminal actions. People v Elliott, 172 N.Y. 146, 64 N.E. 837, 172 N.Y. (N.Y.S.) 146, 1902 N.Y. LEXIS 660 (N.Y. 1902).

Under CPA § 348 it did not matter that one action was criminal and the other civil provided that issue was so nearly identical that cross-examination on both instances would normally cover

same field. Healy v Rennert, 9 N.Y.2d 202, 213 N.Y.S.2d 44, 173 N.E.2d 777, 1961 N.Y. LEXIS 1442 (N.Y. 1961).

Testimony given in criminal action against defendant for traffic violation by witness, who had been passenger in emergency vehicle driven by plaintiff at time of intersectional collision with defendant's car, and who had since become a nonresident, was admissible in plaintiff's action for injuries sustained in collision since issue was nearly identical and defendant had had ample opportunity to cross-examine witness. Healy v Rennert, 9 N.Y.2d 202, 213 N.Y.S.2d 44, 173 N.E.2d 777, 1961 N.Y. LEXIS 1442 (N.Y. 1961).

Provision that testimony, at a former hearing, of a witness who has since died may be read does not apply to disbarment proceedings. In re Lynch, 227 A.D. 477, 238 N.Y.S. 482, 1930 N.Y. App. Div. LEXIS 12050 (N.Y. App. Div. 1930).

Hearing conducted by Motor Vehicle Bureau to determine whether to suspend or revoke driver's license and registration certificate does not constitute a "prosecution in a court of justice" and is neither an "action" nor a "special proceeding," so that a decedent's testimony at hearing is inadmissible in subsequent negligence action. Fleury v Edwards, 11 A.D.2d 588, 200 N.Y.S.2d 675, 1960 N.Y. App. Div. LEXIS 9943 (N.Y. App. Div. 3d Dep't 1960).

Testimony given by witness before magistrate at hearing on complaint charging the felonious taking of building blocks was admissible in a civil action to recover the value of such blocks. Profitos v Comerma, 158 N.Y.S. 369, 94 Misc. 334, 1916 N.Y. Misc. LEXIS 1047 (N.Y. App. Term 1916).

Administrative Code, authorizing Comptroller of New York city to examine claimant for injuries, did not warrant administratrix of claimant, after his death, to read in evidence his deposition taken by Comptroller. Boschi v New York, 65 N.Y.S.2d 425, 187 Misc. 875, 1946 N.Y. Misc. LEXIS 2842 (N.Y. Sup. Ct. 1946).

Where an inquest was taken by the plaintiff at circuit, the defendant being present, on which the plaintiff was sworn on his own behalf, and the plaintiff recovered judgment thereon and

subsequently died, and afterwards, the defendant having been adjudged an habitual drunkard, his committee procured the inquest and judgment to be opened, and the action proceeded between the original plaintiff's administrator and the defendant as represented by the committee, held, that the original plaintiff's testimony upon the inquest could be read in evidence. Bradley v Mirick, 25 Hun 272 (N.Y.), aff'd, 91 N.Y. 293, 91 N.Y. (N.Y.S.) 293, 1883 N.Y. LEXIS 36 (N.Y. 1883).

Upon the first trial husband of contestant testified; before second trial contestant died. Held, competent upon second trial for contestants to read the minutes of husband's testimony given upon first trial. In re Budlong, 7 N.Y.S. 289, 54 Hun 131, 1889 N.Y. Misc. LEXIS 1054 (N.Y. Sup. Ct. 1889), aff'd, 126 N.Y. 423, 27 N.E. 945, 126 N.Y. (N.Y.S.) 423, 1891 N.Y. LEXIS 1649 (N.Y. 1891).

CPA § 348 included any former trial where evidence was given by a party since deceased which it was subsequently desired to use. Koehler v Scheider, 10 N.Y.S. 101, 1890 N.Y. Misc. LEXIS 1982 (N.Y.C.P. 1890).

5. Application to expert testimony

CPA § 348 applied to the testimony of a deceased expert witness; if the judge presiding at the trial refused over the objection and exception of the party to allow the testimony of the deceased witness to be read, the excepting party did not waive such exception by calling another expert. Wallach v Manhattan E. R. Co., 105 A.D. 422, 94 N.Y.S. 574, 17 N.Y. Ann. Cas. 68, 1905 N.Y. App. Div. LEXIS 2086 (N.Y. App. Div. 1905).

B. Conditions For Use Of Former Testimony

6. Generally

The evidence of a deceased witness given on the trial of an action for damages brought against the original company, might be read on a new trial of the action against the lessee brought in as defendant; it was unnecessary to determine whether CPA § 348, as amended by chap 352 of 1899, permitted the same to be read against a lessee since the common-law rule permitting such evidence to be read as between the original parties or their privies stood in the absence of an express or necessarily implied repeal. Shaw v New York E. R. Co., 187 N.Y. 186, 79 N.E. 984, 187 N.Y. (N.Y.S.) 186, 1907 N.Y. LEXIS 768 (N.Y. 1907).

CPA § 348 did not apply where everything done in the prior action or proceeding was absolutely void because of lack of jurisdiction in the court, and where the objection of want of jurisdiction was raised in such action. Deering v Schreyer, 88 A.D. 457, 85 N.Y.S. 275, 1903 N.Y. App. Div. LEXIS 3175 (N.Y. App. Div. 1903).

Even if common-law rule as to admissibility of decedent’s testimony does survive to some extent, it cannot authorize reception of evidence in contravention of statutory requirement that such testimony must have been given at prior hearing on the merits of a special proceeding. Fleury v Edwards, 11 A.D.2d 588, 200 N.Y.S.2d 675, 1960 N.Y. App. Div. LEXIS 9943 (N.Y. App. Div. 3d Dep't 1960)(testimony of decedent given at Motor Vehicle Bureau hearing was inadmissible in subsequent negligence action).

7. Preliminary proof

Party offering prior testimony must produce proof that the requirements of CPA § 348 have been complied with, and it had to be incorporated in the record and no mere hearsay statement of counsel could furnish a basis for admission of such testimony. New York County Nat'l Bank v Herman, 173 A.D. 814, 160 N.Y.S. 422, 1916 N.Y. App. Div. LEXIS 7654 (N.Y. App. Div. 1916).

Fact that witness had come down from another state and had been given money to return there and was seen at railroad station waiting for a train, was insufficient to show that she was absent from the state a month later. Longacre v Yonkers R. Co., 191 A.D. 770, 182 N.Y.S. 373, 1920 N.Y. App. Div. LEXIS 4807 (N.Y. App. Div. 1920).

Where it was not competently proved that witness was absent from state, no basis was laid for ruling on admissibility of testimony of witness. Turner v Sunshine Taxi Corp., 269 A.D. 997, 58 N.Y.S.2d 422, 1945 N.Y. App. Div. LEXIS 4967 (N.Y. App. Div. 1945).

Any person who is present at a trial and hears the evidence is competent to testify as to what was sworn to by the witnesses, and a ruling sustaining an objection to his testimony upon the sole ground that the stenographer's minutes were the best evidence is reversible error. Weinhandler v Eastern Brewing Co., 92 N.Y.S. 792, 46 Misc. 584, 1905 N.Y. Misc. LEXIS 138 (N.Y. App. Term 1905).

A transcript of a stenographer's minutes, unverified by him, is no evidence at all and is inadmissible to contradict a witness by proof that he testified differently upon a former trial. Jaffe v Pennsylvania R. Co., 97 N.Y.S. 1037, 49 Misc. 520, 1906 N.Y. Misc. LEXIS 618 (N.Y. App. Term 1906).

It must appear that what is offered on the trial is the whole testimony given; that the stenographer's minutes had been taken and written out correctly; it cannot be inferred from settlement of case that testimony stated therein was that of witness and that it contained the whole of witness' testimony. Odell v Solomon, 4 N.Y.S. 440, 55 N.Y. Super. Ct. 410, 1888 N.Y. Misc. LEXIS 1117 (N.Y. Super. Ct. 1888).

CPA § 348 applied to a case where the jury disagreed upon the former trial. A stenographer, who took the party's testimony on the former trial, might read it from his notes. Lawson v Jones, 61 How. Pr. 424, 1881 N.Y. Misc. LEXIS 209 (N.Y.C.P. June 1, 1881).

8. Unavailability of witness

Testimony given in criminal action against defendant for traffic violation by witness, who had been passenger in emergency vehicle driven by plaintiff at time of intersectional collision with defendant's car, and who had since become a nonresident, was admissible in plaintiff's action for injuries sustained in collision since issue was nearly identical and defendant had had ample

opportunity to cross-examine witness. Healy v Rennert, 9 N.Y.2d 202, 213 N.Y.S.2d 44, 173 N.E.2d 777, 1961 N.Y. LEXIS 1442 (N.Y. 1961).

In an action for injuries suffered by plaintiff while engaged in washing a show window of a store owned by defendant corporation and leased to plaintiff's employer, CPA § 348 did not permit the reading of the lessee's testimony given on a prior trial merely because he had become ill and was absent from the State. Fink v 37 West 36th Street Co., 244 A.D. 622, 280 N.Y.S. 269, 1935 N.Y. App. Div. LEXIS 5889 (N.Y. App. Div. 1935).

In action by insurance carrier of decedent's employer to recover amount of compensation award from defendant whose negligence caused decedent's death while in course of employment, testimony of witness, now nonresident, in testatrix's action for negligent death that decedent was injured while on personal errand was admissible in second action where plaintiff introduced in evidence judgment in former action. Travelers Ins. Co. v Stieglitz, 30 N.Y.S.2d 306, 1941 N.Y. Misc. LEXIS 2261 (N.Y. Sup. Ct. 1941).

Where one who testified on the trial of a cause to which he was a party becomes insane and thereby incompetent to testify on a subsequent trial of the same cause, his testimony on the former trial may be read on the subsequent trial. Morehouse v Morehouse, 41 Hun 146, 3 N.Y. St. 790 (N.Y.).

9. Opportunity for cross examination

Under CPA § 348 it did not matter that one action was criminal and the other civil provided that issue was so nearly identical that cross-examination in both instances normally covered same field. Healy v Rennert, 9 N.Y.2d 202, 213 N.Y.S.2d 44, 173 N.E.2d 777, 1961 N.Y. LEXIS 1442 (N.Y. 1961).

Where, pending an adjournment, one of the witnesses whose cross-examination had been interrupted and left incomplete, dies, the testimony of such witness given on the trial is not

admissible. Morley v Castor, 63 A.D. 38, 71 N.Y.S. 363, 1901 N.Y. App. Div. LEXIS 1542 (N.Y. App. Div. 1901).

The right given to read evidence of a witness given on a previous trial and who has since died should be carefully restricted to the extent to which, on the previous trial, a reasonable opportunity to cross-examine the witness was given. Willsen v Metropolitan S. R. Co., 95 A.D. 388, 88 N.Y.S. 597, 1904 N.Y. App. Div. LEXIS 1997 (N.Y. App. Div. 1904).

Cross-examination, or opportunity to do so, by defendant, is condition precedent to admissibility of former testimony of absent witness. Turner v Sunshine Taxi Corp., 269 A.D. 997, 58 N.Y.S.2d 422, 1945 N.Y. App. Div. LEXIS 4967 (N.Y. App. Div. 1945).

Where a party has not had an opportunity to cross-examine a witness for his adversary as fully and as adequately as such party is entitled to, due to the incapacity of the witness to appear for further cross-examination, the testimony of such witness, both on direct and cross-examination, will be stricken out. In re Mezger's Estate, 278 N.Y.S. 669, 154 Misc. 633, 1935 N.Y. Misc. LEXIS 1079 (N.Y. Sur. Ct. 1935).

10. Identity of parties

Under CPA § 348 testimony of a deceased witness given at a former trial or hearing might be received in evidence at a subsequent trial or hearing where the subject matter and the parties were the same. In re White's Will, 2 N.Y.2d 309, 160 N.Y.S.2d 841, 141 N.E.2d 416, 1957 N.Y. LEXIS 1206 (N.Y.), reh'g denied, 2 N.Y.2d 996, 1957 N.Y. LEXIS 1664 (N.Y. 1957).

The requirement of CPA § 348 that subject matter and parties to both litigations had to be the same was to insure that party against whom testimony was offered had adequate opportunity to cross-examine witness. Healy v Rennert, 9 N.Y.2d 202, 213 N.Y.S.2d 44, 173 N.E.2d 777, 1961 N.Y. LEXIS 1442 (N.Y. 1961).

The evidence of a witness, through whom the defendant does not claim, is admissible although taken de bene esse while the witness was on his deathbed, in another action of ejectment

brought by the life tenant of the estate of which plaintiffs are remaindermen against the same defendant; where parties go to an attorney at law intending to draw a given paper, there is a presumption that the document as drawn was of a nature that would accomplish the result desired. Shook v Fox, 126 A.D. 565, 110 N.Y.S. 951, 1908 N.Y. App. Div. LEXIS 3404 (N.Y. App. Div. 1908).

Testimony of witness in action for death at crossing could be read in action by same administrator for the death of a brother or sister in the same accident. Cohen v Long I. R. Co., 154 A.D. 603, 139 N.Y.S. 887, 1913 N.Y. App. Div. LEXIS 4609 (N.Y. App. Div. 1913).

Testimony of deceased witness on former trial can only be read in action between the same parties or their privies. Vail v Craig, 13 N.Y. St. 448.

11. —Individual and representative capacities

Testimony of a deceased witness given in a prior action between the same parties to recover for the same cause might be read in evidence, although the former action was against the defendants individually instead of against them individually and as executors; where the former testimony of a deceased witness was offered under CPA § 348 the other party might exclude so much of the testimony as was inadmissible, although objection was not made at the former trial. Pratt, Hurst & Co. v Tailer, 135 A.D. 1, 119 N.Y.S. 803, 1909 N.Y. App. Div. LEXIS 3891 (N.Y. App. Div. 1909).

The provisions of CPA § 348 which permitted the reading of the testimony of a deceased witness upon any subsequent trial of the same subject matter in the same or another action between the same parties, or which affirmed the right to permit an amendment to correct the name of a defendant from a representative into an individual capacity without according to the latter the rights of a new party, were not intended to do more than liberalize practice in these respects; they did not go to the extent of warranting the inference that a judgment against a person in a representative capacity was a conclusive adjudication of his obligations as an individual. Dodds v McColgan, 211 N.Y.S. 371, 125 Misc. 405, 1925 N.Y. Misc. LEXIS 920 (N.Y.

App. Term 1925), rev'd, 222 A.D. 126, 225 N.Y.S. 609, 1927 N.Y. App. Div. LEXIS 7814 (N.Y. App. Div. 1927).

12. Identity of subject matter

Under CPA § 348 testimony of a deceased witness given at a former trial or hearing might be received in evidence at a subsequent trial or hearing where the subject matter and the parties were the same. In re White's Will, 2 N.Y.2d 309, 160 N.Y.S.2d 841, 141 N.E.2d 416, 1957 N.Y. LEXIS 1206 (N.Y.), reh'g denied, 2 N.Y.2d 996, 1957 N.Y. LEXIS 1664 (N.Y. 1957).

Testimony given at a prior lunacy proceeding by two witnesses, now deceased, on the issue of competency of a decedent who left a will and codicil may properly be admitted in evidence in a probate proceeding. In re White's Will, 2 N.Y.2d 309, 160 N.Y.S.2d 841, 141 N.E.2d 416, 1957 N.Y. LEXIS 1206 (N.Y.), reh'g denied, 2 N.Y.2d 996, 1957 N.Y. LEXIS 1664 (N.Y. 1957).

Under CPA § 348 it did not matter that one action was criminal and the other civil provided that issue was so nearly identical that cross-examination in both instances would normally cover same field. Healy v Rennert, 9 N.Y.2d 202, 213 N.Y.S.2d 44, 173 N.E.2d 777, 1961 N.Y. LEXIS 1442 (N.Y. 1961).

Testimony given in criminal action against defendant for traffic violation by witness, who had been passenger in emergency vehicle driven by plaintiff at time of intersectional collision with defendant’s car, and who had since become a nonresident, was admissible in plaintiff’s action for injuries sustained in collision since issue was nearly identical and defendant had had ample opportunity to cross-examine witness. Healy v Rennert, 9 N.Y.2d 202, 213 N.Y.S.2d 44, 173 N.E.2d 777, 1961 N.Y. LEXIS 1442 (N.Y. 1961).

Plaintiff in an action against the personal representatives of the deceased defendant in a previous action brought by plaintiff is entitled to prove the testimony of such deceased defendant, given at such former trial, on the trial of the later action, where such testimony relates to the same general abstract subject or contractual relation, although the two actions were upon

separate and distinct causes of action arising out of such contractual relation. Hassett v Rathbone, 204 A.D. 229, 198 N.Y.S. 381, 1923 N.Y. App. Div. LEXIS 9448 (N.Y. App. Div. 1923).

In an action to recover damages for an injury, plaintiff's testator was examined in his own behalf before trial. Defendant cross-examined him. While action was pending testator died, and action was brought by her executor to recover damages occasioned to the widow and next of kin by his death. Held, that deposition of deceased taken in first action could not, against defendants' objection, be read in evidence. Murphy v New York C. & H. R. R. Co., 31 Hun 358 (N.Y.).

Not only the parties, but the questions involved must be the same. Varnum v Hart, 47 Hun 18, 14 N.Y. St. 140 (N.Y.), rev'd, 119 N.Y. 101, 23 N.E. 183, 119 N.Y. (N.Y.S.) 101, 1890 N.Y. LEXIS 1064 (N.Y. 1890).

13. Stipulation or admission at former trial

Evidence of a statement by the plaintiff who died after the commencement of the action, made upon the taking of her deposition, that her husband did not support her, is inadmissible. Young v Valentine, 177 N.Y. 347, 69 N.E. 643, 177 N.Y. (N.Y.S.) 347, 1904 N.Y. LEXIS 939 (N.Y. 1904).

Where, on the trial of an action involving an issue between two of the defendants, one of such defendants admits that the other defendant would, if sworn, testify to certain facts, and waives the personal production of such defendant, the admission operates as a stipulation, binding upon the party making it during the continuance of the litigation, and, in the event of the death of the defendant, to whose testimony the admission related, pending a new trial for the action, his executors are entitled to read the testimony upon the new trial; if the defendant, making the stipulation, desires to be relieved therefrom upon the new trial, it is its duty to apply to the court for that relief and show equitable consideration authorizing the court to grant it. Fortunato v Mayor, etc., of New York, 74 A.D. 441, 77 N.Y.S. 575, 1902 N.Y. App. Div. LEXIS 1864 (N.Y. App. Div. 1902), modified, 173 N.Y. 608, 66 N.E. 1109, 173 N.Y. (N.Y.S.) 608, 1903 N.Y. LEXIS 1225 (N.Y. 1903).

Testimony on a former trial as to admissions of mortgagor, testified to in his presence, was admissible in a subsequent trial after mortgagor's death. Staley v Nellis, 188 A.D. 325, 177 N.Y.S. 112, 1919 N.Y. App. Div. LEXIS 7766 (N.Y. App. Div. 1919), aff'd, 231 N.Y. 521, 132 N.E. 872, 231 N.Y. (N.Y.S.) 521, 1921 N.Y. LEXIS 674 (N.Y. 1921).

Defendant's testimony, in former action against her husband on the same items, that she ordered the goods on her own credit was admissible as an admission. Kaht v Frazin, 144 N.Y.S. 644 (N.Y. App. Term 1913).

14. Objection to evidence

Evidence given on a former trial is subject to any objection that may be taken at the time it is read on the subsequent trial. Murphy v McMahon, 179 A.D. 837, 167 N.Y.S. 270, 1917 N.Y. App. Div. LEXIS 8054 (N.Y. App. Div. 1917).

15. Impeachment of former testimony

Where new trial was granted on affidavits as to falsity of testimony of witness, including affidavit of such witness, court did not err on granting the new trial in making it a condition that the testimony of such witness might be read in evidence, but the other party to have the right to impeach it without laying a foundation. Fried v New York, N. H. & H. R. Co., 178 A.D. 309, 165 N.Y.S. 495, 1917 N.Y. App. Div. LEXIS 6493 (N.Y. App. Div. 1917).

Research References & Practice Aids

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6 Rohan, New York Civil Practice: EPTL ¶ 11-2.3, 11-3.1.

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Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 10.14. Using Prior Testimony in Civil Action.

Annotations:

Mode of proof of testimony given at former examination, hearing, or trial. 11 ALR2d 30.

Witness' refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions. 43 ALR3d 1413.

Admissibility of former testimony of nonparty witness, present in jurisdiction, who refuses to testify at subsequent trial without making claim of privilege. 92 ALR3d 1138.

Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification. 29 ALR4th 104.

Former testimony used at subsequent trial as subject to ordinary objections and exceptions. 40 ALR4th 514.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial. 57 ALR4th 1049.

Who is "predecessor in interest" for purposes of Rule 804(b)(1) of Federal Rules of Evidence. 47 ALR Fed 895.

Admissibility of testimony before grand jury of unavailable witness under Rule 804(b)(5), Federal Rules of Evidence, providing for admission of hearsay statement not covered by any specific exception but having equivalent circumstantial guaranties of trustworthiness. 50 ALR Fed 848.

Matthew Bender's New York Checklists:

Checklist for Using Prior Testimony in Civil Action LexisNexis AnswerGuide New York Civil Litigation § 10.13.

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LexisNexis Forms FORM 75-CPLR 4517:1.—Notice of Motion to Use Prior Testimony Pursuant to CPLR 4517(a)(e)(v).

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