NY CLS CPLR § 4519

Current through 2025 released Chapters 1-207

New York

Consolidated Laws Service **>**

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

Article 45 Evidence (§§ 4501 — 4551)

Notice

This section has more than one version with varying effective dates.

§ 4519. Personal transaction or communication between witness and decedent or person with a mental illness.

Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a person with a mental illness, or a person deriving his title or interest from, through or under a deceased person or person with a mental illness, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or person with a mental illness, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the person with a mental illness or deceased person is given in evidence, concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section

by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof. No party or person interested in the event, who is otherwise competent to testify, shall be disqualified from testifying by the possible imposition of costs against him or the award of costs to him. A party or person interested in the event or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be qualified for the purposes of this section, to testify in his own behalf or interest, or in behalf of the party succeeding to his title or interest, to personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate.

Nothing contained in this section, however, shall render a person incompetent to testify as to the facts of an accident or the results therefrom where the proceeding, hearing, defense or cause of action involves a claim of negligence or contributory negligence in an action wherein one or more parties is the representative of a deceased or incompetent person based upon, or by reason of, the operation or ownership of a motor vehicle being operated upon the highways of the state, or the operation or ownership of aircraft being operated in the air space over the state, or the operation or ownership of a vessel on any of the lakes, rivers, streams, canals or other waters of this state, but this provision shall not be construed as permitting testimony as to conversations with the deceased.

History

Add, L 1962, ch 308; amd, L 1963, ch 532, § 22; L 1978, ch 550, § 6, eff July 24, 1978; L 2021, ch 351, § 6, effective August 2, 2021.

Annotations

Notes

Prior Law

Earlier statutes: CPA § 347; CCP § 829.

Advisory Committee Notes

Former CPA § 347 has been continued, with minor language changes, at the suggestion of a substantial number of members of the bar that any change in the “dead man’s statute” required separate and fuller consideration and should not be part of a general practice revision.

Amendment Notes

The 2021 amendment by ch 351, § 6, substituted “person with a mental illness” for “mentally ill person” and similar changes in the section heading and throughout the first sentence of the paragraph.

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I. Under CPLR

1. Generally

Conversations between decedent and parties contesting rights to decedent's lump-sum benefits, excluding life insurance component, payable on decedent's death did not fall within exception to testimonial bar of Dead Man's Statute that relates solely to life insurance proceeds; decedent's assets in his vested retirement plan belonged to him during his lifetime and were sufficiently manageable by him in ways significantly distinct from life insurance assets. Poslock v Teachers' Retirement Bd., 88 N.Y.2d 146, 643 N.Y.S.2d 935, 666 N.E.2d 528, 1996 N.Y. LEXIS 673 (N.Y. 1996).

Dead Man's Statute is device intended to protect decedents' estates from unverifiable outside claims based upon personal transaction or communication with deceased; statute is not applicable where evidence involved consists of affidavits of personal knowledge by decedent himself and not testimony of any transactions or communications with him. 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).

In action in which defendant was declared to have prescriptive easement in driveway along boundary of plaintiffs' land, plaintiff's testimony concerning his 1982 conversation with since-deceased person, in which plaintiff allegedly asserted his rights in driveway and granted that person permission to use it, was proscribed by CLS CPLR § 4519. Allen v Farrell, 266 A.D.2d

857, 698 N.Y.S.2d 186, 1999 N.Y. App. Div. LEXIS 11702 (N.Y. App. Div. 4th Dep't 1999), app. dismissed, 95 N.Y.2d 777, 710 N.Y.S.2d 837, 732 N.E.2d 944, 2000 N.Y. LEXIS 1068 (N.Y. 2000).

In a legal malpractice action against defendants, members of a defunct law firm, a Dead Man's Statute, N.Y. C.P.L.R. 4519, barred deposition testimony of a client's principal concerning actions allegedly taken by a defendant who died before they could give a deposition, because where, as here, N.Y. C.P.L.R. 4519 rendered a witness incompetent, and the witness's testimony inadmissible, the fact that the testimony would fall within an exception to the hearsay rule was simply irrelevant. Wall St. Assocs. v Brodsky, 295 A.D.2d 262, 744 N.Y.S.2d 378, 2002 N.Y. App. Div. LEXIS 6888 (N.Y. App. Div. 1st Dep't 2002).

Where named executor admitted that he had signed and delivered to the decedent promissory notes of at least $40,000 but he claimed that he was not legally obligated to decedent for any money at the time of her death and refused to discuss the matter further, conflict of interest between executor and estate existed rendering named executor ineligible to receive letters on the ground of "improvidence" under SCPA 707, subd 1(e). In re Will of Badore, 73 Misc. 2d 471, 341 N.Y.S.2d 970, 1973 N.Y. Misc. LEXIS 2109 (N.Y. Sur. Ct. 1973).

Hearsay which is admissible as an exception to the hearsay rule should be allowed as a substitute for testimony otherwise barred by the dead-man's statute. D. v D., 79 Misc. 2d 6, 358 N.Y.S.2d 920, 1974 N.Y. Misc. LEXIS 1574 (N.Y. Fam. Ct. 1974).

Fact that pedigree declarations are admissible in a probate proceeding does not mean that the trier of fact must accept them as true; he may give such declarations the weight they warrant, taking into account that the declarant may have some reason for alleging or denying a particular relationship. Will of T., 86 Misc. 2d 452, 382 N.Y.S.2d 916, 1976 N.Y. Misc. LEXIS 2467 (N.Y. Sur. Ct. 1976).

A tape recording made by one who was incompetent to testify under dead man's statute and which purported to record a conversation between the recorder and a deceased person against

whose estate the recording was offered was not admissible on basis of foundation sought to be laid by the recorder, notwithstanding testimony of several persons who purported to identify voice on tape. Tepper v Tannenbaum, 87 Misc. 2d 829, 386 N.Y.S.2d 936, 1976 N.Y. Misc. LEXIS 2315 (N.Y. Sup. Ct. 1976), rev'd, 65 A.D.2d 359, 411 N.Y.S.2d 588, 1978 N.Y. App. Div. LEXIS 13428 (N.Y. App. Div. 1st Dep't 1978).

Where defendant in fraud action suffered from kidney failure and heart disease, and testimony of one of plaintiff corporations' shareholders and/or partners as to dealings with defendant would be precluded under Dead Man's Statute (CLS CPLR § 4519) should defendant die prior to trial, plaintiffs' motion to depose shareholder/partner in advance of trial would be granted; just as testimony of party can be taken by deposition to preserve it should that person die prior to trial, so should it be permitted where death of opposing party would prevent such testimony from being given at trial due to Dead Man's Statute. Sigman-Weiss Consultants, Inc. v Raiff, 149 Misc. 2d 111, 563 N.Y.S.2d 618, 1990 N.Y. Misc. LEXIS 640 (N.Y. Sup. Ct. 1990).

Coguardians of husband's person and property (defendants) were entitled to benefit of CLS CPLR § 4519 in wife's divorce action. Tworkowski v Tworkowski, 181 Misc. 2d 1038, 696 N.Y.S.2d 637, 1999 N.Y. Misc. LEXIS 429 (N.Y. Sup. Ct. 1999).

Summary judgment for co-owners in their claim for possession of sculptures under a written agreement with a decedent sculptor was proper because, inter alia, CPLR 4519 did not bar documentary evidence, and the sculptor's wife conceded in testimony that the signature on the agreement was that of her husband, thus authenticating the document; moreover, and among other evidence, the gift documents to the sculptor's son expressly acknowledged that the art work was co-owned with the co-owners. Given this evidence, which was not barred by CPLR 4519, the co-owners established prima face entitlement to summary judgment, and, in response, the administrator submitted no evidence to create a triable fact issue. Miller v Lu-Whitney, 61 A.D.3d 1043, 876 N.Y.S.2d 211, 2009 N.Y. App. Div. LEXIS 2474 (N.Y. App. Div. 3d Dep't 2009).

Dead man statute does not preclude an adverse party from submitting the deposition of a deceased party which contains admissions against the decedent's interest. Rubin v Kurzman, 436 F. Supp. 1044, 1977 U.S. Dist. LEXIS 15654 (S.D.N.Y. 1977).

If artist's estate asserts New York Dead Man's Statute, CLS CPLR § 4519, at retrial, art dealer will become "unavailable" within meaning of FRE 804(a) to testify about her dealings with deceased artist, making admissible her testimony from first trial about alleged failure of artist to deliver 3 paintings, because Federal Rules of Evidence govern hearsay problems in federal court even when state law supplies rule of decision. Rosenfeld v Basquiat, 866 F. Supp. 790, 1994 U.S. Dist. LEXIS 15662 (S.D.N.Y. 1994).

2. Applicable proceedings

Dead man's statute did not apply to pretrial proceedings and, on motion for summary judgment, did not constitute bar to defendant's president's averments concerning purported personal transactions with decedent wherein latter allegedly orally agreed to include certain obligation of defendant as subject to certain extension and to waive past-due indebtedness for interest on note and on loan receivable. McCain v Manhasset Machine Co., 45 A.D.2d 965, 359 N.Y.S.2d 348, 1974 N.Y. App. Div. LEXIS 4109 (N.Y. App. Div. 2d Dep't 1974).

Suit brought to determine validity of codicils to will was a "special proceeding" subject to provision in dead man's statute that upon trial of special proceeding the testimony of interested witnesses is barred. In re Will of Sheehan, 51 A.D.2d 645, 378 N.Y.S.2d 141, 1976 N.Y. App. Div. LEXIS 10992 (N.Y. App. Div. 4th Dep't 1976).

Formal evidentiary rule embodied in Dead Man's Statute under CLS CPLR § 4519 was inapplicable to proceeding brought by decedent's estranged wife seeking to disinter his body under CLS N-PCL § 1510; thus, decedent's girlfriend, who objected to disinterment, could offer proof of statements made by decedent regarding his burial wishes. In re Estate of Conroy, 138 A.D.2d 212, 530 N.Y.S.2d 653, 1988 N.Y. App. Div. LEXIS 7237 (N.Y. App. Div. 3d Dep't), app.

dismissed, 73 N.Y.2d 810, 537 N.Y.S.2d 497, 534 N.E.2d 335, 1988 N.Y. LEXIS 3379 (N.Y. 1988).

Evidence that would be inadmissible at trial under dead man's statute, CLS CPLR § 4519, may nevertheless be considered in opposition to motion for summary judgment. Pickett v Whipple, 216 A.D.2d 833, 629 N.Y.S.2d 489, 1995 N.Y. App. Div. LEXIS 7456 (N.Y. App. Div. 3d Dep't 1995).

Filiation petition by 25-year-old putative daughter of decedent would be reinstated, and case would be remitted for hearing on issue of whether petition was untimely under CLS Family Ct Act § 517, where (1) such hearing was not "trial of an action or the hearing upon the merits of a special proceeding" under CLS CPLR § 4519, (2) petitioner's mother, whose testimony was offered to prove that decedent had acknowledged petitioner as his daughter, was not "person interested in the event" under § 4519, and (3) to extent that testimony of petitioner and her mother might be pedigree testimony, it was admissible as exception to hearsay rule. Washington v Fields, 281 A.D.2d 552, 722 N.Y.S.2d 247, 2001 N.Y. App. Div. LEXIS 2601 (N.Y. App. Div. 2d Dep't 2001).

At a pretrial examination under CPLR art 31, the testimony of the executrix asserting a personal claim against the decedent's estate was admissible, this section being construed only to prohibit the testimony of a claimant against the estate of a decedent at the trial itself. In re Kelly's Will, 45 Misc. 2d 107, 255 N.Y.S.2d 773, 1964 N.Y. Misc. LEXIS 1258 (N.Y. Sur. Ct. 1964).

While CLS N-PCL § 1510(e) is special proceeding to which hearsay principles and Dead Man's Statute (CLS CPLR § 4519) normally apply, facts that statute not only designates request to court for disinterment as "application," but allows for service of any required notice by mere regular mail, indicates legislative intent to informalize proceeding and relax rules of evidence so as to allow deceased's expressed wish to be buried with her mother to become part of record. Viscomi v McGuire, 169 Misc. 2d 713, 647 N.Y.S.2d 397, 1996 N.Y. Misc. LEXIS 329 (N.Y. Sup. Ct. 1996).

Dead Man's Statute was not applicable in a holdover eviction proceeding because the challenged testimony of the wife of the deceased tenant was not offered against the executor, administrator, or survivor of the deceased tenant, but instead, it was offered against the building owner. 1504 Assoc., L.P. v Wescott, 972 N.Y.S.2d 809, 41 Misc. 3d 6, 2013 N.Y. Misc. LEXIS 3086 (N.Y. App. Term 2013).

Trial court's post-trial decision that testimony from a deceased tenant's wife was not admissible in a holdover eviction proceeding was error and caused the wife prejudice, as it did not afford her a chance to alter her trial strategy. 1504 Assoc., L.P. v Wescott, 972 N.Y.S.2d 809, 41 Misc. 3d 6, 2013 N.Y. Misc. LEXIS 3086 (N.Y. App. Term 2013).

While an attorney was precluded under N.Y. C.P.L.R. § 4519 from testifying regarding an oral authorization from a deceased client to retain funds in escrow to disprove disciplinary charges, § 4519 did not preclude such testimony for the purposes of mitigation with respect to the sanction imposed; a two-year suspension as opposed to disbarment was imposed for violations of N.Y. Comp. Codes R. & Regs. tit. 22, §§ 1200.3(a)(4) and (a)(7) and 1200.46(a). Matter of Zalk, 45 A.D.3d 42, 842 N.Y.S.2d 377, 2007 N.Y. App. Div. LEXIS 9310 (N.Y. App. Div. 1st Dep't 2007), rev'd, 10 N.Y.3d 669, 862 N.Y.S.2d 305, 892 N.E.2d 369, 2008 N.Y. LEXIS 1488 (N.Y. 2008).

Dead Man's Statute, N.Y. C.P.L.R. § 4519, did not apply in a case involving a dispute as to when real property should be transferred pursuant to a trust agreement as the case was a trust proceeding and not a dispute as to the proper disposition of an estate. Matter of Myers, 45 A.D.3d 955, 845 N.Y.S.2d 510, 2007 N.Y. App. Div. LEXIS 10963 (N.Y. App. Div. 3d Dep't 2007).

Under the Dead Man's Statute, a lease containing an option paragraph could remain in evidence because a disinterested witness, a real estate broker, could authenticate the signature of the landlord's deceased predecessor on the lease. The party claiming that a witness is "interested in the event," and therefore precluded from testifying under the Statute, has the burden to prove

that the witness is interested. 25-35 Bridge St. LLC v Excel Automotive Tech Ctr. Inc., 63 Misc. 3d 269, 87 N.Y.S.3d 823, 2018 N.Y. Misc. LEXIS 4893 (N.Y. Sup. Ct. 2018).

While the Dead Man's Statute prohibited the introduction of affidavits or pretrial depositions at trial of persons other than the deceased, since he could not offer a rebuttal, the statute would not be implicated by the admission of the complaint and affidavits sworn to by the decedent while he was alive, since he authored them and while alive could promote his version of the events. 25-35 Bridge St. LLC v Excel Automotive Tech Ctr. Inc., 63 Misc. 3d 269, 87 N.Y.S.3d 823, 2018 N.Y. Misc. LEXIS 4893 (N.Y. Sup. Ct. 2018).

3. Party or person interested in event

Circumstances of interest that may be employed to discredit witness are not confined to financial bases alone; actor in transaction at issue, having motive to shield himself from blame, would be interested witness, even though not a party to the action. At common law, person was incompetent to testify if interested in event, on supposed ground that he or she was unworthy of belief, but for most part and under statute, interest disqualification has been abolished. Coleman v New York City Transit Authority, 37 N.Y.2d 137, 371 N.Y.S.2d 663, 332 N.E.2d 850, 1975 N.Y. LEXIS 1938 (N.Y. 1975).

A trustee attorney, who had issued mortgage participation certificates to a decedent, but who had no pecuniary interest in the outcome of a proceeding concerning the certificates' ownership, was not incompetent as a witness in the action. In re Will of Levinsky, 23 A.D.2d 25, 258 N.Y.S.2d 613, 1965 N.Y. App. Div. LEXIS 4576 (N.Y. App. Div. 2d Dep't 1965).

In an action against the representatives of a deceased tenant of a joint savings account, CPLR § 4519 did not bar the representatives from testifying since their interests were adverse to the party contesting the estate and not adverse to the interests of the deceased. Brezinski v Brezinski, 84 A.D.2d 464, 446 N.Y.S.2d 833, 1982 N.Y. App. Div. LEXIS 14943 (N.Y. App. Div. 4th Dep't 1982).

In a medical malpractice action, plaintiff's wife was properly allowed to testify as to conversations she had had with defendant doctor, who had died in an automobile accident prior to trial, since she was not an interested party for purposes of CPLR § 4519 at the time of trial, in that she had dropped her derivative suit against the doctor. Bechard v Eisinger, 105 A.D.2d 939, 481 N.Y.S.2d 906, 1984 N.Y. App. Div. LEXIS 21043 (N.Y. App. Div. 3d Dep't 1984).

Dead Man's Statute did not foreclose testimony by plaintiff's judgment creditor since he might not be interested witness within meaning of CLS CPLR § 4519 depending on financial status of plaintiff and possible effect of litigation on plaintiff's debt to him. In action by owner of automobile rental business against landlord, who died prior to trial, for malicious prosecution, defamation, prima facie tort, trespass and conversion, Dead Man's Statute did not foreclose testimony by judgment creditor of plaintiff as "person from, through or under whom" plaintiff derived her interest, as action did not concern title to or interest in license to plaintiff from judgment creditor to operate franchise, but instead concerned landlord's alleged misconduct and its effect on franchise. Stay v Horvath, 177 A.D.2d 897, 576 N.Y.S.2d 908, 1991 N.Y. App. Div. LEXIS 15067 (N.Y. App. Div. 3d Dep't 1991).

Testimony of partner regarding purported oral agreement with other deceased partner, providing that in event of either partner's death survivor would be granted first option to purchase share of other, was inadmissible by reason of dead man's statute, CLS CPLR § 4519. Albany Sav. Bank FSB v Seventy-Nine Columbia St., 197 A.D.2d 816, 603 N.Y.S.2d 72, 1993 N.Y. App. Div. LEXIS 10120 (N.Y. App. Div. 3d Dep't 1993).

Testimony of 2 co-executors named in contested will was properly excluded under CLS CPLR § 4519 because of their interest in defending against objectants' allegations regarding their influence over decedent; similarly, testimony concerning purported conversations between decedent and 2 of his children about his estate were properly excluded because decedent's children were "interested" parties within meaning of statute. In re Estate of Schrutt, 206 A.D.2d 851, 615 N.Y.S.2d 204, 1994 N.Y. App. Div. LEXIS 7760 (N.Y. App. Div. 4th Dep't), app. denied, 84 N.Y.2d 810, 621 N.Y.S.2d 519, 645 N.E.2d 1219, 1994 N.Y. LEXIS 4391 (N.Y. 1994).

Test of interest of witness is whether witness will gain or lose by direct legal operation and effect of judgment or that record will be legal evidence for or against witness in some other action. Smith v Kuhn, 221 A.D.2d 620, 634 N.Y.S.2d 167, 1995 N.Y. App. Div. LEXIS 12460 (N.Y. App. Div. 2d Dep't 1995).

Filiation petition by 25-year-old putative daughter of decedent would be reinstated, and case would be remitted for hearing on issue of whether petition was untimely under CLS Family Ct Act § 517, where (1) such hearing was not “trial of an action or the hearing upon the merits of a special proceeding” under CLS CPLR § 4519, (2) petitioner’s mother, whose testimony was offered to prove that decedent had acknowledged petitioner as his daughter, was not “person interested in the event” under § 4519, and (3) to extent that testimony of petitioner and her mother might be pedigree testimony, it was admissible as exception to hearsay rule. Washington v Fields, 281 A.D.2d 552, 722 N.Y.S.2d 247, 2001 N.Y. App. Div. LEXIS 2601 (N.Y. App. Div. 2d Dep't 2001).

Attorney who had worked with decedent in past, as well as decedent’s longtime secretary, were properly allowed to testify regarding decedent’s intent in acquiring and selling property since their respective interests were far too uncertain to bar such testimony. In re Estate of Rosenblum, 284 A.D.2d 820, 727 N.Y.S.2d 193, 2001 N.Y. App. Div. LEXIS 6741 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 604, 735 N.Y.S.2d 493, 760 N.E.2d 1289, 2001 N.Y. LEXIS 3359 (N.Y. 2001).

The Dead Man’s Statute (N.Y. C.P.L.R. 4519) presented no bar to testimony that was not offered against anyone who had derived a property interest from, through, or under the deceased. Cinquemani v Lazio, 37 A.D.3d 882, 829 N.Y.S.2d 265, 2007 N.Y. App. Div. LEXIS 1039 (N.Y. App. Div. 3d Dep't 2007).

Where respondent moved to dismiss petitioners' constructive trust claim premised on his alleged breach of his promises to decedents, the trial court was not precluded from considering statements by an accountant and respondent's sisters because 1) they were not parties,

persons interested in the event, or persons from, through, or under whom petitioners derived their interest; and 2) the issue of the statements' admissibility was premature because this section's bar is not operative until trial. Matter of Thomas, 124 A.D.3d 1235, 1 N.Y.S.3d 598, 2015 N.Y. App. Div. LEXIS 163 (N.Y. App. Div. 4th Dep't 2015).

Because two deponents were defendants at the time they gave deposition testimony, they were interested parties under the Dead Man’s Statute, and as they both testified to transactions or communications with the decedent and sought to offer that testimony against the decedent’s estate, the statute barred admission of their testimony. Grechko v Maimonides Med. Ctr., 175 A.D.3d 1261, 109 N.Y.S.3d 418, 2019 N.Y. App. Div. LEXIS 6474 (N.Y. App. Div. 2d Dep't 2019), vacated, sub. op., 188 A.D.3d 832, 134 N.Y.S.3d 435, 2020 N.Y. App. Div. LEXIS 6749 (N.Y. App. Div. 2d Dep't 2020).

Trial court erred in ruling that deposition testimony of two physicians was admissible under the Dead Man’s Statute, as they were both defendants at the time they gave deposition testimony, making them interested parties under the statute and they both testified to transactions or communications with decedent and sought to offer that testimony against decedent’s estate. Grechko v Maimonides Med. Ctr., 188 A.D.3d 832, 134 N.Y.S.3d 435, 2020 N.Y. App. Div. LEXIS 6749 (N.Y. App. Div. 2d Dep't 2020).

Deposition testimony and affidavits of a cardiologist and hospital were barred by the Dead Man’s Statute, causing triable issues of fact as to whether the cardiologist and hospital had departed from accepted practice by failing to advise decedent patient of the need for immediate emergency treatment since evidence that would have been inadmissible at trial under the Statute could not be relied upon to establish a prima facie entitlement to judgment as a matter of law. Weber v Sharma, 232 A.D.3d 930, 222 N.Y.S.3d 602, 2024 N.Y. App. Div. LEXIS 6368 (N.Y. App. Div. 2d Dep't 2024).

Employees of county do not come within exclusion of dead man’s statute. In re Estate of Andrus, 85 Misc. 2d 1062, 381 N.Y.S.2d 985, 1976 N.Y. Misc. LEXIS 2118 (N.Y. Sur. Ct. 1976).

Where a contract is made for the benefit of a third party, who furnishes no consideration therefor, the third party is deemed to derive his interest in the contract from the promisee and the promisee is incompetent to testify to transactions with the deceased promisor to prove the agreement, even where promise might be said to run directly to the third-party beneficiary. Estate of Isaacs, 86 Misc. 2d 954, 383 N.Y.S.2d 976, 1976 N.Y. Misc. LEXIS 2552 (N.Y. Sur. Ct. 1976).

In proceeding to annul surviving spouse's election to take against decedent's will, CLS CPLR § 4519 (prohibiting testimony by interested parties concerning conversations with deceased) did not preclude friends of decedent and surviving spouse from testifying as to surviving spouse's financial and emotional contributions to marriage, since witnesses were not "interested," and their testimony concerned decedent's state of mind. In re Estate of Henken, 139 Misc. 2d 12, 526 N.Y.S.2d 334, 1988 N.Y. Misc. LEXIS 81 (N.Y. Sur. Ct. 1988), aff'd, 150 A.D.2d 447, 540 N.Y.S.2d 886, 1989 N.Y. App. Div. LEXIS 6466 (N.Y. App. Div. 2d Dep't 1989).

"Dead Man's Statute" (CLS CPLR § 4519) rendered plaintiff incompetent to testify as to transactions and communications he had with defendant corporation's now deceased president since his estate, which still held 50 percent of defendant's stock, would be directly affected by outcome of litigation given that deceased officer held ownership interest in defendant at time of his death, executors of decedent's estate held stock giving it direct pecuniary interest in any judgment affecting stock, and plaintiff sought to bolster his claims against corporation by his own recitation of conversations with decedent. Mark Patterson, Inc. v Bowie ex rel. Certain Underwriters at Lloyd's London, 172 Misc. 2d 1000, 661 N.Y.S.2d 709, 1997 N.Y. Misc. LEXIS 293 (N.Y. Sup. Ct. 1997).

In a case involving a request for specific performance of a stock agreement, certain testimony as to a deceased stockholder's transactions and verbal and written communications with plaintiff stockholder was properly excluded under the Dead Man's Statute, N.Y. C.P.L.R. § 4519, as plaintiff stockholder was an interested party. ROI, Inc. v Hidden Val. Realty Corp., 45 A.D.3d 1010, 845 N.Y.S.2d 848, 2007 N.Y. App. Div. LEXIS 11178 (N.Y. App. Div. 3d Dep't 2007).

4. —Husband or wife

In an action to recover for room, board and care rendered to a decedent, the claimant's husband, who had an interest in the claim for room and board, was incompetent to testify as to transactions with the decedent. However, if the claim had been only for personal care and services rendered by the claimant in which the husband could have had no possible financial interest, then his testimony would have been competent. Application of La Manna, 23 A.D.2d 957, 259 N.Y.S.2d 987, 1965 N.Y. App. Div. LEXIS 4214 (N.Y. App. Div. 4th Dep't 1965).

A sister and her husband were properly precluded from testifying as to purported conversations with a deceased aunt and brother with respect to an alleged constructive trust of shares of stock bequeathed by the aunt to the brother. Payne v Connelly, 32 A.D.2d 693, 299 N.Y.S.2d 1013, 1969 N.Y. App. Div. LEXIS 3958 (N.Y. App. Div. 3d Dep't 1969).

In an action to rescind a deed to real property, wherein the plaintiff was awarded a judgment based on unjust enrichment, testimony by the plaintiff, on the assessment, over objection, that she had given her deceased husband money out of her own funds to pay various bills and that he had then personally paid those bills, fell squarely within the prohibition of CPLR 4519 which bars testimony by the survivor as to personal transactions or communications between such witnesses and the deceased. Yodice v Reilly, 36 A.D.2d 849, 321 N.Y.S.2d 459, 1971 N.Y. App. Div. LEXIS 4257 (N.Y. App. Div. 2d Dep't 1971).

Under CPLR § 4519, it was error to permit codefendant wife to testify on her own behalf in personal representative's action on debt against husband and wife. Slusarczyk v Slusarczyk, 41 A.D.2d 593, 340 N.Y.S.2d 250, 1973 N.Y. App. Div. LEXIS 5306 (N.Y. App. Div. 4th Dep't 1973).

Surrogate's Court did not err in allowing husband of intended donee to testify concerning conversation with decedent in which she told him she intended to give his wife funds from savings account set up jointly with him, where record established that account was set up for convenience and there was no proof that he received any money therefrom, since husband was

not shown to be “person interested in the event,” and spouse of interested party is not necessarily disqualified from testifying against estate under dead man’s statute (CLS CPLR § 4519). Murray v Smith, 155 A.D.2d 963, 547 N.Y.S.2d 774, 1989 N.Y. App. Div. LEXIS 14833 (N.Y. App. Div. 4th Dep't 1989).

Wife in divorce action against mentally ill husband was not party “interested in the event” within meaning of CLS CPLR § 4519 because “event” was trial of her cause of action for constructive abandonment, and issue of whether she was entitled to divorce involved question as to status of marriage; thus, court would overrule objections of husband’s co-guardians to wife’s testimony, but ruling was without prejudice to raising of same objection in trial for equitable distribution. Tworkowski v Tworkowski, 181 Misc. 2d 1038, 696 N.Y.S.2d 637, 1999 N.Y. Misc. LEXIS 429 (N.Y. Sup. Ct. 1999).

Father’s former wife was not an interested person in the father’s claim against a doctor’s estate for N.Y. C.P.L.R. 4519 purposes because any benefit to the children from the lawsuit would not have benefited the former wife, the father’s medical bills did not made the former wife an “interested” person, and the claim that the former wife could have moved to modify the divorce decree if the father won his suit was speculative and inconsistent with divorce law. Tenuto v Lederle Labs., 896 N.Y.S.2d 618, 27 Misc. 3d 506, 2010 N.Y. Misc. LEXIS 317 (N.Y. Sup. Ct. 2010).

5. —Claimants against decedent’s estate, generally

Claimant’s testimony is inadmissible to prove personal services, consisting of cleaning, cooking, laundering and shopping, as performance of decedent’s alleged express agreement to compensate for such services. In re O'Neil's Estate, 20 A.D.2d 741, 246 N.Y.S.2d 892, 1964 N.Y. App. Div. LEXIS 4392 (N.Y. App. Div. 3d Dep't 1964).

In an action to recover for room, board, and care rendered to a decedent, it was error to receive testimony by the claimant as to transactions with the decedent. Application of La Manna, 23 A.D.2d 957, 259 N.Y.S.2d 987, 1965 N.Y. App. Div. LEXIS 4214 (N.Y. App. Div. 4th Dep't 1965).

CPLR 4519 would not bar a claimant-attorney from proving his contribution to services rendered by himself and a deceased attorney to their mutual client, so that claimant could obtain an equitable share of the fees paid by the client from the deceased attorney's estate. Klein v Brussel, 25 A.D.2d 824, 269 N.Y.S.2d 723, 1966 N.Y. App. Div. LEXIS 4286 (N.Y. App. Div. 1st Dep't 1966).

In will contest, testimony of psychiatrist to statements made to him by decedent pertaining to conversation between decedent and his stepbrother did not open the door to the stepbrother, an interested party, to testify with respect to the statements, under the dead man's statute. Will of Kirwan, 55 A.D.2d 582, 390 N.Y.S.2d 2, 1976 N.Y. App. Div. LEXIS 15271 (N.Y. App. Div. 1st Dep't 1976), app. denied, 41 N.Y.2d 807, 1977 N.Y. LEXIS 3120 (N.Y. 1977).

CPLR § 4519 did not operate to bar an attorney from testifying as to his transactions with the decedent in a proceeding in which the attorney was seeking to prove his claims against decedent's estate, since the estate's cross-examination of the attorney as to those transactions operated as a waiver of the statute. In re Estates of Smith, 84 A.D.2d 664, 444 N.Y.S.2d 325, 1981 N.Y. App. Div. LEXIS 15785 (N.Y. App. Div. 3d Dep't 1981).

Plaintiffs were properly barred from testifying about any personal communications or transactions with their deceased brother, including negative testimony or documents as to such communications or transactions, and to extent that plaintiffs were seeking to recover from decedent's estate, his heirs, and assigns, such defendants were proper parties to invoke protection afforded by CLS CPLR § 4519. Endervelt v Slade, 214 A.D.2d 456, 625 N.Y.S.2d 210, 1995 N.Y. App. Div. LEXIS 4454 (N.Y. App. Div. 1st Dep't 1995).

Dead Man's Statute (CLS CPLR § 4519) did not bar infant plaintiff's brother from testifying as to conversation he had with deceased defendant; any general interest that plaintiff's brother might

have had in outcome of case would go to his credibility. Smith v Kuhn, 221 A.D.2d 620, 634 N.Y.S.2d 167, 1995 N.Y. App. Div. LEXIS 12460 (N.Y. App. Div. 2d Dep't 1995).

Respondent's claim that decedent gave him 2 bank books and signed withdrawal slips 2 days before her death and told him to cash them after her funeral, but that these documents were taken away from him by one of decedent's daughters, was properly disallowed pursuant to Dead Man's Statute, where there were no witnesses to respondent's conversation with decedent and he failed to offer extrinsic evidence to support his claim. In re Estate of Lockwood, 234 A.D.2d 782, 651 N.Y.S.2d 224, 1996 N.Y. App. Div. LEXIS 12462 (N.Y. App. Div. 3d Dep't 1996).

Surrogate properly refused to admit manuscripts offered into evidence by objectant to establish lack of testamentary capacity, where objectant could not authenticate manuscripts due to strictures of CLS CPLR § 4519, attorney-executor (who was permitted to testify about circumstances surrounding will) did not waive those strictures by testifying to any transactions between deceased and objectant, and there was no proof that any relevant documents were intentionally destroyed. Will of Warsaski v Spiegel, 258 A.D.2d 379, 685 N.Y.S.2d 684, 1999 N.Y. App. Div. LEXIS 1854 (N.Y. App. Div. 1st Dep't), app. denied, 93 N.Y.2d 810, 694 N.Y.S.2d 632, 716 N.E.2d 697, 1999 N.Y. LEXIS 1384 (N.Y. 1999), cert. denied, 528 U.S. 1066, 120 S. Ct. 625, 145 L. Ed. 2d 518, 1999 U.S. LEXIS 8351 (U.S. 1999).

In medical malpractice action, court correctly applied CLS CPLR § 4519 to preclude plaintiff's testimony concerning his communications and transactions with his former physician, who died before commencement of action and whose estate was defendant where, despite plaintiff's agreement to limit his recovery to proceeds of physician's medical malpractice policy, he was asserting claim "from, through or under" defendant estate's decedent. Barnes v Todd, 285 A.D.2d 373, 728 N.Y.S.2d 450, 2001 N.Y. App. Div. LEXIS 7366 (N.Y. App. Div. 1st Dep't 2001).

Although the Dead Man's Statute (CPLR 4519) does not exclude introduction of tangible evidence in the form of a document by an interested witness, testimony explaining the purpose of the underlying transaction between the decedent and the witness giving rise to the document

falls within the usual exclusions of the statute and is, therefore, inadmissible. Thus, in an action against a decedent's estate to recover attorney's fees under an alleged retainer agreement between plaintiff attorney and the decedent, although plaintiff attorney may as a matter of law introduce into evidence a check signed by the decedent payable to him, testimony as to the purpose thereof or underlying transaction between plaintiff and the deceased is inadmissible. Kiser v Bailey, 92 Misc. 2d 435, 400 N.Y.S.2d 312, 1977 N.Y. Misc. LEXIS 2562 (N.Y. Civ. Ct. 1977).

Plaintiffs, who claimed that deceased, as legal counsel, defrauded themof certain interests, would be prohibited from testifying as to anyaffirmative action taken by deceased concerning personal communication ortransaction with them; further, plaintiffs could not testify as to"negative" facts (matters of which decedent did not inform them) in orderto establish fraud claim against decedent's estate. Endervelt v Slade, 162 Misc. 2d 975, 618 N.Y.S.2d 520, 1994 N.Y. Misc. LEXIS 479 (N.Y. Sup. Ct. 1994), aff'd, 214 A.D.2d 456, 625 N.Y.S.2d 210, 1995 N.Y. App. Div. LEXIS 4454 (N.Y. App. Div. 1st Dep't 1995).

Father's former wife was not an interested person in the father's claim against a doctor's estate for N.Y. C.P.L.R. 4519 purposes because any benefit to the children from the lawsuit would not have benefited the former wife, the father's medical bills did not made the former wife an "interested" person, and the claim that the former wife could have moved to modify the divorce decree if the father won his suit was speculative and inconsistent with divorce law. Tenuto v Lederle Labs., 896 N.Y.S.2d 618, 27 Misc. 3d 506, 2010 N.Y. Misc. LEXIS 317 (N.Y. Sup. Ct. 2010).

Office of Mental Health was entitled to summary judgment as to an administrator's claimed defense under the Dead Man's Statute because the claim presented issues of fact as to the alleged negotiated settlement with the decedent and it was not the court's function to determine the credibility of the conflicting evidence presented. Matter of Miller, 47 Misc. 3d 409, 2 N.Y.S.3d 871, 2015 N.Y. Misc. LEXIS 82 (N.Y. Sur. Ct. 2015).

6. — —Spouse

In a discovery proceeding to compel a widow to turn over three bearer bonds to the executor, testimony by the attorney who drew testator's will that testator told him the bonds had been purchased by testator with his money was inadmissible because it was hearsay and a privileged communication. On the other hand the widow's testimony as to communications between her and testator was inadmissible because she was not a competent witness pursuant to CPLR 4519. In re Estate of Fishman, 32 A.D.2d 1063, 303 N.Y.S.2d 905, 1969 N.Y. App. Div. LEXIS 3272 (N.Y. App. Div. 2d Dep't 1969), aff'd, 27 N.Y.2d 809, 315 N.Y.S.2d 866, 264 N.E.2d 356, 1970 N.Y. LEXIS 1046 (N.Y. 1970)).

In action against wife of plaintiff's deceased uncle, alleging that uncle had agreed to give plaintiff half interest in realty corporation and that defendant was guilty of misconduct in selling corporation following uncle's death, Dead Man's Statute barred plaintiff from testifying about prior communications with uncle since testimony was offered in derogation of interest of uncle's survivor. Kwoh v Delum Builders & Suppliers, Inc., 173 A.D.2d 326, 575 N.Y.S.2d 465, 1991 N.Y. App. Div. LEXIS 7256 (N.Y. App. Div. 1st Dep't 1991).

While decedent's widow may be competent to testify concerning funds that she put in a safe and withdrawal therefrom, her testimony relative to transactions that she had with decedent would be inadmissible, thus, where both she and decedent put funds into and withdrew funds from the safe, she could not prove that the specific amount removed from the safe by the decedent's executors was hers without inadmissible testimony. In re Marri's Estate, 57 Misc. 2d 793, 293 N.Y.S.2d 670, 1968 N.Y. Misc. LEXIS 1191 (N.Y. Sur. Ct. 1968).

Transcript of testimony of deceased husband, given in prior examination before trial of action between husband and wife, in which he admitted that he had not supported his wife, although acknowledging that he had received a copy of family court order requiring him to do so, was admissible in proceeding to enforce support order against decedent's estate as evidence of both an admission and a declaration against interest and its admission was not precluded by the

dead-man's statute. D. v D., 79 Misc. 2d 6, 358 N.Y.S.2d 920, 1974 N.Y. Misc. LEXIS 1574 (N.Y. Fam. Ct. 1974).

Dead man's statute barred receipt of any testimony by surviving wife, who along with her three children made claims against estate of deceased former husband, as to execution and negotiation of letter, which was signed by the wife and former husband and which provided that notwithstanding anything to the contrary in separation agreement the husband would provide for completion of one child's medical school education, would provide for reasonable graduate work for another child and would maintain specified life policy in force and would devise each of the children no less than $50,000. Estate of Isaacs, 86 Misc. 2d 954, 383 N.Y.S.2d 976, 1976 N.Y. Misc. LEXIS 2552 (N.Y. Sur. Ct. 1976).

Widow contending that oral agreement was entered into between her deceased husband and his deceased partner that in addition to whatever any written agreement provided, the widow of the partner passing away first was to be paid the equivalent of the deceased husband's annual salary was the beneficiary of the contract and thus a party interested in the event precluded from testifying by CPLR 4519. Schwerin v Leibowitz, 358 F. Supp. 195, 1973 U.S. Dist. LEXIS 13953 (S.D.N.Y. 1973).

7. — —Executors and administrators

Although an attorney testified in the attorney's own behalf at a disciplinary hearing, the attorney did not testify against the executor, administrator, or survivor of a deceased client; accordingly, the Dead Man's Statute, N.Y. C.P.L.R. 4519, did not apply, and the attorney's testimony should not have been precluded. Matter of Zalk, 10 N.Y.3d 669, 862 N.Y.S.2d 305, 892 N.E.2d 369, 2008 N.Y. LEXIS 1488 (N.Y. 2008).

In will contest executors under prior will were not disqualified as such to testify. In re Will of Potter, 24 A.D.2d 812, 263 N.Y.S.2d 910, 1965 N.Y. App. Div. LEXIS 3125 (N.Y. App. Div. 3d Dep't 1965).

Where petitioner, who commenced proceeding against respondent, decedent's daughter who had been granted power of attorney by her father prior to his death, to discover personal property belonging to decedent nearly two years after petitioner was issued temporary letters of administration c.t.a., did not move to have proceeds paid to estate based upon concession of possession of funds by respondent, which surrogate might have allowed, leaving respondent to assert claims against estate, dead man's statute was applicable when hearings commenced and when respondent was first called as witness. In re Estate of Mastrianni, 55 A.D.2d 784, 389 N.Y.S.2d 914, 1976 N.Y. App. Div. LEXIS 15577 (N.Y. App. Div. 3d Dep't 1976).

In proceeding wherein decedent's daughter, who was one of coexecutrices of estate, sought authorization to pay out of estate the amount allegedly due daughter from decedent for personal services, care, room, board, laundry and transportation, admission of daughter's husband's testimony concerning existence of contractual relationship between daughter and decedent and nature and extent of services performed by daughter was proper insofar as she sought compensation for expenses other than room, but not insofar as she sought payment for providing decedent with place to live, but the error was harmless. Hamar v Isachsen, 58 A.D.2d 988, 397 N.Y.S.2d 485, 1977 N.Y. App. Div. LEXIS 13200 (N.Y. App. Div. 4th Dep't 1977).

In proceeding wherein decedent's daughter, who was one of coexecutrices of estate, sought authorization to pay out of the estate the amount allegedly due daughter from decedent for personal services, care, room, board, laundry and transportation, evidence supported finding that decedent had intended to pay for care she received from daughter and that an implied contractual relationship existed between them. Hamar v Isachsen, 58 A.D.2d 988, 397 N.Y.S.2d 485, 1977 N.Y. App. Div. LEXIS 13200 (N.Y. App. Div. 4th Dep't 1977).

An executor is not a "person interested in the event" and therefore incompetent to testify that he was present when deceased loaned money to defendant, on ground that his commissions would be increased by any recovery by the estate. Manes v Rutkowski, 40 Misc. 2d 644, 243 N.Y.S.2d 207, 1963 N.Y. Misc. LEXIS 1604 (N.Y. Civ. Ct. 1963).

The affidavit of an executor in support of his claim against his testator's estate was refused consideration where he was an incompetent witness. In re Siegel's Will, 44 Misc. 2d 668, 254 N.Y.S.2d 780, 1964 N.Y. Misc. LEXIS 1148 (N.Y. Sur. Ct. 1964), aff'd, 29 A.D.2d 502, 288 N.Y.S.2d 944, 1968 N.Y. App. Div. LEXIS 4237 (N.Y. App. Div. 2d Dep't 1968).

An administratrix, claiming title to real estate by a gift by virtue of an unrecorded deed found in decedent's safe deposit box registered in the joint names of the decedent and the administratrix, is incompetent to testify as to conversations had with the deceased relating to the deed in question. In re Kennedy's Estate, 56 Misc. 2d 1092, 290 N.Y.S.2d 964, 1968 N.Y. Misc. LEXIS 1407 (N.Y. Sur. Ct. 1968), modified, In re Estate of Kennedy, 36 A.D.2d 549, 318 N.Y.S.2d 759, 1971 N.Y. App. Div. LEXIS 4938 (N.Y. App. Div. 3d Dep't 1971).

In action brought by executor on behalf of his deceased father to recover an alleged share of profits earned by defendant executor's ancestor under building maintenance contracts obtained through efforts of plaintiff's decedent, executor, who testified that he and his father would share 50 percent of the profits, was "a party or person interested in the event," within dead man's statute, since he would gain by the direct legal operation and effect of the judgment and the record would be legal evidence for or against him in other actions. Tepper v Tannenbaum, 87 Misc. 2d 829, 386 N.Y.S.2d 936, 1976 N.Y. Misc. LEXIS 2315 (N.Y. Sup. Ct. 1976), rev'd, 65 A.D.2d 359, 411 N.Y.S.2d 588, 1978 N.Y. App. Div. LEXIS 13428 (N.Y. App. Div. 1st Dep't 1978).

8. — —Legatees

In will contest legatees under prior will who received the same legacies under both prior will and the will in contest would not have had the requisite financial gain by defeating the will in contest to become persons "interested in the event" within the meaning of this section and were eligible to testify. In re Will of Potter, 24 A.D.2d 812, 263 N.Y.S.2d 910, 1965 N.Y. App. Div. LEXIS 3125 (N.Y. App. Div. 3d Dep't 1965).

Testimony of witnesses in proceeding commenced for purpose of having codicil admitted to probate was properly excluded where the witnesses stood to either gain or lose as legatees by the direct legal operation and effect of the judgment. In re Will of Sheehan, 51 A.D.2d 645, 378 N.Y.S.2d 141, 1976 N.Y. App. Div. LEXIS 10992 (N.Y. App. Div. 4th Dep't 1976).

In action seeking distribution of decedent's retirement benefits from teachers' retirement system pursuant to designation of beneficiary form allegedly executed by decedent shortly before his death, Dead Man's Statute (CLS CPLR § 4519) barred testimony from plaintiffs, decedent's friends and family, since they were all interested parties in light of claim that designation of beneficiary form named plaintiffs as beneficiaries. However, Dead Man's Statute (CLS CPLR § 4519) did not bar testimony from plaintiffs, decedent's friends and family, even though designation of beneficiary form named plaintiffs as beneficiaries, where life insurance policy had no cash value and could not be invaded during decedent's lifetime. Poslock v Teachers' Retirement Bd. of the Teachers Retirement Sys., 209 A.D.2d 87, 624 N.Y.S.2d 574, 1995 N.Y. App. Div. LEXIS 3623 (N.Y. App. Div. 1st Dep't 1995), aff'd, 88 N.Y.2d 146, 643 N.Y.S.2d 935, 666 N.E.2d 528, 1996 N.Y. LEXIS 673 (N.Y. 1996).

Named beneficiary under 2 wills immediately preceding will executed by decedent in 1990 was "person interested" in outcome within meaning of CLS CPLR § 4519, and thus was properly precluded from testifying as to any personal transactions or communications with decedent despite fact that, without her testimony, respondent might encounter practical difficulties in admitting either prior will to probate should 1990 will fail. In re Estate of Murtlow, 258 A.D.2d 686, 685 N.Y.S.2d 323, 1999 N.Y. App. Div. LEXIS 951 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 814, 697 N.Y.S.2d 562, 719 N.E.2d 923, 1999 N.Y. LEXIS 2172 (N.Y. 1999).

Where the court sustained an objection to the testimony of the attorney-draftsman, who was also a residuary legatee, upon the authority of CPLR § 4519, CPLR § 4503 has no application to that ruling. In re Kindermann's Will, 48 Misc. 2d 607, 265 N.Y.S.2d 538, 1965 N.Y. Misc. LEXIS 1234 (N.Y. Sur. Ct. 1965), aff'd, 27 A.D.2d 856, 278 N.Y.S.2d 546, 1967 N.Y. App. Div. LEXIS 4554 (N.Y. App. Div. 2d Dep't 1967).

Legatees were not competent to testify concerning matters pertaining to execution of codicils in proceeding to determine validity of the codicils, absent valid release of their interests in the estate. In re Estate of Sheehan, 80 Misc. 2d 793, 364 N.Y.S.2d 718, 1975 N.Y. Misc. LEXIS 2264 (N.Y. Sur. Ct. 1975), aff'd, 51 A.D.2d 645, 378 N.Y.S.2d 141, 1976 N.Y. App. Div. LEXIS 10992 (N.Y. App. Div. 4th Dep't 1976).

As to the extent that the terms of a document that the son had prepared and the decedent, his mother, sign could be considered ambiguous the son was not entitled to a hearing to present extrinsic evidence supporting his interpretation of the document because he did not assert that anyone other than himself and the decedent were present during the conversations which resulted in his attorney preparing the document; thus, the son’s testimony would have been barred under N.Y. C.P.L.R. 4519 at trial. In re Estate of Camac, 772 N.Y.S.2d 792, 2 Misc. 3d 894, 2004 N.Y. Misc. LEXIS 5 (N.Y. Sur. Ct. 2004), dismissed, 2004 NYLJ LEXIS 25 (N.Y. Sur. Ct. Jan. 15, 2004).

9. — —Distributees

Executor, by introducing evidence of opening of bank accounts and withdrawals therefrom tending to show that property belonging to estate of decedent was in possession of respondents, does not thereby “open the door” and waive protection of CPLR 4519, allowing respondents to introduce evidence of personal transaction with decedent in order to show proper disposition of such property, since executor can only “open the door” by testifying or forcing another to testify to personal transaction with decedent. In re Estate of Wood, 52 N.Y.2d 139, 436 N.Y.S.2d 850, 418 N.E.2d 365, 1981 N.Y. LEXIS 2112 (N.Y. 1981).

In will contest where there was prior will, heirs at law were capable of testifying under this section where they would have to defeat prior will and codicils thereto in order to benefit. In re Will of Potter, 24 A.D.2d 812, 263 N.Y.S.2d 910, 1965 N.Y. App. Div. LEXIS 3125 (N.Y. App. Div. 3d Dep't 1965).

Pedigree testimony of decedent's alleged issue, in which they stated that decedent openly and notoriously acknowledged them as his own on numerous occasions, was admissible in their wrongful death action as established exception to hearsay rule; defendants' reliance on Dead Man's Statute was misplaced because defendants, as parties not interested in outcome of decedent's estate, could not invoke protections afforded by statute (CLS CPLR § 4519). Lancaster v 46 NYL Partners, 228 A.D.2d 133, 651 N.Y.S.2d 440, 1996 N.Y. App. Div. LEXIS 12417 (N.Y. App. Div. 1st Dep't 1996).

Decedent's declarations to her brother and sister that contestant was her son came within the pedigree exception to the hearsay rule and, hence, evidence of declarations was admissible in probate proceeding to determine whether contestant was, in fact, decedent's son, also, contestant's testimony as to his pedigree was admissible. Will of T., 86 Misc. 2d 452, 382 N.Y.S.2d 916, 1976 N.Y. Misc. LEXIS 2467 (N.Y. Sur. Ct. 1976).

Objectant attempting to establish pedigree of decedent for purposes of being declared decedent's distributee was not barred from testifying as to conversations with decedent, but such evidence was admissible under pedigree exception to hearsay rule. In re Estate of Berlin, 91 Misc. 2d 666, 398 N.Y.S.2d 334, 1977 N.Y. Misc. LEXIS 2385 (N.Y. Sur. Ct. 1977).

An affidavit, stating that a donee-decedent intended to exercise a power of appointment, submitted by a person who would be a beneficiary if it is found that the donee-decedent validly exercised that power, is not only self-serving but also incompetent as evidence. In re Estate of Gilchrist, 95 Misc. 2d 873, 408 N.Y.S.2d 684, 1978 N.Y. Misc. LEXIS 2521 (N.Y. Sur. Ct. 1978).

10. Personal transaction or communication

Dead Man's Statute, N.Y. C.P.L.R. § 4519, would pose no bar to presentation of affidavits setting forth the circumstances surrounding the alleged conversations between a not-for-profit corporation's (NFPC) employees and a testatrix regarding an alleged contract to bequeath to the NFPC the proceeds of the testatrix's cooperative duplex apartment or to the introduction of

testimony consistent with such affidavits at trial as corporate employees were not disqualified from testifying for their employer. Matter of American Comm. for the Weizmann Inst. of Science v Dunn, 10 N.Y.3d 82, 854 N.Y.S.2d 89, 883 N.E.2d 996, 2008 N.Y. LEXIS 223 (N.Y. 2008).

Testator's letter unequivocally creating street easement on his property was admissible under CPLR § 4519, where no testimony was admitted concerning any conduct, communication, or conversation with deceased. Yager Pontiac, Inc. v Fred A. Danker & Sons, Inc., 41 A.D.2d 366, 343 N.Y.S.2d 209, 1973 N.Y. App. Div. LEXIS 4544 (N.Y. App. Div. 3d Dep't 1973), aff'd, 34 N.Y.2d 707, 356 N.Y.S.2d 860, 313 N.E.2d 340, 1974 N.Y. LEXIS 1626 (N.Y. 1974).

In an action to finally settle and allow the accounts of an executrix, a claim for alleged medical and transportation expenses incurred by or on behalf of the deceased was properly denied and the testimony pertaining to the claim was properly excluded pursuant to the Dead Man's Statute, CPLR § 4519, where the testimony concerned a personal transaction between the claimant and the deceased. In re Estate of Regnante, 80 A.D.2d 965, 438 N.Y.S.2d 626, 1981 N.Y. App. Div. LEXIS 10871 (N.Y. App. Div. 3d Dep't 1981).

In action by property owner against neighbor for damages for trespass and for injunction directing neighbor to remove fence, in which plaintiff asserted prescriptive easement and title by adverse possession, neighbor's testimony about his friendship with plaintiff's deceased predecessor-in-title was inadmissible under CLS CPLR § 4519. Boumis v Caetano, 140 A.D.2d 401, 528 N.Y.S.2d 104, 1988 N.Y. App. Div. LEXIS 4976 (N.Y. App. Div. 2d Dep't 1988).

In proceeding by executrix under CLS SCPA § 2103 to recover contents of decedent's home from decedent's nephew by marriage and his wife, who asserted that decedent made inter vivos gift of property to them, Surrogate's Court did not err in admitting nephew's testimony describing his rearrangement, storage, and disposal of decedent's furniture and belongings while he and his wife were residing with decedent, since such descriptions pertained only to acts performed by nephew himself and thus did not violate dead man's rule by referring to transaction between

person since deceased and another person. In re Estate of Tremaine, 156 A.D.2d 862, 549 N.Y.S.2d 857, 1989 N.Y. App. Div. LEXIS 15936 (N.Y. App. Div. 3d Dep't 1989).

Action brought by a father in 2003 to impose a constructive trust on real property originally held with his daughter as tenants in common was time-barred by N.Y. C.P.L.R. 213(8) because the father should have discovered the alleged fraud that the daughter improperly transferred the property to only herself by 1995 at the latest; the daughter's testimony regarding certain events from which the father should have discovered the alleged fraud was not barred by the Dead Man's Statute, N.Y. C.P.L.R. 4519, because although the daughter was an interested party, her testimony did not involve personal transactions or communications that she had with the father but the father's transactions with third parties. Durazinski v Chandler, 41 A.D.3d 918, 837 N.Y.S.2d 775, 2007 N.Y. App. Div. LEXIS 6832 (N.Y. App. Div. 3d Dep't 2007).

In habeas corpus proceeding by maternal great aunt and grandmother for custody of child upon death of natural mother, putative father who had not legally established paternity was permitted to adduce testimony as to acts of intercourse and cohabitation between himself and the decedent; such testimony was not prohibited by CPLR § 4519. People ex rel. Blake v Charger, 76 Misc. 2d 577, 351 N.Y.S.2d 322, 1974 N.Y. Misc. LEXIS 1989 (N.Y. Fam. Ct. 1974).

In holdover proceeding brought under CLS RPAPL § 713 against daughter of deceased tenant who had leased premises under federal section 8 housing assistance law (42 USCS § 1437f), re-certification forms signed by decedent stating that she was sole occupant of apartment and that her social security payments were only source of household income, were not barred by dead man's statute since statements were otherwise admissible, and statute was intended to shield decedent's estates from spurious claims incapable of defense but not to be used as sword to bar competent, genuine and trustworthy documentary evidence. Morrisania II Associates v Harvey, 139 Misc. 2d 651, 527 N.Y.S.2d 954, 1988 N.Y. Misc. LEXIS 175 (N.Y. Civ. Ct. 1988).

Wife of deceased seller was barred by dead man's statute (CLS CPLR § 4519) from testifying as to information she gleaned from observing her husband taking measurements of property in preparation of sketch thereof, since such observations constituted "communication" with deceased under statute. Hadley v Clabeau, 140 Misc. 2d 994, 532 N.Y.S.2d 221, 1988 N.Y. Misc. LEXIS 526 (N.Y. Sup. Ct. 1988), aff'd, 161 A.D.2d 1141, 555 N.Y.S.2d 951, 1990 N.Y. App. Div. LEXIS 9119 (N.Y. App. Div. 4th Dep't 1990).

In a Mental Hygiene Law art. 81 proceeding for the appointment of a guardian for an alleged incapacitated person, there was no basis for barring the testimony of a witness who had business transactions and conversations with respondent pursuant to CPLR 4519, the Dead Man's statute, because there was no evidence that respondent suffered from a mental illness. Matter of Corinne S. (Steven S.), 79 Misc. 3d 777, 188 N.Y.S.3d 905, 2023 N.Y. Misc. LEXIS 2166 (N.Y. Sup. Ct. 2023).

Because a borrower's testimony concerned a personal transaction or communication between the borrower and the deceased lender, it violated N.Y. C.P.L.R. 4519 and was highly prejudicial to the decedent's executrix; therefore, the executrix was properly allowed to set aside the verdict and receive a new trial. Peterson v See, 877 N.Y.S.2d 600, 23 Misc. 3d 1 (Sup App T 2009).

CPLR 4519 excludes the testimony of an interested witness to any knowledge he has gained by use of his senses from personal presence of deceased. Schwerin v Leibowitz, 358 F. Supp. 195, 1973 U.S. Dist. LEXIS 13953 (S.D.N.Y. 1973).

Decedent's estate did not waive dead man's statute, CPLR 4519, as result of executrix's testimony during deposition regarding what decedent had said about genuineness of painting in decedent's possession, and, thus, owner's testimony that she discussed painting with decedent and agreed to give decedent possession on decedent's assurance that she would insure it was barred by statute, where executrix's testimony was elicited on cross-examination in owner's action to recover for loss of painting in fire that killed decedent, and executrix's conversations with decedent did not relate to same personal transaction or communication with decedent upon

which owner relied. Clark v Meyer, 188 F. Supp. 2d 416, 2002 U.S. Dist. LEXIS 3912 (S.D.N.Y. 2002).

11. —Gifts

Buyer was entitled to summary judgment in a dispute over the ownership of a sculpture because the decedent's intent to make transfer of sculpture to a friend, who had sold his interest to the buyer, was clear on the face of the gift instrument, there was no suggestion that the decedent was coerced, and no question about her capacity; thus, the decedent made a valid inter vivos gift of the sculpture to the friend. The Dead Man's Statute created no impediment to the friend's reliance on the presumption of delivery created by his possession of the gift instrument, which was specifically addressed to him, after the decedent's death. Mirvish v Mott, 18 N.Y.3d 510, 942 N.Y.S.2d 404, 965 N.E.2d 906, 2012 N.Y. LEXIS 266 (N.Y. 2012).

Upon proper objection in discovery proceedings as to introduction of party's evidence as to gift of decedent's bank accounts such evidence was properly excluded in subsequent proceeding to discover if party had bank book and checking account information in her possession. Lalor v Duff, 28 A.D.2d 66, 281 N.Y.S.2d 614, 1967 N.Y. App. Div. LEXIS 3479 (N.Y. App. Div. 3d Dep't 1967).

Claimant who obtained possession of decedent's property after receiving power of attorney covering said property could not establish that said property was subject of an inter vivos gift to her where testimony pertaining to donative intent was no more conclusive than deceased "was going to give", "spoke of giving", "she wanted to give", and that claimant "was to have", and where claimant, hampered by CPLR § 4519, was unable to rebut presumption that title to principal's property in hands of agent remains in principal. Lawless v Mortimore, 42 A.D.2d 1021, 348 N.Y.S.2d 394, 1973 N.Y. App. Div. LEXIS 3328 (N.Y. App. Div. 3d Dep't 1973), app. denied, 34 N.Y.2d 515, 1974 N.Y. LEXIS 2526 (N.Y. 1974).

Trial court properly entered a trial order of dismissal because the Dead Man's Statute precluded a grantor from testifying about his discussions with the decedent about transferring certain real property to the decedent, with whom he had been cohabitating for approximately a decade, the grantor received legal advice before making the transfer, the grantor failed to establish that decedent made an express or implied promise to maintain his children as beneficiaries of her estate, the grantor did not rely on it in making the transfer even if there was a promise, and equity and good conscience permitted the decedent's estate to retain the gifts that the grantor gave her even after she ended their relationship. Klugman v Laforest, 138 A.D.3d 1185, 29 N.Y.S.3d 625, 2016 N.Y. App. Div. LEXIS 2569 (N.Y. App. Div. 3d Dep't 2016).

In a replevin action by a corporation to recover furnishings of an apartment, testimony by the defendant that the decedent president of the corporation had made a gift to the defendant of such furnishings was competent, where it was established that the corporation actually owned the furnishings. International Packaging Corp. v Marshall, 68 Misc. 2d 575, 326 N.Y.S.2d 462, 1971 N.Y. Misc. LEXIS 1143 (N.Y. Civ. Ct. 1971).

While the provisions of CPLR § 4519, the Dead Man’s Statute, are not applicable to the inquisitorial phase of a discovery proceeding in Surrogate’s Court seeking discovery of assets allegedly belonging to the decedent in which general information referable to the assertion of title and other matters is elicited, once an answer asserting title is served as directed by the court, the discovery proceeding judicially metamorphoses into a trial on the merits of title, and the provisions of the Dead Man’s Statute then become applicable as in any other trial to prevent testimony of transactions with the decedent upon timely objection; although non-objectionable evidence adduced during the inquisitorial stage of the discovery proceeding may be considered by the court in the trial phase, such non-objectionable evidence must be reintroduced during the trial phase since the evidence developed on the inquisitorial phase of a discovery proceeding is akin to evidence adduced in a deposition on an examination before trial and is thus not before the court on the trial phase of the discovery proceeding, unless that evidence is specifically

made a part of the trial proceedings. In re Estate of Detweiler, 121 Misc. 2d 453, 467 N.Y.S.2d 766, 1983 N.Y. Misc. LEXIS 3938 (N.Y. Sur. Ct. 1983).

In an action by the plaintiff claiming to have had the right to exploit all performances of a world famous singing group, for a preliminary injunction to restrain the manufacturing and distributing of a record album and tape of the group which had been recorded in the 1960's and distributed to members of the group's fan clubs, evidence that one of the members of the group, now deceased, made an oral gift to a former employee of the group's manager of all rights, title and interest in the performances would be inadmissible under the Dead Man's Statute (CPLR § 4519), in that the claim was not substantiated by documents of any kind, and the statute exists expressly so that persons cannot assert an adverse claim to title based upon alleged oral dealings with the deceased. Apple Corps, Ltd. v Adirondack Group, 124 Misc. 2d 351, 476 N.Y.S.2d 716, 1983 N.Y. Misc. LEXIS 4182 (N.Y. Sup. Ct. 1983).

Third party's relating to the decedent's delivery of a gift instrument to him was inadmissible under N.Y. C.P.L.R. 4519 because the third person was the person from whom the buyer derived his interest in a sculpture at issue; evidence that was inadmissible under N.Y. C.P.L.R. 4519 could not have been used to support a motion for summary judgment. Mirvish v Mott, 75 A.D.3d 269, 901 N.Y.S.2d 603, 2010 N.Y. App. Div. LEXIS 4442 (N.Y. App. Div. 1st Dep't 2010), rev'd, 18 N.Y.3d 510, 942 N.Y.S.2d 404, 965 N.E.2d 906, 2012 N.Y. LEXIS 266 (N.Y. 2012).

12. —Bank accounts

Upon proper objection in discovery proceedings as to introduction of party's evidence as to gift of decedent's bank accounts such evidence was properly excluded in subsequent proceeding to discover if party had bank book and checking account information in her possession. Lalor v Duff, 28 A.D.2d 66, 281 N.Y.S.2d 614, 1967 N.Y. App. Div. LEXIS 3479 (N.Y. App. Div. 3d Dep't 1967).

In an action against the representatives of a deceased tenant of a joint savings account, CPLR § 4519 did not bar the surviving tenant from testifying as to her intent in establishing the account, where her testimony did not relate to any communications or transactions with the deceased. Brezinski v Brezinski, 84 A.D.2d 464, 446 N.Y.S.2d 833, 1982 N.Y. App. Div. LEXIS 14943 (N.Y. App. Div. 4th Dep't 1982).

Widow's testimony with respect to the transfer by her deceased husband of funds from a joint account to a newly created account in trust for his son by a previous marriage was barred under this section. Kwoczka v Dry Dock Sav. Bank, 52 Misc. 2d 67, 275 N.Y.S.2d 156, 1966 N.Y. Misc. LEXIS 1266 (N.Y. Civ. Ct. 1966).

Husband would have burden of showing that he did not consent to wife's withdrawal of more than one half of her moiety interest in joint bank account 6 days before her death, even though husband was charged with intentionally killing her so that, by operation of CLS CPLR § 4519 and hearsay rules, he would be unable to meet his burden and could not show present entitlement to funds. In re Estate of Liebman, 138 Misc. 2d 128, 523 N.Y.S.2d 737, 1987 N.Y. Misc. LEXIS 2783 (N.Y. Sur. Ct. 1987).

Reversal was required because of the trial court's repeated admission of testimony in violation of the Dead Man's Statute, N.Y. C.P.L.R. 4519 as the buyer, accused of exerting undue influence over the decedent, was allowed to testify regarding transactions or communications with the decedent; the error was not harmless as there was no other competent evidence at trial establishing either that the buyer's mortgage checks were "cashed" as a courtesy to the decedent and the balance remitted to her, or that the checks drawn on the decedent's account were "loans" agreed to by the decedent. Sepulveda v Aviles, 308 A.D.2d 1, 762 N.Y.S.2d 358, 2003 N.Y. App. Div. LEXIS 7225 (N.Y. App. Div. 1st Dep't 2003).

13. Competent testimony, generally

Where the plaintiff brought an action in his individual capacity, and not as a representative of an estate or a survivor of a decedent, CPLR 4519 would not bar the defendant's proffered testimony about his dealing with the decedent. Ehrlich v American Moninger Greenhouse Mfg. Corp., 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890, 1970 N.Y. LEXIS 1464 (N.Y. 1970).

In an action to recover a now deceased plaintiff's share of profits earned under contracts executed by corporate defendants and a real estate corporation for the former to furnish services to buildings owned or operated by the latter, and to recover plaintiff's proportionate shares of the stock of corporate defendants, in which a now deceased defendant's executors hold stock as part of his estate, based upon an alleged agreement by the deceased defendant to compensate plaintiff and his son for their assistance in obtaining such contracts, the son, who is also plaintiff's executor, may testify concerning his personal transactions and communications with the deceased defendant, and may introduce into evidence the taped recording of a conversation allegedly had with the deceased defendant, if the tapes are authenticated, since the submission of the deceased defendant's examination before trial is testimony of the deceased person given in evidence within the meaning of the waiver provision of CPLR 4519. Tepper v Tannenbaum, 65 A.D.2d 359, 411 N.Y.S.2d 588, 1978 N.Y. App. Div. LEXIS 13428 (N.Y. App. Div. 1st Dep't 1978), reh'g denied, 67 A.D.2d 882, 413 N.Y.S.2d 1019, 1979 N.Y. App. Div. LEXIS 10635 (N.Y. App. Div. 1st Dep't 1979).

In proceeding by executrix under CLS SCPA § 2103 to recover contents of decedent's home from decedent's nephew by marriage and his wife, who asserted that decedent made inter vivos gift of property to them, Surrogate's Court did not err in admitting nephew's testimony describing close relationship he and his wife had with decedent and supporting inter vivos gift claim, since testimony effectively precluded nephew from sharing in any portion of property at issue as residuary beneficiary under decedent's will, and CLS CPLR § 4519 is no bar to interested party testifying against his own interest. In re Estate of Tremaine, 156 A.D.2d 862, 549 N.Y.S.2d 857, 1989 N.Y. App. Div. LEXIS 15936 (N.Y. App. Div. 3d Dep't 1989).

In action for damages arising from business decisions made by 2 real estate partnerships in which plaintiffs alleged that partnerships breached fiduciary duty to them, dead man's statute did not bar testimony of defendant partner regarding his deceased brother's representation of interests of his children, who were plaintiffs, although such testimony would be against interest of children, since it would not be against interest of brother's estate. Levine v Levine, 184 A.D.2d 53, 590 N.Y.S.2d 439, 1992 N.Y. App. Div. LEXIS 13473 (N.Y. App. Div. 1st Dep't 1992).

Dead Man's Statute (CLS CPLR § 4519) would not preclude injured plaintiff's testimony that he had seen defendant's principal (since deceased) break off at base 2 other signs on same sidewalk; defendant was not party protected under statute. Hand v Stanper Food Corp., 224 A.D.2d 584, 638 N.Y.S.2d 683, 1996 N.Y. App. Div. LEXIS 1404 (N.Y. App. Div. 2d Dep't 1996).

Court erred in allowing interested witness, over continuing objection, to testify that "original facsimile" was in hands of her handwriting expert, to determine authenticity of decedent's signature, for even if signature were authentic, that would not establish authenticity of document itself, which was issue about which witness was incompetent to offer testimony, as matter of law. Glatter v Borten, 233 A.D.2d 166, 649 N.Y.S.2d 677, 1996 N.Y. App. Div. LEXIS 11683 (N.Y. App. Div. 1st Dep't 1996), app. dismissed, 89 N.Y.2d 1030, 658 N.Y.S.2d 245, 680 N.E.2d 619, 1997 N.Y. LEXIS 437 (N.Y. 1997).

In action by widow and other relatives of deceased husband for mental anguish resulting from wrongful disposal of his remains, CLS CPLR § 4519 did not preclude parties from submitting testimony of disinterested persons regarding decedent's wishes as to how he wanted to be laid to rest after his death. Booth v Huff, 273 A.D.2d 576, 708 N.Y.S.2d 757, 2000 N.Y. App. Div. LEXIS 6680 (N.Y. App. Div. 3d Dep't 2000).

Dead Man's Statute would bar building owners from expressing opinion as to genuineness of deceased tenant's handwriting on receipt acknowledging installation of smoke detector in tenant's apartment. However, adverse party's introduction of document authored by deceased does not violate Dead Man's Statute if document is authenticated by source other than

interested witness' testimony concerning transaction of communication with deceased. Receipt was authenticated by testimony of deceased's daughter, conceding that signature on receipt was that of her father, and since daughter's testimony did not concern transaction or communication with deceased, it did not fall within prohibition of Dead Man's Statute. Given status of deceased's daughter as representative of estate, her testimony authenticating deceased's signature on receipt could not be deemed to have been given against estate in violation of Dead Man's Statute. Acevedo v Audubon Mgmt., Inc., 280 A.D.2d 91, 721 N.Y.S.2d 332, 2001 N.Y. App. Div. LEXIS 1752 (N.Y. App. Div. 1st Dep't 2001).

Shareholder's complaint, alleging that defendant's decedent converted and misappropriated corporate assets, was properly dismissed where (1) shareholder failed to adduce evidence sufficient to prove that decedent, on any specific occasion, misappropriated funds or made erroneous or deceitful entries in corporation's records, and (2) decedent's purported admission, which was disputed, was not competent, standing alone, to prove that decedent misappropriated corporation's assets for his personal use. Sakow v City King Rest., Inc., 281 A.D.2d 276, 722 N.Y.S.2d 145, 2001 N.Y. App. Div. LEXIS 2970 (N.Y. App. Div. 1st Dep't 2001).

In a medical malpractice action, testimony given by the urgent care physician and a triage nurse regarding the mentally ill patient did not violate the Dead Man's Statute because the physician's testimony was consistent with the medical records, on which the experts relied, and the records were properly considered on the motions and provided sufficient, independent support for the expert opinions, and the nurse, who was no longer employed by the medical center, was not an interested person. Butler v Cayuga Med. Ctr., 158 A.D.3d 868, 71 N.Y.S.3d 642, 2018 N.Y. App. Div. LEXIS 629 (N.Y. App. Div. 3d Dep't 2018).

The testimony of a defendant as to his transaction with a deceased codefendant is not inadmissible under CPLR § 4519, for this testimony would not be against the interests of the representative or survivor of the codefendant. Home Ins. Co. v Aurigemma, 45 Misc. 2d 875, 257 N.Y.S.2d 980, 1965 N.Y. Misc. LEXIS 2175 (N.Y. Sup. Ct. 1965).

Granting of temporary administration to defendant, whose son had been absent for some three years, to conserve estate of son was an insufficient adjudication of son's death to satisfy unambiguous exclusionary rule of dead man's statute which provides, inter alia, that upon trial of an action a party shall not be examined as a witness in his own behalf or interest against the executor, administrator or survivor of a deceased person concerning a personal transaction or communication between the witness and the deceased person, so that plaintiff who sought to recover legal fees was not an incompetent witness under the statute and could testify as to his conversations and transactions with defendant's son. Jacobs v Stark, 83 Misc. 2d 605, 373 N.Y.S.2d 758, 1975 N.Y. Misc. LEXIS 2945 (N.Y. Civ. Ct. 1975).

Where a decedent was not merely an officer of a corporation but also owned 1000 of the corporation's 1100 shares, the corporation was permitted to invoke the Dead Man's Statute set forth at N.Y. C.P.L.R. art. 4519 to bar plaintiff's testimony regarding his conversations with the decedent. Herrmann v Sklover Group, Inc., 2 A.D.3d 307, 768 N.Y.S.2d 600, 2003 N.Y. App. Div. LEXIS 13686 (N.Y. App. Div. 1st Dep't 2003).

Although the son of a deceased corporate officer was present during conversations between the decedent and plaintiff and the son had the same interests as the decedent and was available to testify, the Dead Man's Statute of N.Y. C.P.L.R. art. 4519 barred plaintiff from testifying about the conversations because New York did not recognize an exception for surviving partners and joint contractors, and the court would not create such an exception where the legislature failed to act. Herrmann v Sklover Group, Inc., 2 A.D.3d 307, 768 N.Y.S.2d 600, 2003 N.Y. App. Div. LEXIS 13686 (N.Y. App. Div. 1st Dep't 2003).

Corporation and others did not open door to plaintiff's testimony about conversations with a now deceased corporate officer by introducing plaintiff's affidavit into evidence because the corporation and others did not try to use the Dead Man's Statute of N.Y. C.P.L.R. art. 4519 as a sword rather than a shield with respect to that affidavit. Herrmann v Sklover Group, Inc., 2 A.D.3d 307, 768 N.Y.S.2d 600, 2003 N.Y. App. Div. LEXIS 13686 (N.Y. App. Div. 1st Dep't 2003).

Defendant's argument that New York's Dead Man's Statute rendered plaintiff's husband and the person who took in his interest, i.e., plaintiff, incompetent to testify with regard to an "oral arrangement" failed in that a promise to reconvey legal title may be implied by the circumstances surrounding the transfer. Beacher v Estate of Beacher, 2008 U.S. Dist. LEXIS 123684 (E.D.N.Y. Sept. 18, 2008).

14. —Wrongful death; contributory negligence

In an action for wrongful death, the plaintiff is not to be held to as high degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence. Inverso v Whitestone Transit Mix Corp., 30 A.D.2d 565, 290 N.Y.S.2d 953, 1968 N.Y. App. Div. LEXIS 3856 (N.Y. App. Div. 2d Dep't 1968).

Decedent's statement concerning circumstances of accident was admissible under exception to dead man's statute concerning facts of accident where cause of action involves claim of contributory negligence. Hawkins v Unterborn, 48 A.D.2d 176, 369 N.Y.S.2d 233, 1975 N.Y. App. Div. LEXIS 9568 (N.Y. App. Div. 4th Dep't 1975).

Where doctor had stated his version of incident giving rise to medical malpractice action by deposition for the record, under oath and in adversary contest, and thereafter died, patient was properly allowed to contradict doctor's deposition by testifying as to doctor's alleged failure to respond properly to patient's telephone call, despite fact that it was patient, rather than doctor's representative, who read into record portion of doctor's deposition in which he denied having received such a call. Ward v Kovacs, 55 A.D.2d 391, 390 N.Y.S.2d 931, 1977 N.Y. App. Div. LEXIS 9987 (N.Y. App. Div. 2d Dep't 1977).

In wrongful death action arising from defendant doctor's alleged negligence in removing catheter from decedent's femoral vein, plaintiff was not entitled to reversal of jury verdict in defendants' favor on ground that she was improperly precluded from testifying to statements made by decedent after catheter was removed where (1) her claim that his statements were admissible to

demonstrate his pain and suffering was academic because jury did not reach issue of damages, (2) she failed to show that his factual statements would have been relevant to issue of defendants' liability, and (3) since she was in room both before and after removal of catheter and was able to testify as to doctor's demeanor, there was no need for jury to hear decedent's hearsay statements regarding same. Feltus v Staten Island Univ. Hosp., 285 A.D.2d 445, 726 N.Y.S.2d 727, 2001 N.Y. App. Div. LEXIS 6913 (N.Y. App. Div. 2d Dep't 2001).

15. —Principals and agents

An interested party may testify to transactions with an agent, even if both the principal and agent are dead at the time of trial. International Packaging Corp. v Marshall, 68 Misc. 2d 575, 326 N.Y.S.2d 462, 1971 N.Y. Misc. LEXIS 1143 (N.Y. Civ. Ct. 1971).

CPLR 4519 does not bar testimony as to conversations with an agent or officer of a corporation where the corporation is party to a contract, even though the agent was deceased at the time of the action. Leighton v New York, S. & W. R. Co., 303 F. Supp. 599, 1969 U.S. Dist. LEXIS 10334 (S.D.N.Y. 1969), aff'd, 455 F.2d 389, 1972 U.S. App. LEXIS 11555 (2d Cir. N.Y. 1972).

A party may testify in an action in behalf of or against a principal with respect to transactions or conversations with the principal's deceased agent, a claimant may testify against the interests of the principal, when the agent is deceased at the time of suit, with respect to transactions or conversations he had with the agent, and an agent who is not interested in the event may testify as to a transaction he conducted with the decedent in an action by the principal against the decedent's estate. Courtland v Walston & Co., 340 F. Supp. 1076, 1972 U.S. Dist. LEXIS 15160 (S.D.N.Y. 1972).

16. Waiver of objections

Although an executor introduced evidence that funds within the decedent's and respondents' joint bank accounts had been withdrawn and converted to cash by the respondents before the

decedent's death and that a diligent search had failed to reveal the whereabouts of the funds, and although the executor cross-examined the respondents as to their personal transactions with the decedent but did not testify in his own behalf or cause any other interested party to testify as to a personal transaction of the respondents with the decedent, the executor did not "open the door" so as to permit the respondents to testify that they had delivered the money to the decedent and thereby waive the protection of CPLR § 4519. In re Estate of Wood, 52 N.Y.2d 139, 436 N.Y.S.2d 850, 418 N.E.2d 365, 1981 N.Y. LEXIS 2112 (N.Y. 1981).

The protection afforded by CPLR 4519 is not waived until testimony adduced at the inquisitorial phase of the proceeding is offered in evidence at the trial on the merits as to the issue of title, or is used as the basis for a determination of title. Lalor v Duff, 28 A.D.2d 66, 281 N.Y.S.2d 614, 1967 N.Y. App. Div. LEXIS 3479 (N.Y. App. Div. 3d Dep't 1967).

Trial court committed prejudicial error in permitting testimony from a person "interested in the event" concerning his loan transaction with decedent, and defendant's objections, properly interposed to such testimony, were not waived by their subsequent cross-examination of said person with regard to the testimony improperly admitted. Continental Diamond Mines, Inc. v Kopp, 28 A.D.2d 518, 279 N.Y.S.2d 752, 1967 N.Y. App. Div. LEXIS 4226 (N.Y. App. Div. 1st Dep't 1967).

Deposition of decedent, who died prior to trial, was not testimony of deceased person given in evidence within meaning of exception to general rule of CPLR 4519. Foro v Doetsch, 39 A.D.2d 150, 332 N.Y.S.2d 817, 1972 N.Y. App. Div. LEXIS 4477 (N.Y. App. Div. 3d Dep't 1972), aff'd, 33 N.Y.2d 767, 350 N.Y.S.2d 412, 305 N.E.2d 491, 1973 N.Y. LEXIS 951 (N.Y. 1973).

Where petitioner for discovery of personal property belonging to decedent and rest of interested parties failed to make appropriate objections in timely fashion to testimony of respondent, daughter of decedent to whom decedent prior to his death had executed power of attorney, as to spending money in accordance with her father's wishes, assuming dead man's statute applied,

there was waiver of those objections. In re Estate of Mastrianni, 55 A.D.2d 784, 389 N.Y.S.2d 914, 1976 N.Y. App. Div. LEXIS 15577 (N.Y. App. Div. 3d Dep't 1976).

Act of reading into record the pretrial deposition of executor with respect to circumstances of his loan to decedent constituted a waiver of the dead man's statute permitting executor to testify at trial as to the loan. In re Estate of Sylvestri, 57 A.D.2d 558, 393 N.Y.S.2d 82, 1977 N.Y. App. Div. LEXIS 11514 (N.Y. App. Div. 2d Dep't 1977).

In proceeding wherein decedent's daughter, who was one of coexecutrices of estate, sought authorization to pay out of the estate the amount allegedly due daughter from decedent for personal services, care, room, board, laundry and transportation, respondents waived contention that daughter was disqualified from testifying as to the services she performed for decedent where respondents failed to object at trial. Hamar v Isachsen, 58 A.D.2d 988, 397 N.Y.S.2d 485, 1977 N.Y. App. Div. LEXIS 13200 (N.Y. App. Div. 4th Dep't 1977).

In a proceeding by the executors of an estate to recover the amount of an alleged loan from the decedent to his son, the executors did not waive the protection of CPLR § 4519 where they offered into evidence the son's testimony in a Florida divorce action as proof of the outstanding debt and where the executors sought to object to the son's attempt to give oral evidence as to the decedent's forgiveness of the debt; while it is well settled that where an executor elicits testimony from an interested party on the personal transaction in issue he waives the protection of the statute, that rule applies only where the executor of the estate forced the interested party to testify and not where the interested party's testimony was given in an unrelated proceeding in which the representatives of the estate were not parties. Estate of Sternberg v Sternberg, 81 A.D.2d 1010, 440 N.Y.S.2d 96, 1981 N.Y. App. Div. LEXIS 11764 (N.Y. App. Div. 4th Dep't 1981).

In proceeding brought by executor pursuant to CLS SCPA § 2103 to recover proceeds of bank account which decedent had given to persons with whom he lived shortly before his death, executor waived protection of dead man's statute, CLS CPLR § 4519, by introducing deposition

of one of recipients of money, and it was therefore error for Surrogate to exclude trial testimony of that recipient concerning her relationship with decedent. In re Radus, 140 A.D.2d 348, 527 N.Y.S.2d 840, 1988 N.Y. App. Div. LEXIS 4602 (N.Y. App. Div. 2d Dep't 1988).

In medical malpractice action, defendant's testimony that there was no reason to believe plaintiff's decedent was suffering from hormonal mass based on examination was not admitted in violation of Dead Man's Statute, CLS CPLR § 4519, since by testifying on her own behalf concerning defendant's examination of her mother, plaintiff waived protection of statute with regard to examination. Nigro v Benjamin, 155 A.D.2d 872, 547 N.Y.S.2d 710, 1989 N.Y. App. Div. LEXIS 14691 (N.Y. App. Div. 4th Dep't 1989).

Court properly denied plaintiff's motion to prohibit defendant from testifying as to conversation with decedent since conversation in question was part of gratuitous bailment transaction that was crux of plaintiff's case. French v O'Donohue, 239 A.D.2d 903, 659 N.Y.S.2d 655, 1997 N.Y. App. Div. LEXIS 6261 (N.Y. App. Div. 4th Dep't), app. denied, 91 N.Y.2d 804, 668 N.Y.S.2d 559, 691 N.E.2d 631, 1997 N.Y. LEXIS 4234 (N.Y. 1997).

Protection of dead person's statute is waived, and door is opened to otherwise prohibited testimony by interested person regarding personal transaction with decedent, where estate's representative elicits such testimony from interested party. In re Estate of Buchanan, 245 A.D.2d 642, 665 N.Y.S.2d 980, 1997 N.Y. App. Div. LEXIS 12542 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 957, 671 N.Y.S.2d 717, 694 N.E.2d 886, 1998 N.Y. LEXIS 926 (N.Y. 1998).

In probate proceeding, decedent's former treating physician was not interested person under CLS CPLR § 4519, and thus physician's testimony did not waive protection of dead person's statute; also, there was no such waiver where counsel for opponents of will, rather than counsel for executor, elicited physician's statement that was claimed to have opened door to opponents' otherwise prohibited testimony. In re Estate of Buchanan, 245 A.D.2d 642, 665 N.Y.S.2d 980,

1997 N.Y. App. Div. LEXIS 12542 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 957, 671 N.Y.S.2d 717, 694 N.E.2d 886, 1998 N.Y. LEXIS 926 (N.Y. 1998).

Defendant partially waived protection of dead man's statute when, in response to plaintiffs' affidavits setting forth representations made by deceased, it submitted affidavit of deceased's son making reference to certain affidavit of deceased; however, defendant at most opened door to evidence pertaining to deceased's affidavit and did not open door to plaintiffs' proffer of deceased's separate representations. Huff v C. K. Sanitary Sys., Inc., 260 A.D.2d 892, 688 N.Y.S.2d 801, 1999 N.Y. App. Div. LEXIS 4201 (N.Y. App. Div. 3d Dep't 1999).

In a case to determine the distribution of proceeds of a settlement in a wrongful death action in which most of the mother's testimony violated N.Y. C.P.L.R. 4519 and the father's attorney objected only once, objection to each other portion of the mother's testimony was waived, even though the lower court had incorrectly determined that the father's counsel had waived the Dead Man's Statute by eliciting testimony from the father regarding conversations with the deceased child. In re Estate of Ellers, 309 A.D.2d 1055, 765 N.Y.S.2d 910, 2003 N.Y. App. Div. LEXIS 10939 (N.Y. App. Div. 3d Dep't 2003).

Executor was not allowed to invoke N.Y. C.P.L.R. 4519 to prevent an owner from testifying as to a transaction involving a disputed motorcycle because the executor's testimony regarding the documentary evidence and a prior dispute regarding the alleged sale of the motorcycle to the owner and the testimony adduced by the executor from a seller of the motorcycle effectively waived the protection of the statute. Matter of Breistol, 64 A.D.3d 1122, 883 N.Y.S.2d 799, 2009 N.Y. App. Div. LEXIS 5914 (N.Y. App. Div. 3d Dep't 2009).

Testimony before trial of a deceased party and offered against the estate does not constitute testimony of deceased person given in evidence within meaning of waiver provisions of dead man's statute, and it may not be used as a bootstrap for the admission against estate of testimony by others prohibited under dead man's statute. Tepper v Tannenbaum, 87 Misc. 2d

829, 386 N.Y.S.2d 936, 1976 N.Y. Misc. LEXIS 2315 (N.Y. Sup. Ct. 1976), rev'd, 65 A.D.2d 359, 411 N.Y.S.2d 588, 1978 N.Y. App. Div. LEXIS 13428 (N.Y. App. Div. 1st Dep't 1978).

In proceeding brought by administratrix to recover cash removed from decedent's safe-deposit box, question posed by administratrix' counsel on direct examination of respondent as to whether she ever had possession or retained any of safe-deposit money, even though merely calling for affirmative or negative response, nevertheless created equivalent of dangling participle, thereby allowing respondent on cross-examination, to give complete testimony as to single transaction which question had raised; however, "door" was not "opened" regarding other transactions between respondent and decedent relative to money at issue. In re Estate of Dunbar, 139 Misc. 2d 955, 529 N.Y.S.2d 452, 1988 N.Y. Misc. LEXIS 316 (N.Y. Sur. Ct. 1988).

In divorce action against mentally ill husband, failure of his coguardians to assert his disability as affirmative defense under CLS CPLR § 3018(b) did not bar their reliance on CLS CPLR § 4519 as basis for objection to wife's testimony, since wife could not plausibly claim to be surprised by defendants' assertion of mental illness. Tworkowski v Tworkowski, 181 Misc. 2d 1038, 696 N.Y.S.2d 637, 1999 N.Y. Misc. LEXIS 429 (N.Y. Sup. Ct. 1999).

Corporation's introduction at trial of portions of a deposition from a now deceased corporate officer did not waive the Dead Man's Statute set forth at N.Y. C.P.L.R. art. 4519 because the portions that were admitted had nothing to do with the topic about which plaintiff wished to testify. The exception applies only when the deposition testimony concerns the same transaction or communication about which the survivor wants to testify. Herrmann v Sklover Group, Inc., 2 A.D.3d 307, 768 N.Y.S.2d 600, 2003 N.Y. App. Div. LEXIS 13686 (N.Y. App. Div. 1st Dep't 2003).

Party's waiver of Dead Man's Statute (CLS CPLR § 4519) at first trial did not automatically preclude him from asserting it at retrial following mistrial, where he withdrew his objection to surviving witness' competency as witness at first trial in light of judge's proposed jury instruction as to why witness could not testify about her dealings with decedent; objections not raised at

first trial may be urged at later trial. Lawson v Getty Terminals Corp., 866 F. Supp. 793, 1994 U.S. Dist. LEXIS 15667 (S.D.N.Y. 1994).

In an action regarding copyright ownership of photographs, plaintiff, as an interested party, could not testify to any personal transaction or communication between himself and the famed photographer for whom he worked, unless the foundation which owned the famed photographer's copyrights had waived the protection of the dead man's statute with respect to the specific transaction or communication at issue. By testifying to its version of certain events, the foundation “opened the door” to plaintiff's testimony, and could not seek to preclude plaintiff from testifying about the same communications or transactions. Lewin v Richard Avedon Found., 2015 U.S. Dist. LEXIS 83452 (S.D.N.Y. June 26, 2015).

17. Motion for summary judgment

Evidence otherwise excludable under the Dead Man’s Statute may be considered in opposition to a motion for summary judgment. Phillips v Joseph Kantor & Co., 31 N.Y.2d 307, 338 N.Y.S.2d 882, 291 N.E.2d 129, 1972 N.Y. LEXIS 987 (N.Y. 1972).

In an action to determine the ownership of a bank account standing in the name of a decedent “or” the plaintiff where the only evidence was incompetent under the provisions of this section and it was abundantly clear that no additional evidence could be adduced at the trial, summary judgment against the plaintiff was properly granted. Lombardi v First Nat'l Bank, 23 A.D.2d 713, 257 N.Y.S.2d 83, 1965 N.Y. App. Div. LEXIS 4694 (N.Y. App. Div. 3d Dep't 1965).

Evidence excludable under dead man’s statute may be used to defeat a motion for summary judgment but not in support thereof. Moyer v Briggs, 47 A.D.2d 64, 364 N.Y.S.2d 532, 1975 N.Y. App. Div. LEXIS 8713 (N.Y. App. Div. 1st Dep't 1975).

In wrongful death action, any conversation by police officer with decedent is not admissible under dead man’s statute and, although it might be used to defeat motion for summary judgment, it may not be used in support thereof. Zibbon v Cheektowaga, 51 A.D.2d 448, 382

N.Y.S.2d 152, 1976 N.Y. App. Div. LEXIS 11102 (N.Y. App. Div. 4th Dep't), app. dismissed, 39 N.Y.2d 1056, 387 N.Y.S.2d 428, 355 N.E.2d 388, 1976 N.Y. LEXIS 2984 (N.Y. 1976).

Evidence excludable under the dead man's statute may be considered to defeat a motion for summary judgment. In re Will of Sheehan, 51 A.D.2d 645, 378 N.Y.S.2d 141, 1976 N.Y. App. Div. LEXIS 10992 (N.Y. App. Div. 4th Dep't 1976).

In action on promissory note, fact that payee's vice-president was deceased and that proof of oral representation, which maker alleged vice-president of payee had made and which, according to maker, relieved maker of liability on portion of note, might therefore have been excluded at trial was not relevant on motion for summary judgment. Plastoid Cable Corp. v TFI Cos., 55 A.D.2d 930, 390 N.Y.S.2d 641, 1977 N.Y. App. Div. LEXIS 10188 (N.Y. App. Div. 2d Dep't 1977).

Evidence excludible under dead man's statute should not be used to support summary judgment; support of motion for partial summary judgment with affidavit testifying that deceased promised plaintiff that she would be paid for care she provided him runs afoul of statute and cannot be used to support motion for partial summary judgment; violation of statute is harmless and does not warrant reversal where similar evidence is available which does not violate statute. Peters v Morse, 112 A.D.2d 559, 491 N.Y.S.2d 495, 1985 N.Y. App. Div. LEXIS 55914 (N.Y. App. Div. 3d Dep't 1985).

In wrongful death action, court erred in granting summary judgment to defendants predicated on its finding that testimony of decedent's alleged issue was barred by Dead Man's Statute, as such evidence, which may be excludable at trial, can be considered to defeat summary judgment motion. Lancaster v 46 NYL Partners, 228 A.D.2d 133, 651 N.Y.S.2d 440, 1996 N.Y. App. Div. LEXIS 12417 (N.Y. App. Div. 1st Dep't 1996).

Respondent was not entitled to summary judgment in proceeding brought by executor to recover possession of automobile and money allegedly owned by estate, despite contention that decedent, prior to her death, directed respondent to reimburse himself for services rendered and

to transfer automobile to himself, since respondent's testimony as to transaction with decedent would be inadmissible at trial (CLS CPLR § 4519), and thus his affidavit could not be considered in support of summary judgment motion. Estate of Naber, 231 A.D.2d 849, 647 N.Y.S.2d 611, 1996 N.Y. App. Div. LEXIS 14217 (N.Y. App. Div. 4th Dep't 1996).

In ruling on summary judgment motion in action in which ownership of certain pumps was in issue, Supreme Court was prohibited by dead man's statute from relying on plaintiffs' affidavits setting forth representations made by deceased predecessor of defendant company regarding his ownership of pumps. Huff v C. K. Sanitary Sys., Inc., 260 A.D.2d 892, 688 N.Y.S.2d 801, 1999 N.Y. App. Div. LEXIS 4201 (N.Y. App. Div. 3d Dep't 1999).

In action to recover on promissory note signed by defendant in favor of plaintiff's testator, defendant rebutted plaintiff's prima facie showing of entitlement to summary judgment where he alleged that he repaid loan during testator's lifetime in monthly installments, and that testator kept written records of those payments; while defendant's testimony would be excluded at trial on objection under Dead Man's Statute, it could be considered to defeat summary judgment. Silvestri v Iannone, 261 A.D.2d 387, 689 N.Y.S.2d 241, 1999 N.Y. App. Div. LEXIS 4519 (N.Y. App. Div. 2d Dep't 1999).

In action alleging that defendant, acting as decedent's attorney-in-fact, improperly transferred decedent's property to himself and his wife, evidence consisting of conversations between defendant and decedent was insufficient to defeat summary judgment where it was proffered as sole proof in support of defendant's claim. Mantella v Mantella, 268 A.D.2d 852, 701 N.Y.S.2d 715, 2000 N.Y. App. Div. LEXIS 598 (N.Y. App. Div. 3d Dep't 2000).

In quiet title action involving property which decedent conveyed to plaintiff after having conveyed it to defendant several years earlier, Dead Man's Statute did not preclude court's consideration of statements allegedly made by decedent which were offered in opposition to defendant's summary judgment motion. Williams v Ross, 277 A.D.2d 776, 716 N.Y.S.2d 756, 2000 N.Y. App. Div. LEXIS 12204 (N.Y. App. Div. 3d Dep't 2000).

Although the Dead Man’s Statute could impact a note maker’s ability at trial to prove that a decedent to whom he issue notes did not expect repayment of the money that the decedent provided to the maker, that fact did not warrant summary judgment as the key issue underlying the maker’s defense, the maker’s intent in drafting the notes, did not necessarily hinge on any representation or action made or taken by the decedent. Estate of George L. Goth v Tremble, 59 A.D.3d 839, 873 N.Y.S.2d 364, 2009 N.Y. App. Div. LEXIS 1222 (N.Y. App. Div. 3d Dep't 2009).

Trial court erred in denying summary judgment pursuant to N.Y. C.P.L.R. 3212 to the proponent of a will as to an objection based on fraud, as the objectants failed to present any evidence of a false statement knowingly made by the proponent; summary judgment was properly denied as to a claim of undue influence, because while the deposition testimony presented by the objectants was based, in part, on alleged conversations with the decedent, evidence excludable by N.Y. C.P.L.R. 4519 could be considered to defeat a motion for summary judgment. In re Cavallo, 6 A.D.3d 434, 774 N.Y.S.2d 371, 2004 N.Y. App. Div. LEXIS 3846 (N.Y. App. Div. 2d Dep't 2004).

Evidence of the death of the prior owner of the landowners' property would not have changed the trial court's determination on the underlying summary judgment motion because proof regarding the prior owner's acquiescence was only relevant to the question of whether the neighbors' installation of the original sewer line constituted a trespass, a question the landowners viewed as moot given the neighbors' installation of the new sewer line. Wasson v Bond, 134 A.D.3d 1224, 20 N.Y.S.3d 735, 2015 N.Y. App. Div. LEXIS 8991 (N.Y. App. Div. 3d Dep't 2015).

Appellate division rejected plaintiff's contention on her cross appeal that defendants' opposition to her motion for summary judgment was precluded by the Dead Man's Statute or by the doctrine of waiver. The evidence submitted on the motion raised issues of fact whether the decedent waived strict adherence to the terms of the partnership agreement. Estate of Kingston v Kingston Farms Partnership, 130 A.D.3d 1464, 13 N.Y.S.3d 748, 2015 N.Y. App. Div. LEXIS 5712 (N.Y. App. Div. 4th Dep't 2015).

In medical malpractice action based on lack of informed consent, inasmuch as the expert's affidavit as to the decedent's execution of the consent form was predicated upon the medical records, which contained the decedent's consent form for the prior surgery and on which the expert relied, and the records were properly authenticated and submitted on the motion, the physician properly relied upon the expert opinion to support his motion for summary judgment; thus, the physician's submissions were sufficient to shift the burden to plaintiff to raise a triable issue of fact. Wright v Morning Star Ambulette Servs., Inc., 170 A.D.3d 1249, 96 N.Y.S.3d 678, 2019 N.Y. App. Div. LEXIS 2351 (N.Y. App. Div. 2d Dep't 2019).

Defendants were entitled to summary judgment in plaintiff's action for breach of contract and conversion because defendants demonstrated that evidence of the joint development agreement, which was vital to plaintiff's case, would be inadmissible at trial pursuant to the best evidence rule and the Dead Man's Statute, and plaintiff was unable to explain the unavailability of the original executed agreement. Stathis v Estate of Estate of Donald Karas, 193 A.D.3d 897, 147 N.Y.S.3d 83, 2021 N.Y. App. Div. LEXIS 2424 (N.Y. App. Div. 2d Dep't 2021), app. denied, 38 N.Y.3d 903, 185 N.E.3d 1009, 165 N.Y.S.3d 488, 2022 N.Y. LEXIS 554 (N.Y. 2022).

In ruling on medical providers' motions for summary judgment, the deposition of a physician, with respect to his personal interactions with a decedent, could not be considered in support of the medical providers' motions for summary judgment; however, the physician's contemporaneous medical records did not fall under the scope of the Dead Man's Statute, and they were otherwise admissible as exceptions of the hearsay rule, so the court could consider those records. Gluck v Kamin Health Williamsburg, LLC, 85 Misc. 3d 1256(A), 231 N.Y.S.3d 810, 2025 N.Y. Misc. LEXIS 2335 (N.Y. Sup. Ct. 2025).

Court could consider a physician's testimony as to his interactions with the decedent to the extent it was cited by an administrator in opposition to medical providers' motion for summary judgment because it was not the sole evidence proffered by the opposing side, and the court's primary concern was determining whether an issue of fact existed. Gluck v Kamin Health

Williamsburg, LLC, 85 Misc. 3d 1256(A), 231 N.Y.S.3d 810, 2025 N.Y. Misc. LEXIS 2335 (N.Y. Sup. Ct. 2025).

Fed. R. Civ. P. 56 requires exclusion of evidence on summary judgment motions which the dead man's statute would exclude at trial. Lewin v Richard Avedon Found., 2015 U.S. Dist. LEXIS 83452 (S.D.N.Y. June 26, 2015).

18. Error

In action against executors of estate on oral contract by which decedent promised that plaintiff would be compensated for work, labor and services which she performed for decedent for the last 20 years of his life, trial court did not err in denying executors' motion for mistrial, which was grounded upon plaintiff's testimony with respect to conversation between herself and decedent wherein decedent allegedly promised to compensate plaintiff, since not only was subject testimony stricken as being violative of dead man's statute, but also testimony of other witnesses supplied adequate evidence of decedent's promise to provide for plaintiff. Dombrowski v Somers, 51 A.D.2d 636, 378 N.Y.S.2d 825, 1976 N.Y. App. Div. LEXIS 10976 (N.Y. App. Div. 3d Dep't 1976), rev'd, 41 N.Y.2d 858, 393 N.Y.S.2d 706, 362 N.E.2d 257, 1977 N.Y. LEXIS 1898 (N.Y. 1977).

Notwithstanding fact that proffered evidence of proponent in will contest as to will's execution was excludable under dead man's statute, exclusion of such evidence was error where it was proffered solely to defeat motion for summary judgment denying probate of will. In re Will of Alden, 52 A.D.2d 1051, 384 N.Y.S.2d 287, 1976 N.Y. App. Div. LEXIS 12964 (N.Y. App. Div. 4th Dep't 1976).

Plaintiffs were entitled to a new trial on a breach of contract action against a managing general partner (MGP) because the trial court's error of not precluding the MGP from offering evidence regarding an alleged oral agreement between a partnership manager and now-deceased general partners that authorized the partnership manager to make the challenged

disbursements to himself and his affiliates was not harmless; the alleged oral agreement was central to the defense at trial. Slocum Realty Corp., etc. v Schlesinger, 162 A.D.3d 939, 80 N.Y.S.3d 322, 2018 N.Y. App. Div. LEXIS 4475 (N.Y. App. Div. 2d Dep't 2018).

19. —Harmless error

Receipt of testimony in violation of CPLR 4519, may be harmless error where there is adequate other proof to sustain the cause of action. Turner v Danker, 30 A.D.2d 564, 291 N.Y.S.2d 270, 1968 N.Y. App. Div. LEXIS 3958 (N.Y. App. Div. 2d Dep't 1968).

Although surrogate erred in concluding that administrator had, by his testimony, waived the protection of CPLR 4519 and thereby opened the door for testimony regarding transactions with decedent, such error was harmless in view of fact that there was ample evidence from other witnesses as well as supporting documentary proof to establish constructive trust. Bean v Estate of McKenna, 41 A.D.2d 1019, 344 N.Y.S.2d 57, 1973 N.Y. App. Div. LEXIS 4376 (N.Y. App. Div. 4th Dep't 1973).

Error, if any, in applying CLS CPLR § 4519 (Dead Man’s Statute) to strike testimony regarding lease, and lease itself, was harmless where there was ample evidence to establish that lease was not authentic, including testimony of 2 experts that decedent’s signature was forged. Ramirez v Smith, 133 A.D.2d 104, 518 N.Y.S.2d 811, 1987 N.Y. App. Div. LEXIS 49629 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 804, 528 N.Y.S.2d 829, 524 N.E.2d 149, 1988 N.Y. LEXIS 565 (N.Y. 1988).

Admission of petitioner’s testimony that she did not receive any consideration for real property which she transferred to decedent (her father) was harmless error in proceeding to impose constructive trust on property, even though such testimony was inadmissible under CLS CPLR § 4519 (“Deadman’s Statute”), where other evidence established that no consideration was paid for petitioner’s interest. In re Wieczorek, 186 A.D.2d 204, 587 N.Y.S.2d 755, 1992 N.Y. App. Div.

LEXIS 10664 (N.Y. App. Div. 2d Dep't 1992), app. dismissed, 81 N.Y.2d 990, 599 N.Y.S.2d 798, 616 N.E.2d 153, 1993 N.Y. LEXIS 1282 (N.Y. 1993).

Any error in precluding medical malpractice plaintiff's mother from testifying to conversations with plaintiff's physician, since deceased, was harmless where such testimony was not relevant to plaintiff's malpractice claim. Mushatt v Cayuga Med. Ctr., 260 A.D.2d 730, 687 N.Y.S.2d 825, 1999 N.Y. App. Div. LEXIS 3695 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 814, 697 N.Y.S.2d 562, 719 N.E.2d 923, 1999 N.Y. LEXIS 2156 (N.Y. 1999).

Although a corporation and others opened the door to plaintiff's testimony about conversations with a now deceased corporate officer, which was otherwise barred by the Dead Man's Statute of N.Y. C.P.L.R. art. 4519, during their cross-examination of plaintiff, the trial court's ruling to the contrary was harmless; if there was a new trial, plaintiff likely would not be able to testify about the conversations because the corporation and others would not open the door a second time, and if all other evidence remained the same, a fair interpretation of that evidence would still warrant dismissal of plaintiff's action. Herrmann v Sklover Group, Inc., 2 A.D.3d 307, 768 N.Y.S.2d 600, 2003 N.Y. App. Div. LEXIS 13686 (N.Y. App. Div. 1st Dep't 2003).

Although it was error for the lower court to admit evidence from a deceased, pursuant to N.Y. C.P.L.R. 4519, the proceedings were upheld because the error was harmless. In re Estate of Levinson, 11 A.D.3d 826, 784 N.Y.S.2d 165, 2004 N.Y. App. Div. LEXIS 12601 (N.Y. App. Div. 3d Dep't 2004), app. denied, 4 N.Y.3d 704, 792 N.Y.S.2d 1, 825 N.E.2d 133, 2005 N.Y. LEXIS 85 (N.Y. 2005).

II. Under Former Civil Practice Laws

A. In General

20. Generally

Applicability of CPA § 347 did not depend on whether decedent's estate gained or lost by outcome of case. Brundige v Bradley, 294 N.Y. 345, 62 N.E.2d 385, 294 N.Y. (N.Y.S.) 345, 1945 N.Y. LEXIS 758 (N.Y. 1945).

There were no comparative degrees in reference to requirements of CPA § 347. Morrison v Griffin Corners Water Co., 190 A.D. 45, 179 N.Y.S. 333, 1919 N.Y. App. Div. LEXIS 4064 (N.Y. App. Div. 1919).

Although the provision of CPA § 347 which forbids testimony as to transactions with a deceased person often worked a hardship, it was nevertheless the law. Cookinham v Hepler, 259 N.Y.S. 87, 144 Misc. 359, 1932 N.Y. Misc. LEXIS 1202 (N.Y. County Ct. 1932).

Analysis, construction and effect of CPA § 347 were stated in In re Christie's Estate, 4 N.Y.S.2d 484, 167 Misc. 484, 1938 N.Y. Misc. LEXIS 1590 (N.Y. Sur. Ct. 1938).

Hearsay and self-serving declarations are not admissible because person testifying is disinterested. In re Pangborn's Estate, 93 N.Y.S.2d 786, 196 Misc. 298, 1949 N.Y. Misc. LEXIS 2994 (N.Y. Sur. Ct. 1949).

CPA § 343-a construed with CPA § 347 in holding that where legislature spoke about examination of parties as distinguished from witnesses, it said so. Friedman v Berkowitz, 136 N.Y.S.2d 81, 206 Misc. 889, 1954 N.Y. Misc. LEXIS 3094 (N.Y. City Ct. 1954).

Legatee, having no interest in result of litigation to determine which of two persons was decedent's widow, may testify to conversation with decedent to effect that he said he was going to divorce one named. In re Botsford's Estate, 27 N.Y.S.2d 932, 1941 N.Y. Misc. LEXIS 1813 (N.Y. Sur. Ct. 1941).

Gain or loss must result to witness from judgment in its direct or immediate operation. In re Gollhofer's Estate, 111 N.Y.S.2d 831, 1952 N.Y. Misc. LEXIS 2574 (N.Y. Sur. Ct. 1952).

CPA § 347 excluded testimony of interested witness to any knowledge which he had gained by use of his senses from personal presence of decedent. Federal Land Bank v Weaver, 114 N.Y.S.2d 592, 1952 N.Y. Misc. LEXIS 2942 (N.Y. Sup. Ct. 1952), rev'd, 283 A.D. 1134, 131 N.Y.S.2d 599, 1954 N.Y. App. Div. LEXIS 6508 (N.Y. App. Div. 1954).

Purpose of CPA § 347 was to protect estate of deceased person and all those succeeding to property and interest of deceased. In re Cohen's Estate, 137 N.Y.S.2d 300, 1954 N.Y. Misc. LEXIS 2544 (N.Y. Sup. Ct. 1954), aff'd, 285 A.D. 1119, 141 N.Y.S.2d 819, 1955 N.Y. App. Div. LEXIS 6836 (N.Y. App. Div. 1955).

The words “deceased person” apply to a person whose estate is involved in the proceeding, and not to any other deceased person. In re De Baun, 4 N.Y.S. 342, 1889 N.Y. Misc. LEXIS 314 (N.Y. Sur. Ct. 1889).

Construction given CPA § 347 by state courts was binding on federal courts. Harris v Morse, 54 F.2d 109, 1931 U.S. Dist. LEXIS 1862 (D.N.Y. 1931).

21. Application of CPA § 348

In view of CPA § 348 (§ 4517 herein), 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, where such defendant died after the first trial of such 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).

Where the personal representative of the defendant in a former action by the plaintiff was defendant in a later action brought by the same plaintiff, and the two causes of action, while so distinct as to render inoperative the rule of res adjudicata were nevertheless based upon the same general contractual relation, the plaintiff was entitled, under CPA § 348 (CPLR 4517) and notwithstanding CPA § 347 to prove in the later action the testimony given by the defendant in

the former action. Hassett v Rathbone, 204 A.D. 229, 198 N.Y.S. 381, 1923 N.Y. App. Div. LEXIS 9448 (N.Y. App. Div. 1923).

22. Proceedings to which applicable

CPA § 347 was founded upon § 399 of the former Code of Procedure, as amended in 1869, and although the language of the latter was remodeled, the meaning was left substantially unchanged; except that the words “upon the trial of an action or the hearing upon the merits of a special proceeding,” were added, so as to render it inapplicable to motions and other interlocutory proceedings; and that the words, “in his own behalf or interest, or in behalf of the party succeeding to his title or interest,” were added, so as to overrule a construction, which had been given to § 399 of the former Code, to the effect that the question of competency was the same, whether the witness was called to testify in support of or against his own interest. Alexander v Dutcher, 70 N.Y. 385, 70 N.Y. (N.Y.S.) 385, 1877 N.Y. LEXIS 628 (N.Y. 1877).

CPA § 347 was not applicable to case where party claimed property from third person which never belonged to deceased. Ward v New York Life Ins. Co., 225 N.Y. 314, 122 N.E. 207, 225 N.Y. (N.Y.S.) 314, 1919 N.Y. LEXIS 1130 (N.Y. 1919), limited, Poslock v Teachers' Retirement Bd., 88 N.Y.2d 146, 643 N.Y.S.2d 935, 666 N.E.2d 528, 1996 N.Y. LEXIS 673 (N.Y. 1996).

An application for the revocation of letters of administration issued to a party was a special proceeding within the meaning of CPA § 347. In re Kelly's Estate, 238 N.Y. 71, 143 N.E. 795, 238 N.Y. (N.Y.S.) 71, 1924 N.Y. LEXIS 650 (N.Y.), reh'g denied, 238 N.Y. 581, 144 N.E. 900, 238 N.Y. (N.Y.S.) 581, 1924 N.Y. LEXIS 757 (N.Y. 1924).

CPA § 347 applied to actions for wrongful death and hence defendant in such an action could not testify to personal communications between himself and the intestate. Abelein v Porter, 45 A.D. 307, 61 N.Y.S. 144, 1899 N.Y. App. Div. LEXIS 2565 (N.Y. App. Div. 1899).

CPA § 347 did not apply as to one who had been committed to state hospital as insane patient on adjudication of insanity by county judge, no proceedings having been taken in the nature of a

writ de lunatico inquirendo and no committee having been appointed. Clark v Dada, 183 A.D. 253, 171 N.Y.S. 205, 1918 N.Y. App. Div. LEXIS 6009 (N.Y. App. Div. 1918).

In death action defendant should not have been permitted to testify as to conversations between himself and plaintiff's intestate. Northrop v Kay, 5 A.D.2d 957, 171 N.Y.S.2d 660, 1958 N.Y. App. Div. LEXIS 6636 (N.Y. App. Div. 4th Dep't 1958).

Where a brother and a sister in support of their action in ejectment against those claiming under a deceased brother, moved to set aside the latter's naturalization: Held, that as CPA § 347 did not apply to matter contained in affidavits submitted on a motion and that it appeared that such section might be successfully interposed to defeat an action to set aside the order attacked, the motion should be denied and the parties relegated to a proper action where the question could be determined on competent evidence. In re McCarran, 29 N.Y.S. 582, 8 Misc. 482, 1894 N.Y. Misc. LEXIS 500 (N.Y.C.P. 1894).

CPA § 347 did not apply in an action by a husband for loss of his wife's services during the interval between the time when she was disabled by the alleged negligence of the defendant and her subsequent death. Minns v Crossman, 193 N.Y.S. 714, 118 Misc. 70, 1922 N.Y. Misc. LEXIS 1153 (N.Y. Sup. Ct. 1922).

Proceeding to construe a will was a special proceeding within the meaning of CPA § 347. In re Milliette's Estate, 206 N.Y.S. 342, 123 Misc. 745, 1924 N.Y. Misc. LEXIS 1207 (N.Y. Sur. Ct. 1924).

Provisions applied to attempt to establish a lost or destroyed deed. Oneida v Drake, 232 N.Y.S. 248, 133 Misc. 382, 1928 N.Y. Misc. LEXIS 1192 (N.Y. Sup. Ct. 1928).

CPA § 347 applied to trial of cases in Small Claims Part of Municipal Court of City of New York. Levins v Bucholtz, 145 N.Y.S.2d 79, 208 Misc. 597, 1955 N.Y. Misc. LEXIS 3283 (N.Y. App. Term 1955), aff'd, 2 A.D.2d 351, 155 N.Y.S.2d 770, 1956 N.Y. App. Div. LEXIS 4207 (N.Y. App. Div. 1st Dep't 1956).

In appraising an estate and determining whether certain transfers were in contemplation of death the Tax Commission erred in rejecting testimony of grantees and notary public as to date of transfer. In re Schumacher's Estate, 8 Misc. 2d 349, 166 N.Y.S.2d 336, 1957 N.Y. Misc. LEXIS 2492 (N.Y. Sur. Ct. 1957).

Conversations between officials of bank-mortgagee and decedent mortgagor pertaining to banking transactions were exempted from the prohibitions of CPA § 347. Domestic Finance Corp. v Tinney Cadillac Corp., 23 Misc. 2d 153, 197 N.Y.S.2d 693, 1960 N.Y. Misc. LEXIS 3485 (N.Y. City Ct. 1960).

The prohibition of CPA § 347 was applicable to evidence in affidavits on motion for summary judgment, and though such evidence might be considered on such motion to determine whether a triable issue exists, it could not be used to obtain affirmative relief by summary judgment. Sprung v Halberstam, 28 Misc. 2d 636, 208 N.Y.S.2d 203, 1960 N.Y. Misc. LEXIS 2069 (N.Y. App. Term 1960).

CPA § 347 was applicable to examinations under Surrogate’s Ct Act, §§ 237, 241, to discover effects of deceased persons. Tilton v Ormsby, 10 Hun 7 (N.Y.), aff'd, 70 N.Y. 609, 70 N.Y. (N.Y.S.) 609, 1877 N.Y. LEXIS 677 (N.Y. 1877).

23. Deposition, pretrial examination, or discovery

In discovery proceeding by administrator to determine whether proceeds of bank check endorsed by decedent coadministrator and his wife, in order named, belonged to estate, coadministrator was incompetent to testify that, following telephone conversation with decedent, he visited decedent who endorsed check and delivered it to coadministrator who endorsed it and delivered it to his wife. Petition of Jennings, 286 A.D. 256, 143 N.Y.S.2d 383, 1955 N.Y. App. Div. LEXIS 4023 (N.Y. App. Div. 1955), aff'd, 1 N.Y.2d 762, 152 N.Y.S.2d 305, 135 N.E.2d 56, 1956 N.Y. LEXIS 929 (N.Y. 1956).

The provisions of CPA § 347 applied to the examination of witnesses in discovery proceedings in surrogate's courts. In re Benioff's Estate, 133 N.Y.S. 413, 73 Misc. 493, 1911 N.Y. Misc. LEXIS 547 (N.Y. Sur. Ct. 1911).

On discovery proceeding involving the right to savings bank account, testimony adduced from petitioner, decedent's wife, respecting personal transactions with decedent relating to the account was inadmissible where it appeared that a discovery proceeding was a "special proceeding," within the meaning of CPA § 347; that the widow, under subdivision 1 of § 83 of the Decedent Estate Law, would be entitled to receive one-third of any assets recovered and, therefore, was "interested in the event." In re Christie's Estate, 4 N.Y.S.2d 484, 167 Misc. 484, 1938 N.Y. Misc. LEXIS 1590 (N.Y. Sur. Ct. 1938).

In "reversed" discovery proceeding against administrator to recover possession of bond delivered by petitioner to decedent, petitioner was incompetent to testify to conversations with decedent. In re Miller's Estate, 104 N.Y.S.2d 100, 199 Misc. 408, 1950 N.Y. Misc. LEXIS 2496 (N.Y. Sur. Ct. 1950), aff'd, 278 A.D. 780, 103 N.Y.S.2d 902, 1951 N.Y. App. Div. LEXIS 4721 (N.Y. App. Div. 1951).

CPA § 347 did not apply to preliminary proceedings prior to trial. Terwilliger v Terwilliger, 106 N.Y.S.2d 481, 201 Misc. 453, 1951 N.Y. Misc. LEXIS 2104 (N.Y. Sup. Ct. 1951).

Where the examination was material and necessary, the court would order the examination on written interrogatory even though there was a possibility that the testimony would be disqualified under CPA § 347. In re Venti's Estate, 4 Misc. 2d 1058, 163 N.Y.S.2d 115, 1956 N.Y. Misc. LEXIS 1341 (N.Y. Sur. Ct. 1956).

An application of a surviving spouse to have his testimony perpetuated was granted even though he might have been incompetent to testify at a trial. In re Estate of Imparato, 8 Misc. 2d 503, 170 N.Y.S.2d 440, 1957 N.Y. Misc. LEXIS 3624 (N.Y. Sur. Ct. 1957).

Where an examination before trial of contestant and witness was sought as to conversations with the decedent relevant to the drawing of lines through signature on will, CPA § 347 was not a bar to the relief sought, since it was material and necessary. In re Russell's Will, 9 Misc. 2d 67, 167 N.Y.S.2d 269, 1957 N.Y. Misc. LEXIS 2351 (N.Y. Sur. Ct. 1957).

The fact that CPA § 347 might bar a petitioner’s testimony at the trial had no effect upon the right of petitioner in a discovery proceeding in surrogate’s court to an examination before trial pursuant to CPA § 288 (§ 3101(a), Rule 3106(a)). In re Mortiz' Will, 10 Misc. 2d 101, 168 N.Y.S.2d 385, 1957 N.Y. Misc. LEXIS 2074 (N.Y. Sur. Ct. 1957), aff'd, 5 A.D.2d 839, 171 N.Y.S.2d 800, 1958 N.Y. App. Div. LEXIS 6988 (N.Y. App. Div. 2d Dep't 1958).

Incompetency of witness is not ground for vacating order for examination before trial. Holmes v Crane, 167 N.Y.S. 735 (N.Y. Sup. Ct. 1917).

Where in discovery proceeding claimant on his examination made no claim to savings bankbook as gift, he was incompetent to testify on trial that he was owner of inter vivos gift. In re Bodker's Estate, 72 N.Y.S.2d 237, 1945 N.Y. Misc. LEXIS 2795 (N.Y. Sur. Ct. 1945).

In discovery proceeding by executor, respondent’s contention that part of her testimony elicited by executor is binding upon him, can be sustained only if he had solicited such testimony upon trial of action or hearing upon merits of special proceeding. In re Erickson's Estate, 135 N.Y.S.2d 56, 1954 N.Y. Misc. LEXIS 2874 (N.Y. Sur. Ct. 1954).

Claim of privilege not to testify concerning transactions with deceased pursuant to CPA § 347 was not permitted in examination before trial of executor. In re Lowenstein's Estate, 138 N.Y.S.2d 420, 1954 N.Y. Misc. LEXIS 2972 (N.Y. Sur. Ct. 1954).

In administrator’s discovery proceeding to recover items of jewelry claimed by decedent daughter as gift, daughter’s husband was disinterested and so competent to testify to conversations with decedent. In re Corn's Estate, 141 N.Y.S.2d 16, 1955 N.Y. Misc. LEXIS 2460 (N.Y. Sur. Ct. 1955).

24. Probate or contest of will

A devisee is not competent to testify to transactions between himself and testator, tending to establish the will. Lee v Dill, 41 N.Y. 619 (N.Y. 1869).

Plaintiff, in a suit to establish a lost or destroyed will, against the administrator and next of kin, cannot testify to conversations had between himself and deceased at the time of the will and before on the subject of the will. Timon v Claffy, 41 N.Y. 619 (N.Y. 1869).

On probate proceedings, the executor who presented the will and was the principal legatee, after proving loss of a former will was permitted to testify as to its contents, that a memorandum made by him was produced at an interview with decedent, and from it another prior will was drawn by him. Held, error. In re Will of Smith, 95 N.Y. 516, 95 N.Y. (N.Y.S.) 516, 1884 N.Y. LEXIS 676 (N.Y. 1884).

Probate of will was opposed by a stranger in blood to testatrix, but who claimed as legatee under a former will. Held that he was a person deriving an interest under deceased within CPA § 347. In re Will of Smith, 95 N.Y. 516, 95 N.Y. (N.Y.S.) 516, 1884 N.Y. LEXIS 676 (N.Y. 1884).

Legatees under a contested will are not competent witnesses for the proponent as to a personal transaction or communication between them and testator; but where a legatee has executed a valid release of all his interest the disability is removed. In re Will of Wilson, 103 N.Y. 374, 8 N.E. 731, 103 N.Y. (N.Y.S.) 374, 3 N.Y. St. 613, 1886 N.Y. LEXIS 1068 (N.Y. 1886).

Where a person who was principal devisee was permitted to testify to acts, conduct and conversations of testator during last week of his life, attending the attestation and publication of his will, and also as to his mental and physical condition. Held, that the evidence was incompetent. In re Eysaman's Will, 113 N.Y. 62, 20 N.E. 613, 113 N.Y. (N.Y.S.) 62, 1889 N.Y. LEXIS 922 (N.Y. 1889).

Contestant, who objected to probate of a will because of undue influence and mental incapacity, offered to prove transactions and conversations had with decedent with witness (who was a

nephew and legatee) and with others in presence of witness. The will gave proponent a large legacy: Held, evidence properly excluded. In re Dunham's Will, 121 N.Y. 575, 24 N.E. 932, 121 N.Y. (N.Y.S.) 575, 1890 N.Y. LEXIS 1444 (N.Y. 1890).

A specific and residuary legatee cannot on contested probate of will on ground of undue influence, testify as witness on behalf of contestants as to transactions of decedent with witness and others in his presence. In re Dunham's Will, 121 N.Y. 575, 24 N.E. 932, 121 N.Y. (N.Y.S.) 575, 1890 N.Y. LEXIS 1444 (N.Y. 1890).

In proceedings for probate of a will, testimony of a daughter as to personal transactions and communications with her father stricken out. In re Lasak's Will, 131 N.Y. 624, 30 N.E. 112, 131 N.Y. (N.Y.S.) 624, 1892 N.Y. LEXIS 1115 (N.Y. 1892).

The daughter of a testator is incompetent to testify as to personal transactions, on the contest of the will of such testator, when her pecuniary interest would be promoted by the success of the contest; and is not rendered competent by withdrawing as a contestant, and withdrawing her appearance. In re Lasak's Will, 131 N.Y. 624, 30 N.E. 112, 131 N.Y. (N.Y.S.) 624, 1892 N.Y. LEXIS 1115 (N.Y. 1892).

Where a will was contested on the ground that it was not duly executed, a beneficiary under such will is incompetent as a witness to testify as to a conversation, between the testatrix and the attesting witnesses in his presence, in which he took no part. In re Bernsee's Will, 141 N.Y. 389, 36 N.E. 314, 141 N.Y. (N.Y.S.) 389, 1894 N.Y. LEXIS 1140 (N.Y. 1894).

Beneficiaries under a will contested upon the grounds of undue influences exerted by said beneficiaries, cannot be called as witnesses by the contestants to testify concerning conversations with the testator. In re Potter's Will, 161 N.Y. 84, 55 N.E. 387, 161 N.Y. (N.Y.S.) 84, 1899 N.Y. LEXIS 926 (N.Y. 1899).

A party to a probate proceeding who has filed written objections asking for affirmative relief was disqualified as a witness under CPA § 347. In re McCulloch's Will, 263 N.Y. 408, 189 N.E. 473,

263 N.Y. (N.Y.S.) 408, 1934 N.Y. LEXIS 1289 (N.Y.), reh'g denied, 264 N.Y. 598, 191 N.E. 583, 264 N.Y. (N.Y.S.) 598, 1934 N.Y. LEXIS 1625 (N.Y. 1934).

Legatees are not incompetent to testify, when called by the contestants of a will, to conversations had by them with the testatrix in reference to the making of the will. In re Potter's Will, 17 A.D. 267, 45 N.Y.S. 563, 1897 N.Y. App. Div. LEXIS 881 (N.Y. App. Div. 1897), rev'd, 161 N.Y. 84, 55 N.E. 387, 161 N.Y. (N.Y.S.) 84, 1899 N.Y. LEXIS 926 (N.Y. 1899).

Where an alleged widow has brought a proceeding to revoke letters of administration, it is incompetent for her to testify that she and the decedent agreed to assume the relation of husband and wife without the marriage ceremony. In re Brush, 25 A.D. 610, 49 N.Y.S. 803, 1898 N.Y. App. Div. LEXIS 141 (N.Y. App. Div. 1898).

The heirs of a testatrix who would be prejudiced if the will of the testatrix was admitted to probate, may, when called by proponent’s counsel, testify as to acts and declarations made to them and to others by the testatrix. In re Hedges' Will, 57 A.D. 48, 67 N.Y.S. 1028, 1901 N.Y. App. Div. LEXIS 15 (N.Y. App. Div. 1901).

Beneficiary under a will subsequent to that sought to be probated is not a “person interested in the event” of the probate. In re Hennessey's Will, 157 A.D. 136, 141 N.Y.S. 736, 1913 N.Y. App. Div. LEXIS 5862 (N.Y. App. Div. 1913).

Children of testatrix were not competent to testify that testatrix on her death bed stated that she had made out a new will, by reason of the fact that opposing party who had lived with testatrix as her husband for twenty years was present. Hermann v Ludwig, 186 A.D. 287, 174 N.Y.S. 469, 1919 N.Y. App. Div. LEXIS 5849 (N.Y. App. Div. 1919), aff'd, 229 N.Y. 544, 129 N.E. 908, 229 N.Y. (N.Y.S.) 544, 1920 N.Y. LEXIS 746 (N.Y. 1920).

Where contestant’s witness testified that proponent of will asked testator to bequeath his property to her and he refused to make such will at that time, proponent was entitled to testify

that she made no such request. In re Gratton's Will, 195 A.D. 32, 185 N.Y.S. 472, 1921 N.Y. App. Div. LEXIS 4690 (N.Y. App. Div. 1921).

Facts to which the proponent in a probate proceeding was incompetent to testify on a trial, under CPA § 347 could not be considered. In re Roberts' Will, 235 A.D. 378, 257 N.Y.S. 146, 1932 N.Y. App. Div. LEXIS 7967 (N.Y. App. Div. 1932).

Attorney named as executor in a revoked will, who interposed objections to probate of revoking will, was competent to testify as to execution of revoked will, and neither his interest in possible testamentary commissions nor his right to or liability for costs constituted sufficient interest in event to render him incompetent. In re Will of Stacer, 13 A.D.2d 164, 214 N.Y.S.2d 746, 1961 N.Y. App. Div. LEXIS 10928 (N.Y. App. Div. 4th Dep't 1961), aff'd, 11 N.Y.2d 780, 227 N.Y.S.2d 26, 181 N.E.2d 769, 1962 N.Y. LEXIS 1346 (N.Y. 1962).

On an application in a probate proceeding for the examination of the proponents before trial, the question as to whether the proposed testimony is privileged may await the trial. In re Heughes' Estate, 260 N.Y.S. 615, 144 Misc. 922, 1932 N.Y. Misc. LEXIS 1631 (N.Y. Sur. Ct. 1932).

Contestant in probate proceeding not competent to testify concerning conversations, dealings and transactions with decedent. In re Erlanger's Estate, 259 N.Y.S. 610, 145 Misc. 1, 1932 N.Y. Misc. LEXIS 1279 (N.Y. Sur. Ct. 1932).

Proponent, who was sole beneficiary under will, was incompetent to testify that copy of will was true copy of original. In re Taormina's Will, 81 N.Y.S.2d 330, 192 Misc. 669, 1948 N.Y. Misc. LEXIS 2775 (N.Y. Sur. Ct. 1948).

Legatee was entitled to examine contestant to will as to all relevant facts and circumstances of the drawing of lines through decedent’s signature and as to any conversations had between contestant and decedent with respect to the propounded instrument. In re Russell's Will, 9 Misc. 2d 67, 167 N.Y.S.2d 269, 1957 N.Y. Misc. LEXIS 2351 (N.Y. Sur. Ct. 1957).

The provisions of CPA § 347 were applicable where testimony was to be taken upon an application to vacate a decree admitting will to probate. In re Frorup's Estate, 10 Misc. 2d 159, 170 N.Y.S.2d 963, 1958 N.Y. Misc. LEXIS 3854 (N.Y. Sur. Ct. 1958).

The contestants of the probate of a will are disqualified as witnesses from testifying to personal communications to the deceased. In re Berrien's Will, 5 N.Y.S. 37, 1889 N.Y. Misc. LEXIS 2804 (N.Y. Sur. Ct. 1889), aff'd, 12 N.Y.S. 585, 58 Hun 610, 1890 N.Y. Misc. LEXIS 2625 (N.Y. Sup. Ct. 1890).

In probate proceedings contestants are incompetent to testify by reason of interest. In re O'Neil's Estate, 7 N.Y.S. 197, 1889 N.Y. Misc. LEXIS 1006 (N.Y. Sur. Ct. 1889).

In action where validity of will is concerned the daughter of testator is incompetent to testify that she has not received money which the will stated she had, no other evidence of the gift having been introduced. Doughty v Doughty, 5 N.Y. St. 95.

Proposer of will and beneficiary under it cannot testify that he heard will read over to decedent. Re Hopkins, 6 N.Y. St. 390.

Where, on probate proceedings, a will is declared void, the witness would have an inchoate right of dower, she is disqualified from testifying to personal transactions or communications had with deceased. Steele v Ward, 30 Hun 555 (N.Y.).

Where a widow and daughter took under a will a greater sum than they would receive in case of intestacy, the daughter could not object to her mother’s testimony as incompetent in probate proceedings. In re Baird, 41 Hun 89, 2 N.Y. St. 353 (N.Y.).

A donee of a power with compensation for services and care not beneficially interested or disqualified from testifying to execution of will. In re Chase, 41 Hun 203, 4 N.Y. St. 195 (N.Y.).

A legatee under testatrix’s will, called as a witness for contestant and asked a question which calls for an answer that will disclose a personal communication to her from testatrix, held to be

disqualified as a witness under CPA § 347. In re Stewart, 5 N.Y.S. 32, 1889 N.Y. Misc. LEXIS 2803 (N.Y. Sur. Ct. 1889).

A daughter who is interested in the event of a contest, cannot testify as a witness as to a conversation between the testator and his wife, even though she took no part therein. In re Palmateer's Will, 28 N.Y.S. 1062, 78 Hun 43 (1894).

Testimony of a beneficiary under a will as to the execution of a codicil thereto is not inadmissible where her rights and interests in the estate remain unchanged by such codicil. In re Clark's Will, 31 N.Y.S. 476, 82 Hun 341 (1894), aff'd, 146 N.Y. 399, 42 N.E. 543, 146 N.Y. (N.Y.S.) 399, 1895 N.Y. LEXIS 716 (N.Y. 1895).

25. Accounting of personal representative

A person who presents a claim against an estate based upon a contract with the deceased, is a competent witness as to the contract on an accounting. In re Final Accounting of Frazer, 92 N.Y. 239, 92 N.Y. (N.Y.S.) 239, 1883 N.Y. LEXIS 140 (N.Y. 1883).

The testimony of an executor, on his judicial settlement, as to a payment made by him to the testator, in order to obtain a credit for the amount, relates to a personal transaction with the testator, and is properly excluded. In re Kellogg, 104 N.Y. 648, 10 N.E. 152, 104 N.Y. (N.Y.S.) 648, 5 N.Y. St. 668, 1887 N.Y. LEXIS 642 (N.Y. 1887).

An executor cannot by force of this section, in a proceeding for the settlement of his account, testify as to conversations with the testator concerning the claim of a third party, which the executors paid, and which as against the contesting legatees, he seeks to be allowed credit. In re Myers' Estate, 153 N.Y. 124, 47 N.E. 33, 153 N.Y. (N.Y.S.) 124, 1897 N.Y. LEXIS 686 (N.Y. 1897).

Where, on the reference of a claim of a widow against the estate of her husband, she is allowed to testify without objection to personal communications with her husband to sustain the validity

of her claim, the widow is a competent witness to testify to the same personal communications on the final accounting to which objections were filed that the payment of the said claim was fraudulent and collusive. In re Watson, 101 A.D. 550, 92 N.Y.S. 195, 1905 N.Y. App. Div. LEXIS 405 (N.Y. App. Div. 1905).

Where, on an accounting by executors, one of whom was the testator's widow, objection was made to the allowance of a credit for moneys paid to the widow upon a note purporting to have been executed by the testator to the order of the widow, testimony by one of the executors that she had possession of the note was inadmissible under CPA § 347; evidence by one of the widow's coexecutors as to conversations with the testator showing the note to be paid was inadmissible; a legatee whose legacy has been paid in full was not incompetent to testify in support of a credit claimed by the executors. In re Knibbs' Estate, 108 A.D. 134, 96 N.Y.S. 40, 1905 N.Y. App. Div. LEXIS 3131 (N.Y. App. Div. 1905).

An heir who had been paid his share of the estate was competent to testify on settlement of administrator's account. In re Lese, 176 A.D. 744, 163 N.Y.S. 1014, 1917 N.Y. App. Div. LEXIS 5256 (N.Y. App. Div. 1917).

Although one of the executors was called by objectants to the account to prove the entries in the books of a company against whom an alleged claim existed, the door was not opened to permit said executor, under objection, to testify to a personal transaction with the decedent, when he was personally interested in showing that he did not owe a duty to account because his testatrix had made him and others a present of the asset. In re West, 252 A.D. 919, 300 N.Y.S. 146, 1937 N.Y. App. Div. LEXIS 6807 (N.Y. App. Div. 1937).

In final accounting administrator, claiming stock certificates in name of intestate were purchased with his personal funds, may testify that he retained control of same. In re Dederick's Estate, 259 A.D. 918, 20 N.Y.S.2d 261, 1940 N.Y. App. Div. LEXIS 7292 (N.Y. App. Div. 1940).

Where in an administrator's account his claim is fully set out and no objections to the account are filed, he is not disqualified from testifying in support of his claim. In re Porter's Estate, 113 N.Y.S. 928, 60 Misc. 504, 1908 N.Y. Misc. LEXIS 735 (N.Y. Sur. Ct. 1908).

An executrix paying claims of her husband cannot testify to conversation between testator and her husband on trial of objections to her claim of credit in her account, but husband can testify to such conversation. In re Mulligan, 143 N.Y.S. 686, 82 Misc. 336, 1913 N.Y. Misc. LEXIS 888 (N.Y. Sur. Ct. 1913).

Creditors of decedent whose claims have been paid in full are not incompetent witnesses on judicial settlement of administratrix's account, but their testimony should be weighed and considered in the light of the interest which the creditor has and of the fact that the debtor is dead. In re Hepner, 206 N.Y.S. 217, 123 Misc. 758, 1924 N.Y. Misc. LEXIS 1199 (N.Y. Sur. Ct. 1924).

A claimant whose claim against an estate has been satisfied is competent to testify in behalf of an accounting representative as to personal transactions and conversations with a decedent to establish the justice of the claim. In re Demmerle's Ex'r, 225 N.Y.S. 190, 130 Misc. 684, 1927 N.Y. Misc. LEXIS 1191 (N.Y. Sur. Ct. 1927).

When a claim against an estate has been allowed and paid, on accounting by the representative the claimant may testify as to personal transactions with decedent. In re Hanrette's Estate, 252 N.Y.S. 424, 140 Misc. 832, 1931 N.Y. Misc. LEXIS 1659 (N.Y. Sur. Ct. 1931).

The testimony of an accounting administratrix in respect to personal transactions with the decedent came within the express inhibition of CPA § 347. In re Van Valkenburgh's Will, 298 N.Y.S. 819, 164 Misc. 295, 1937 N.Y. Misc. LEXIS 1777 (N.Y. Sur. Ct. 1937).

Son of creditor whose claim against estate had been paid by executrix was competent in accounting by such executrix. In re Klausner's Will, 77 N.Y.S.2d 775, 192 Misc. 790, 1948 N.Y. Misc. LEXIS 2194 (N.Y. Sur. Ct. 1948).

In accounting proceeding involving validity and effect of assignment of interest in estate, successor in interest of deceased assignee was competent to testify. Estate of Danziger, 145 N.Y.S.2d 381, 208 Misc. 1024, 1955 N.Y. Misc. LEXIS 3345 (N.Y. Sur. Ct. 1955).

Petitioner for compulsory accounting by administrator was incompetent to testify that he paid part of purchase price of house taken in decedent's name alone. Petition of Callard, 73 N.Y.S.2d 538, 1947 N.Y. Misc. LEXIS 3062 (N.Y. Sur. Ct. 1947).

Funeral director, having already been paid, was competent to testify to reasonableness of his charges, where objections had been filed to executor's account, but he was not disinterested witness, since his testimony was designed to justify his own conduct. In re Molinaro's Will, 140 N.Y.S.2d 834, 1955 N.Y. Misc. LEXIS 2442 (N.Y. Sur. Ct. 1955).

In executors' accounting proceeding involving objections to payment of services of attorney-executor, testimony of claimant relating to such services was incompetent under CPA § 347. In re Maratto's Will, 145 N.Y.S.2d 621, 1955 N.Y. Misc. LEXIS 3814 (N.Y. Sur. Ct. 1955).

A son of intestate not disqualified by reason of interest when estate is insolvent. Lathrop v Lathrop, 29 Hun 608 (N.Y. 1883).

B. Party Or Person Interested In Event

26. Generally

A witness who is interested in the action and who will be released from liability to plaintiff, if plaintiff succeeds in action against executor, not competent. Redfield v Redfield, 110 N.Y. 671, 18 N.E. 373, 110 N.Y. (N.Y.S.) 671, 18 N.Y. St. 560, 1888 N.Y. LEXIS 981 (N.Y. 1888).

The test of interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other

action; and the interest must be certain and vested and not remote and contingent. Wallace v Straus, 113 N.Y. 238, 21 N.E. 66, 113 N.Y. (N.Y.S.) 238, 1889 N.Y. LEXIS 940 (N.Y. 1889).

To make out an interest in the event, the judgment must not merely leave open the possibility of another action, but must be evidence in the other action, and evidence adverse to the witness. Franklin v Kidd, 219 N.Y. 409, 114 N.E. 839, 219 N.Y. (N.Y.S.) 409, 1916 N.Y. LEXIS 841 (N.Y. 1916).

The interest that disqualified a witness under CPA § 347 was a financial interest, and that interest might be found in a possible liability for costs, although discretionary with the court. Croker v New York Trust Co., 245 N.Y. 17, 156 N.E. 81, 245 N.Y. (N.Y.S.) 17, 1927 N.Y. LEXIS 583 (N.Y. 1927).

The fact that the witness is a party to the record is not enough to exclude him, but his interest must be such that he will gain or lose by the event, either in money or otherwise, directly or indirectly because the record might be used for or against him as evidence. Croker v New York Trust Co., 245 N.Y. 17, 156 N.E. 81, 245 N.Y. (N.Y.S.) 17, 1927 N.Y. LEXIS 583 (N.Y. 1927).

One who may be made liable for costs has such an interest in the event of a suit as against the administrator of the promisor on whose promise he sues, that he is incompetent to testify as to transactions with the deceased. Croker v New York Trust Co., 245 N.Y. 17, 156 N.E. 81, 245 N.Y. (N.Y.S.) 17, 1927 N.Y. LEXIS 583 (N.Y. 1927) [Amendment of 1935 provided that one should not be disqualified as witness because of possibility of imposition or award of costs.].

The true test of interest is that the witness will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest. Laka v Krystek, 261 N.Y. 126, 184 N.E. 732, 261 N.Y. (N.Y.S.) 126, 1933 N.Y. LEXIS 1265 (N.Y. 1933).

Under CPA § 347 the interest of a witness in order to disqualify him from testifying had to be present, certain and vested, not uncertain, remote or contingent. In re McCulloch's Will, 263 N.Y.

408, 189 N.E. 473, 263 N.Y. (N.Y.S.) 408, 1934 N.Y. LEXIS 1289 (N.Y.), reh'g denied, 264 N.Y. 598, 191 N.E. 583, 264 N.Y. (N.Y.S.) 598, 1934 N.Y. LEXIS 1625 (N.Y. 1934).

The definition of “persons interested” by subdivision 10 of section 314 of the Surrogate’s Court Act, where used in connection with an estate or fund, had no reference to CPA § 347. In re McCulloch's Will, 263 N.Y. 408, 189 N.E. 473, 263 N.Y. (N.Y.S.) 408, 1934 N.Y. LEXIS 1289 (N.Y.), reh'g denied, 264 N.Y. 598, 191 N.E. 583, 264 N.Y. (N.Y.S.) 598, 1934 N.Y. LEXIS 1625 (N.Y. 1934).

A person is not “interested” unless some legal right of his would be affected by the event of the action or unless the judgment might be used to charge him with some legal liability. Lecour v Importers' & Traders' Nat'l Bank, 61 A.D. 163, 70 N.Y.S. 419, 1901 N.Y. App. Div. LEXIS 907 (N.Y. App. Div. 1901).

A witness was not disqualified under CPA § 347 unless he had some privity with the decedent; he must have had an interest in the question at issue. Abbott v Doughan, 138 A.D. 608, 123 N.Y.S. 122, 1910 N.Y. App. Div. LEXIS 1594 (N.Y. App. Div. 1910), aff'd, 204 N.Y. 223, 97 N.E. 599, 204 N.Y. (N.Y.S.) 223, 1912 N.Y. LEXIS 757 (N.Y. 1912).

The common-law rule with respect to what interest disqualified was the test of interest within CPA § 347. Griggs v Renault Selling Branch, Inc., 179 A.D. 845, 167 N.Y.S. 355, 1917 N.Y. App. Div. LEXIS 9388 (N.Y. App. Div. 1917).

The test whether one was “a person interested in the event,” within CPA § 347 was not merely whether he gained or lost by the effect of the judgment in the action, but whether such judgment was legal evidence for or against him in some other action. Kerwood v Hall, 201 A.D. 89, 193 N.Y.S. 811, 1922 N.Y. App. Div. LEXIS 6259 (N.Y. App. Div. 1922).

The true test of the interest of a witness, within the prohibition of CPA § 347 was that he would have either gained or lost by the direct legal operation and effect of the judgment, or that the record was legal evidence for or against him in some other action. It had to be a present, certain

and vested interest, and not an interest uncertain, remote or contingent. In re Abwender's Estate, 241 A.D. 566, 272 N.Y.S. 569, 1934 N.Y. App. Div. LEXIS 8308 (N.Y. App. Div. 1934).

Interest “in the event” means the very judgment sought in the action. Reynolds v Snow, 10 A.D.2d 101, 197 N.Y.S.2d 590, 1960 N.Y. App. Div. LEXIS 11299 (N.Y. App. Div. 1st Dep't), aff'd, 8 N.Y.2d 899, 204 N.Y.S.2d 146, 168 N.E.2d 822, 1960 N.Y. LEXIS 1171 (N.Y. 1960).

Attorney named as executor in a revoked will, who interposed objections to probate of revoking will, was competent to testify as to execution of revoked will, and neither his interest in possible testamentary commissions nor his right to or liability for costs constituted sufficient interest in event to render him incompetent. In re Will of Stacer, 13 A.D.2d 164, 214 N.Y.S.2d 746, 1961 N.Y. App. Div. LEXIS 10928 (N.Y. App. Div. 4th Dep't 1961), aff'd, 11 N.Y.2d 780, 227 N.Y.S.2d 26, 181 N.E.2d 769, 1962 N.Y. LEXIS 1346 (N.Y. 1962).

A witness, though a party and interested in the event, is not incompetent to testify to personal transactions or communications with a decedent in which she took no part. In re Hartman's Estate, 35 N.Y.S. 495, 13 Misc. 486, 1895 N.Y. Misc. LEXIS 672 (N.Y. Sur. Ct. 1895).

In an assault case, a witness, other than the parties, could testify as to right of way, the determination of the question reaching no further than the action. Blass v Linsley, 139 N.Y.S. 540, 78 Misc. 422, 1912 N.Y. Misc. LEXIS 1026 (N.Y. Sup. Ct. 1912).

Evidence of witness who has lived with defendant all her life is not inadmissible upon the ground that she is an interested witness, the test of interest being whether witness is interested not in the question but in the event of the suit. Dinnean v Dinnean, 152 N.Y.S. 587, 90 Misc. 121, 1915 N.Y. Misc. LEXIS 758 (N.Y. Sup. Ct.), aff'd, 171 A.D. 906, 155 N.Y.S. 1102, 1915 N.Y. App. Div. LEXIS 5311 (N.Y. App. Div. 1915).

On appeal by executors from report of transfer tax appraiser, affidavit of claimant of money deposited in name of decedent, was admissible. In re Kolb's Estate, 186 N.Y.S. 670, 114 Misc. 361, 1921 N.Y. Misc. LEXIS 1136 (N.Y. Sur. Ct. 1921).

The phrase “interested in the event,” as used in CPA § 347, modified the word “party” as well as “person.” Croker v New York Trust Co., 201 N.Y.S. 811, 121 Misc. 725, 1923 N.Y. Misc. LEXIS 1325 (N.Y. Sup. Ct. 1923).

To disqualify a witness he must stand to gain or lose by giving the testimony, in money or relief from liability, or because the record could be used against him, and his interest must be a present, certain, vested interest. In re Demmerle's Ex'r, 225 N.Y.S. 190, 130 Misc. 684, 1927 N.Y. Misc. LEXIS 1191 (N.Y. Sur. Ct. 1927).

The prohibition expressed in CPA § 347 against the examination of a witness on the trial “in his own behalf” who was “interested in the event,” extended only to a witness who was in the position of making a financial gain for himself in the event that the jury believed his testimony. In re Zimmerman's Will, 292 N.Y.S. 236, 161 Misc. 473, 1936 N.Y. Misc. LEXIS 1570 (N.Y. Sup. Ct. 1936), rev'd, 254 A.D. 630, 3 N.Y.S.2d 212, 1938 N.Y. App. Div. LEXIS 6780 (N.Y. App. Div. 1938).

A promisee may not testify to personal transactions with a deceased promisor for the benefit of third party beneficiaries. In re Browning's Estate, 1 N.Y.S.2d 67, 165 Misc. 675, 1937 N.Y. Misc. LEXIS 1046 (N.Y. Sur. Ct. 1937), aff'd, 255 A.D. 764, 7 N.Y.S.2d 486, 1938 N.Y. App. Div. LEXIS 5130 (N.Y. App. Div. 1938).

Claims against the estate of an intestate presented by two physicians and a nurse were disputed by the administrator and were referred pursuant to statute. Held that the physicians were not incompetent to testify in support of nurse’s claim to personal transactions with intestate. In re McQueen's Estate, 13 N.Y.S. 663, 59 Hun 625 (N.Y. Sup. Ct. 1891).

“Interest” herein meant a vested interest in the litigation itself and not a collateral or possible interest. Connor v Mayor, etc., of New York, 19 N.Y.S. 85, 64 Hun 635 (N.Y. Sup. Ct. 1892), aff'd, 137 N.Y. 545, 33 N.E. 336, 137 N.Y. (N.Y.S.) 545, 1893 N.Y. LEXIS 728 (N.Y. 1893).

Evidence was not prohibited by CPA § 347 where it destroyed rather than promoted interest of witness. In re Lowenstein's Estate, 138 N.Y.S.2d 420, 1954 N.Y. Misc. LEXIS 2972 (N.Y. Sur. Ct. 1954).

The words “interested in the event” limited in their application to the particular issue or question as to which witness is to be examined. Moore v Oviatt, 35 Hun 216 (N.Y.).

“Interest” as intended by CPA § 347 meant a legal interest in the judgment at the time the witness was sworn. Gourlay v Hamilton, 41 Hun 437, 1 N.Y. St. 555 (N.Y.); and see In re Estate of Hanley, 44 Hun 559 (N.Y. 1887).

27. Interest in property

In action by assignee of executrix of deceased lessee to compel specific performance of a covenant to renew the lease, the defendant cannot testify to personal transactions or communications with deceased lessee. Kolasky v Michels, 120 N.Y. 635, 24 N.E. 278, 120 N.Y. (N.Y.S.) 635, 1890 N.Y. LEXIS 1320 (N.Y. 1890).

In action to set aside deed as fraudulently procured, defendant who claimed no title to premises through deceased mother of defendant and wife of plaintiff, were competent. Pisane v Pisane, 272 A.D. 770, 69 N.Y.S.2d 533, 1947 N.Y. App. Div. LEXIS 3507 (N.Y. App. Div. 1947).

CPA § 347 contemplated property or interest which belonged to deceased in his lifetime and title to which has passed by assignment or otherwise through him to party who was protected by CPA § 347. Agluzzi v Aluzzo, 286 A.D. 399, 143 N.Y.S.2d 51, 1955 N.Y. App. Div. LEXIS 4052 (N.Y. App. Div. 1955).

In action against executor of grantor by assignee of grantee for specific performance of option to buy theater, grantee was incompetent to testify whether he paid $1 consideration to grantor. Sanford v Smith, 4 Misc. 2d 820, 66 N.Y.S.2d 780, 1946 N.Y. Misc. LEXIS 1743 (N.Y. Sup. Ct.

1946), aff'd, 273 A.D. 928, 77 N.Y.S.2d 924, 1948 N.Y. App. Div. LEXIS 5303 (N.Y. App. Div. 1948).

CPA § 347 could not be avoided by device of framing pleading in such way that in form claim was asserted only against corporation whose stock was owned by decedent's executors. In re Cohen's Estate, 137 N.Y.S.2d 300, 1954 N.Y. Misc. LEXIS 2544 (N.Y. Sup. Ct. 1954), aff'd, 285 A.D. 1119, 141 N.Y.S.2d 819, 1955 N.Y. App. Div. LEXIS 6836 (N.Y. App. Div. 1955).

Where sole object of action to impress trust on realty is to take something away from decedent's executors, either realty itself or stock of corporation owning such realty, and plaintiff is asserting claim adverse to estate which executors represent and he is seeking to support it by his own evidence as to personal transactions with decedent, his testimony is incompetent. In re Cohen's Estate, 137 N.Y.S.2d 300, 1954 N.Y. Misc. LEXIS 2544 (N.Y. Sup. Ct. 1954), aff'd, 285 A.D. 1119, 141 N.Y.S.2d 819, 1955 N.Y. App. Div. LEXIS 6836 (N.Y. App. Div. 1955).

28. Title derived through deceased person

Where plaintiff's grantor in ejectment died before trial, and defendant by his answer claimed to be the equitable owner, and asked a conveyance of the premises, held, that defendant was incompetent to testify to transactions between himself and deceased tending to sustain his counterclaim. Buck v Stanton, 51 N.Y. 624, 51 N.Y. (N.Y.S.) 624, 1872 N.Y. LEXIS 567 (N.Y. 1872).

A party cannot testify to a conversation between himself and deceased grantor under whose conveyance the opposite party claims, although the latter was not the immediate grantee of deceased but derived title through mesne conveyances. Pope v Allen, 90 N.Y. 298, 90 N.Y. (N.Y.S.) 298, 1882 N.Y. LEXIS 380 (N.Y. 1882).

In action by second indorser against first indorser of promissory note, plaintiff was competent to testify to personal transactions with deceased maker of the note. In such a case defendant was

not of the class of persons protected by CPA § 347. Kelly v Burroughs, 102 N.Y. 93, 6 N.E. 109, 102 N.Y. (N.Y.S.) 93, 1 N.Y. St. 161, 1886 N.Y. LEXIS 805 (N.Y. 1886).

A widow, suing a warehouseman for refusal to redeliver a piano which she stored with him as her own, but which he surrendered to her husband's executors who claimed it as an asset, cannot testify to the transaction between herself and her husband constituting the alleged gift; such warehouseman being "a person deriving title from a deceased person." Mullins v Chickering, 110 N.Y. 513, 18 N.E. 377, 110 N.Y. (N.Y.S.) 513, 18 N.Y. St. 606, 1888 N.Y. LEXIS 906 (N.Y. 1888).

In an action to recover a specific fund, defendant claimed that the money belonged to and was placed by him in hands of deceased. Held, that he was incompetent to testify to any transaction on the subject between him and deceased, as plaintiff acquired whatever interest she had from decedent. Mason v Prendergast, 120 N.Y. 536, 24 N.E. 806, 120 N.Y. (N.Y.S.) 536, 1890 N.Y. LEXIS 1290 (N.Y. 1890).

The maker of a note is disqualified from testifying in his own behalf as to personal transactions and communications between himself and the deceased payee thereof as against one obtaining title to the note through such payee. Wangner v Grimm, 169 N.Y. 421, 62 N.E. 569, 169 N.Y. (N.Y.S.) 421, 1902 N.Y. LEXIS 1185 (N.Y. 1902).

In an action brought for conversion, a witness who testified that the plaintiff purchased a ring from him and paid for it, and that at the time it was delivered, by parol agreement between the plaintiff and defendant's intestate, the ring was loaned to the latter, the title and ownership being retained by the plaintiff, was not "a person from, through or under whom" plaintiff derived her "interest or title by assignment or otherwise" within the meaning of CPA § 347. Abbott v Doughan, 204 N.Y. 223, 97 N.E. 599, 204 N.Y. (N.Y.S.) 223, 1912 N.Y. LEXIS 757 (N.Y. 1912).

Where the witness has quitclaimed or assigned to the plaintiff an interest in the subject matter of the action, still if the plaintiff relies solely upon a prior transaction as the source of title and does not invoke at all the quitclaim or assignment as conferring any right sought to be enforced, the

witness is not disqualified as one through whom the plaintiff derives interest or title. Harrington v Schiller, 231 N.Y. 278, 132 N.E. 89, 231 N.Y. (N.Y.S.) 278, 1921 N.Y. LEXIS 636 (N.Y.), reh'g denied, 231 N.Y. 646, 132 N.E. 923, 231 N.Y. (N.Y.S.) 646, 1921 N.Y. LEXIS 817 (N.Y. 1921).

In an action to enforce a parol trust in real property transferred by plaintiff to a deceased daughter, a quitclaim conveyance from a daughter of the deceased to plaintiff which was outside the line of title running from the deceased to the plaintiff afforded no basis for or assignment of the claim which plaintiff asserted against the deceased, and did not render such daughter incompetent as a witness under CPA § 347. Harrington v Schiller, 231 N.Y. 278, 132 N.E. 89, 231 N.Y. (N.Y.S.) 278, 1921 N.Y. LEXIS 636 (N.Y.), reh'g denied, 231 N.Y. 646, 132 N.E. 923, 231 N.Y. (N.Y.S.) 646, 1921 N.Y. LEXIS 817 (N.Y. 1921).

In an action by an administrator against a savings bank to recover the amount of certain funds withdrawn by one who had a power of attorney from plaintiff’s intestate and who withdrew the funds after the death of such intestate, such a person is not incompetent to testify as to declarations made by the plaintiff’s intestate in regard to his own acts in relation to the intestate’s property, as he was not a party to the action nor a party from whom the defendant derived its interest, and would not be bound by a judgment in such an action. Hoffman v Union Dime Sav. Inst., 95 A.D. 329, 88 N.Y.S. 686, 1904 N.Y. App. Div. LEXIS 1986 (N.Y. App. Div. 1904).

In an action brought against the widow and the son of a decedent to establish the existence, as a lien upon real estate of which the said decedent dies, seized intestate, of a mortgage which the plaintiff claims was executed to him by the decedent, the widow of the decedent, whose interests in the property in question are derived from her deceased husband, is incompetent to testify to conversations or transactions between herself and her husband tending to establish the invalidity of the alleged mortgage. Smith v Smith, 100 A.D. 1, 90 N.Y.S. 883, 1904 N.Y. App. Div. LEXIS 3319 (N.Y. App. Div. 1904).

Where depositor of bank dies leaving order on bank to pay a specific deposit to plaintiff, plaintiff could testify as to transactions with deceased. Foley v New York Sav. Bank, 157 A.D. 868, 142 N.Y.S. 822, 1913 N.Y. App. Div. LEXIS 6658 (N.Y. App. Div. 1913).

Neither the defendants themselves, nor a witness through whom they obtained title to the property in suit, were competent to testify respecting declarations alleged to have been made by the deceased maker of a mortgage under which plaintiffs claimed title. Beattie v Garrison, 204 A.D. 335, 198 N.Y.S. 71, 1923 N.Y. App. Div. LEXIS 9466 (N.Y. App. Div.), aff'd, 236 N.Y. 574, 142 N.E. 289, 236 N.Y. (N.Y.S.) 574, 1923 N.Y. LEXIS 1001 (N.Y. 1923).

CPA § 347 contemplated property or interest which belonged to deceased in his lifetime and title to which had passed by assignment or otherwise through him to party who was protected by CPA § 347. Agluzzi v Aluzzo, 286 A.D. 399, 143 N.Y.S.2d 51, 1955 N.Y. App. Div. LEXIS 4052 (N.Y. App. Div. 1955).

Where a chattel mortgage brings an action against the executrix of a deceased person for the alleged conversion by the deceased of the chattels mortgaged, the mortgagor is, as a person through whom the plaintiff derives title, debarred from testifying on the behalf of the plaintiff to a personal transaction or communication which she had with the deceased, tending to show that she sold and delivered the chattels to him and that he took possession of them. Beck v Cooke, 57 N.Y.S. 653, 27 Misc. 185, 1899 N.Y. Misc. LEXIS 113 (N.Y. City Ct. 1899).

Although a release of interest of a legatee increases the shares of the residuary legatee, the legatee releasing cannot be said to have been called in behalf of the persons from whom he derived his interest or title by assignment or otherwise, as a residuary legatee takes nothing in right of the legatee releasing. In re Fitzgerald' Will, 68 N.Y.S. 632, 33 Misc. 325, 1900 N.Y. Misc. LEXIS 1048 (N.Y. Sur. Ct. 1900).

Where a husband on his promissory note borrowed moneys and thereafter purchased real estate which was conveyed by the vendor directly to his wife, she took the property “from, through or under” her husband, within the meaning of CPA § 347, and therefore when the lender

brought an action against her to impress a trust on the property to the amount unpaid, the lender could not testify as to personal transactions with the husband tending to establish the agreement which he claimed. Freygang v Train, 85 N.Y.S. 538, 42 Misc. 49, 1903 N.Y. Misc. LEXIS 442 (N.Y. Sup. Ct. 1903).

Where plaintiff agreed with decedent to assign his share in his mother's estate to his brother in consideration of the decedent's agreement to turn over a like amount to both the brother and a sister, held, in a suit by plaintiff to compel the decedent's administrator to make the payments under the agreement, that the beneficiaries of the agreement did not derive their title or interest from, through, or under the plaintiff, so as to make the plaintiff incompetent to testify as to the contract with the decedent. Croker v New York Trust Co., 205 N.Y.S. 761, 123 Misc. 460, 1924 N.Y. Misc. LEXIS 1002 (N.Y. Sup. Ct. 1924), aff'd, 216 A.D. 832, 215 N.Y.S. 833, 1926 N.Y. App. Div. LEXIS 10696 (N.Y. App. Div. 1926).

In discovery proceeding to compel husband to return funds allegedly withdrawn from decedent's bank account, the fact that his daughter testified that part of such funds so withdrawn constituted a gift from decedent to her did not disqualify her, no present, certain, and vested interest in the event having been shown. In re Estate of Ratz, 25 Misc. 2d 415, 202 N.Y.S.2d 787, 1960 N.Y. Misc. LEXIS 3057 (N.Y. Sur. Ct. 1960).

In trespass involving land boundary, predecessor in title of plaintiff was incompetent to testify to acts and remarks of defendant's deceased predecessor in title when he substituted iron pin for wooden stake at time of boundary survey. Whitney v Dudley, 40 N.Y.S.2d 838, 1943 N.Y. Misc. LEXIS 1754 (N.Y. Sup. Ct.), aff'd, 266 A.D. 1056, 45 N.Y.S.2d 725, 1943 N.Y. App. Div. LEXIS 5925 (N.Y. App. Div. 1943).

"Deriving title or interest" should be construed as if it read "claiming to derive title or interest." Estate of Voorhis, 1 How. Pr. (n.s.) 261.

Where the principal question in controversy was whether a certain transfer of property from deceased to plaintiff was fraudulent and void, to which plaintiff claimed title by virtue of a sale

under execution against deceased, held, that evidence as to personal transactions between plaintiff and deceased were inadmissible. Taylor v Meldram, 31 Hun 455 (N.Y. 1884).

In action by one claiming title to goods through transfer from a deceased person against sheriff who has levied on goods by virtue of execution against deceased, plaintiff cannot testify in his own behalf as to what took place between himself and deceased at the time of the transfer. Taylor v Meldram, 31 Hun 455 (N.Y. 1884).

In an action upon promissory note made by defendant payable to his wife (since deceased), or bearer, and which subsequently came into the hands of a third party, held, that defendant was incompetent to prove that the note was given without consideration. Benedict v Driggs, 34 Hun 94 (N.Y.).

In an action to establish plaintiff's title to certain real estate by having a deed of defendant's ancestor declared a mortgage with a provision entitling plaintiff to a conveyance of the title, the grantor in such deed being the party through whom plaintiff claims title is incompetent to prove the signature of the grantee thereto. Garvey v Owens, 37 Hun 498 (N.Y.).

CPA § 347 does not exclude evidence of any personal transactions between a witness who is a party to the action and the person since deceased from whom the witness claims title, but only between the witness and the person from whom the other party to the action against whom the testimony is given claims title. Lyon v Whittaker, 28 N.Y.S. 296, 77 Hun 107 (1894).

A defendant is incompetent to testify in regard to personal transactions between himself and a deceased person from whom plaintiff to some extent derived title. Sheldon v Sheldon, 32 N.Y.S. 419, 84 Hun 422 (1895).

29. Creditors

Checks and stubs evidence personal transaction and were incompetent to establish a loan. In re Carrington, 163 A.D. 544, 148 N.Y.S. 952, 1914 N.Y. App. Div. LEXIS 7001 (N.Y. App. Div. 1914).

Since right of judgment creditor against an insurer did not flow from right which accrued to the policyholder such judgment creditor not person who derived his title through or under the policyholder within the meaning of CPA § 347 and admission of the statement signed by deceased policyholder was not prohibited. Friedman v United States Fidelity & Guaranty Co., 9 Misc. 2d 306, 170 N.Y.S.2d 226, 1957 N.Y. Misc. LEXIS 1934 (N.Y. App. Term 1957).

In an action to foreclose an equitable lien for unpaid purchase money of land sold to plaintiff's father since deceased, the contract for which was assigned to defendant, the defense was payment, and defendant testified to admissions made by plaintiff that he had received payment by allowance of the amount on the sale of a contract by defendant's father to plaintiff. Held, that this did not permit testimony by plaintiff denying that he had the transaction testified to by defendant. Brown v Burgett, 15 N.Y.S. 942, 61 Hun 623, 1891 N.Y. Misc. LEXIS 209 (N.Y. Sup. Ct. 1891), aff'd, 149 N.Y. 578, 43 N.E. 986, 149 N.Y. (N.Y.S.) 578, 1896 N.Y. LEXIS 762 (N.Y. 1896).

Where claims against a decedent's estate, which were admitted by the administrator and not objected to by the decedent's survivors, are supported by the testimony of the claimants, a mere creditor could not take advantage of it. .

The question whether plaintiff's intestate was a creditor of the defendant firm at a certain time involved a personal transaction within the prohibition of CPA § 347. Wheeler v Kuntz, 9 N.Y. St. 496.

In action by judgment creditors of deceased debtor to set aside conveyances made by him to his wife as fraudulent, the wife, the defendant, was allowed to testify to personal transactions between herself and deceased husband; that the plaintiffs did not claim or hold under the husband in such a sense as to bring them within the provisions of CPA § 347. Held, no error.

Gillies v Kreuder, 33 Hun 314 (N.Y.), aff'd, 102 N.Y. 666, 102 N.Y. (N.Y.S.) 666, 1886 N.Y. LEXIS 908 (N.Y. 1886).

A party examined in his own behalf as a witness against an administrator, should not be permitted to testify that the claim sued on has been paid. Lerche v Brasher, 37 Hun 385 (N.Y.), rev'd, 104 N.Y. 157, 10 N.E. 58, 104 N.Y. (N.Y.S.) 157, 4 N.Y. St. 335, 1887 N.Y. LEXIS 578 (N.Y. 1887).

Plaintiff in action for conversion of money belonging to intestate is incompetent to prove the fact that intestate's debtor paid the money to intestate in plaintiff's presence. Crawford v Haines, 44 Hun 597 (N.Y. 1887).

In an action by an administrator to set aside a deed from decedent to defendants as in fraud of decedent's creditors, defendants may testify as to conversations with decedent, relative to the transaction. Miller v Davis, 14 N.Y.S. 725, 60 Hun 198, 1891 N.Y. Misc. LEXIS 2470 (N.Y. Sup. Ct. 1891).

In an action by administrator brought on behalf of creditor to set aside a deed made by intestate for fraud, one of the parties testified on her own behalf under objection as to statements made by the grantor at the time of the transaction, and as to his physical condition at the time the deed was executed. Held, that the testimony was competent. Miller v Davis, 14 N.Y.S. 725, 60 Hun 198, 1891 N.Y. Misc. LEXIS 2470 (N.Y. Sup. Ct. 1891).

In an action against an executor a demand for services rendered plaintiff by defendant's testator was set up as a counterclaim. Plaintiff was asked "was it true that it all had been paid." Held incompetent as calling for a transaction with deceased. 34 Hun 626.

30. —Claimant against decedent's estate.

Upon a hearing on a claim against a decedent's estate, the plaintiff, in support of certain testimony, cannot testify that he went to a certain place with nine hundred dollars ($900) and

came away with only a little change. Dougall v Dougall, 61 A.D. 282, 70 N.Y.S. 336, 1901 N.Y. App. Div. LEXIS 929 (N.Y. App. Div. 1901).

In an action against the estate of a decedent on an account stated, where the defense is payment by check, it is reversible error to allow the plaintiff to testify that he never received the money on the check. Tillman v Rayner, 125 A.D. 309, 109 N.Y.S. 443, 1908 N.Y. App. Div. LEXIS 2774 (N.Y. App. Div. 1908).

Decree of surrogate's court reversed on the ground that claimant was incompetent to testify in support of claim. Cotter v Dignan's Estate, 222 A.D. 789, 225 N.Y.S. 422, 1927 N.Y. App. Div. LEXIS 9163 (N.Y. App. Div. 1927).

Claimant's testimony as to his conversations with respondent's testator was not competent to establish a claim against testator's estate based on an alleged agreement by the testator to leave his estate to claimant's intestate or his children. In re Howe's Estate, 260 A.D. 555, 23 N.Y.S.2d 139, 1940 N.Y. App. Div. LEXIS 4652 (N.Y. App. Div. 1940), app. dismissed, 285 N.Y. 611, 33 N.E.2d 545, 285 N.Y. (N.Y.S.) 611, 1941 N.Y. LEXIS 1627 (N.Y. 1941).

On hearing of claim by executrix against the estate for moneys collected by testator, where it was established that the moneys were either paid to testator or claimant, she could not testify that they were not paid to her. In re Brown's Estate, 137 N.Y.S. 978, 77 Misc. 507, 1912 N.Y. Misc. LEXIS 1191 (N.Y. Sur. Ct. 1912).

A claimant was prevented by CPA § 347 from proving by her own testimony the nonpayment of a debt owed to her by a decedent. In re Thompson's Estate, 269 N.Y.S. 554, 149 Misc. 899, 1934 N.Y. Misc. LEXIS 1087 (N.Y. Sur. Ct. 1934), rev'd, 246 A.D. 566, 282 N.Y.S. 893, 1935 N.Y. App. Div. LEXIS 9111 (N.Y. App. Div. 1935).

In a proceeding involving a claim against an estate, the testimony of the claimant that he "accepted" the deposit as payment was prohibited by CPA § 347. In re Kelly's Will, 271 N.Y.S. 457, 151 Misc. 277, 1934 N.Y. Misc. LEXIS 1286 (N.Y. Sur. Ct. 1934).

Claimant in discovery proceeding was incompetent on hearing on merits. In re Schulman's Estate, 72 N.Y.S.2d 239, 189 Misc. 672, 1947 N.Y. Misc. LEXIS 2731 (N.Y. Sur. Ct.), app. dismissed, 75 N.Y.S.2d 517 (N.Y. App. Div. 1947).

Where a claim is made against an estate a claimant may not testify in his own behalf and is barred under CPA § 347. In re Samuels' Will, 9 Misc. 2d 909, 169 N.Y.S.2d 60, 1957 N.Y. Misc. LEXIS 1946 (N.Y. Sur. Ct. 1957), rev'd, 15 A.D.2d 618, 223 N.Y.S.2d 147, 1961 N.Y. App. Div. LEXIS 6840 (N.Y. App. Div. 3d Dep't 1961).

Upon a reference of a disputed claim upon a note purporting to have been made by defendant testator, the claimant was allowed to testify that deceased had never paid the note, principal or interest. Held, that this was a personal transaction with the deceased, and was inadmissible. Myers v Hunt, 14 N.Y.S. 471, 60 Hun 579, 1891 N.Y. Misc. LEXIS 2059 (N.Y. Sup. Ct. 1891).

In proceeding to adjudicate accounts between decedent and his widow, now deceased, bookkeeper of decedent was competent to testify to conversations with widow, although she holds substantial claims against decedent’s estate but already adjudicated. In re Tarbell's Estate, 127 N.Y.S.2d 768, 1954 N.Y. Misc. LEXIS 1980 (N.Y. Sur. Ct. 1954).

Testimony of plaintiff as to the time when he learned that the decedent had paid less as surety than had been given to indemnify him is not obnoxious as involving a personal transaction with the deceased. Ketchum v Holden, 34 N.Y.S. 870, 88 Hun 482 (1895).

A claimant against a decedent’s estate is not prohibited from testifying to advancements of his own moneys to third persons in payment of bills against the decedent, as such evidence does not refer to personal transactions with the deceased. Zinke v Zinke's Estate, 35 N.Y.S. 645, 90 Hun 127 (1895).

31. Executors and administrators

An executor’s right to commissions as executor does not render him incompetent by reason of interest. In re Will of Wilson, 103 N.Y. 374, 8 N.E. 731, 103 N.Y. (N.Y.S.) 374, 3 N.Y. St. 613, 1886 N.Y. LEXIS 1068 (N.Y. 1886).

Testimony of executor on accounting as to payment by him of money to testator, where he seeks a credit for the amount, relates to a personal transaction and is incompetent. In re Kellogg, 104 N.Y. 648, 10 N.E. 152, 104 N.Y. (N.Y.S.) 648, 5 N.Y. St. 668, 1887 N.Y. LEXIS 642 (N.Y. 1887).

Executors who, after rejecting a claim and having knowledge of facts which might have constituted a defense, made no defense when the action was tried before a referee, but gave evidence supporting the claim and suppressed other facts and did not raise objections to testimony under CPA § 347, were not protected by a judgment so obtained. In re Watson, 115 A.D. 310, 100 N.Y.S. 993, 1906 N.Y. App. Div. LEXIS 3682 (N.Y. App. Div. 1906), aff'd, 187 N.Y. 541, 80 N.E. 1122, 187 N.Y. (N.Y.S.) 541, 1907 N.Y. LEXIS 847 (N.Y. 1907).

Executor who, because of personal knowledge that certain securities belonged in equity to the father of his testator, did not inventory them with the assets of the estate, held competent to testify as to his personal knowledge respecting such ownership through communications and transactions with the deceased, in a proceeding to surcharge his account with such securities. In re Swiller's Will, 205 A.D. 302, 199 N.Y.S. 455, 1923 N.Y. App. Div. LEXIS 5009 (N.Y. App. Div. 1923).

An executor, who had delivered a note and permitted it to be destroyed and was seeking to be allowed a credit as against a contesting residuary legatee, was a person interested in the event within the meaning of CPA § 347. In re Green's Estate, 247 A.D. 540, 288 N.Y.S. 249, 1936 N.Y. App. Div. LEXIS 8317 (N.Y. App. Div. 1936).

On appeal from a decree involving the issue as to the efforts made by an administrator to locate next of kin, the administrator’s testimony as to conversations with the decedent was

inadmissible for any purpose. In re Hone's Estate, 250 A.D. 635, 295 N.Y.S. 232, 1937 N.Y. App. Div. LEXIS 8420 (N.Y. App. Div. 1937).

In action to impress equitable lien upon realty of surviving joint tenant for amount of reasonable value of improvements made and paid for by plaintiffs, they were not competent, suing not as executors of deceased joint tenant but in their personal capacity, to testify that decedent agreed, in consideration of their caring for him for life, that they would become sole owners of all his property. Vulovich v Baich, 286 A.D. 403, 143 N.Y.S.2d 247, 1955 N.Y. App. Div. LEXIS 4053 (N.Y. App. Div. 1955), aff'd, 1 N.Y.2d 735, 152 N.Y.S.2d 281, 135 N.E.2d 40, 1956 N.Y. LEXIS 964 (N.Y. 1956).

Attorney named as executor in a revoked will, who interposed objections to probate of revoking will, was competent to testify as to execution of revoked will, and neither his interest in possible testamentary commissions nor his right to or liability for costs constituted sufficient interest in event to render him incompetent. In re Will of Stacer, 13 A.D.2d 164, 214 N.Y.S.2d 746, 1961 N.Y. App. Div. LEXIS 10928 (N.Y. App. Div. 4th Dep't 1961), aff'd, 11 N.Y.2d 780, 227 N.Y.S.2d 26, 181 N.E.2d 769, 1962 N.Y. LEXIS 1346 (N.Y. 1962).

The verification by an administrator of a claim against his intestate does not establish the validity of the debt; nor is such administrator a competent witness as to the facts constituting the claim. In re Childs' Estate, 26 N.Y.S. 721, 5 Misc. 560, 1893 N.Y. Misc. LEXIS 922 (N.Y. Sur. Ct. 1893).

On the hearing of a disputed claim of a brother, the administrator of and against his sister’s estate, such administrator is incompetent as to payments made by the intestate to him upon the claim. In re Neil's Estate, 71 N.Y.S. 840, 35 Misc. 254, 1901 N.Y. Misc. LEXIS 354 (N.Y. Sur. Ct. 1901).

The testimony of the husband’s attorney and executor as to the facts of a transaction between the husband and the wife, when the latter reconveyed to him upon his promise to provide for her by will was not excluded by either CPA § 347 or CPA § 353 (§ 4503(a) herein), nor because the

plaintiff in the action to foreclose the land in question, and to whom the wife assigned the mortgage, was not present at the transaction. Mertens v Wakefield, 71 N.Y.S. 1062, 35 Misc. 501, 1901 N.Y. Misc. LEXIS 445 (N.Y. Sup. Ct. 1901).

An administratrix with the will annexed, in her action to establish and enforce a trust in certain mortgages alleged to have been held in trust by defendant's testator for plaintiff's testator, is not a competent witness as to her conversations with defendant's testator. Harvey v Cullings, 96 N.Y.S. 638, 48 Misc. 344, 1905 N.Y. Misc. LEXIS 408 (N.Y. Sup. Ct. 1905).

Where an executor or administrator has paid a claim and he is sought to be surcharged with such payment he cannot testify in his own behalf in regard to transactions with the deceased affecting such claim, as in such case he is a "person interested in the event," where, however, a claim has been allowed but not paid, the executor or administrator is not prohibited from testifying as to the facts which were ascertained and known to him before allowing the claim. In re Fitzpatrick's Estate, 206 N.Y.S. 496, 123 Misc. 779, 1924 N.Y. Misc. LEXIS 1217 (N.Y. Sur. Ct. 1924).

CPA § 347 applied to testimony of an administrator proving his own claim against the estate. In re Kahn's Estate, 251 N.Y.S. 23, 140 Misc. 532, 1931 N.Y. Misc. LEXIS 1404 (N.Y. Sur. Ct. 1931).

In action by administratrix for rent of premises held by intestate as life tenant, testimony of decedent as to conversations and transactions with decedent were incompetent. Rizzo v Mataranglo, 16 Misc. 2d 20, 135 N.Y.S.2d 92, 1953 N.Y. Misc. LEXIS 1392 (N.Y. Mun. Ct. 1953), aff'd, 16 Misc. 2d 21, 186 N.Y.S.2d 773, 1954 N.Y. Misc. LEXIS 1876 (N.Y. App. Term 1954), app. denied, 285 A.D. 814, 137 N.Y.S.2d 837, 1955 N.Y. App. Div. LEXIS 5687 (N.Y. App. Div. 1955).

It is well settled law in this state that the claim of an executor against an estate must be established by legal proof. It could be proved by the testimony of the administrator himself

where objection under CPA § 347 was made. In re Murphy's Will, 5 Misc. 2d 107, 159 N.Y.S.2d 878, 1957 N.Y. Misc. LEXIS 3391 (N.Y. Sur. Ct. 1957).

In proceeding to compel administrator to deliver to petitioner bank book of account in name of decedent in trust for petitioner, and administrator claimed the account as an estate asset because the trust was revoked, administrator was held incompetent because interested in the event. In re Estate of Stelma, 25 Misc. 2d 234, 201 N.Y.S.2d 609, 1960 N.Y. Misc. LEXIS 3877 (N.Y. Sur. Ct. 1960).

An executor is not interested in a claim by widow for moneys loaned by deceased for her, and is competent to testify in support thereof. Wiltsie v Wiltsie's Ex'r, 1 N.Y.S. 559, 49 Hun 606, 1888 N.Y. Misc. LEXIS 1441 (N.Y. Sup. Ct. 1888).

In an action for partition among heirs a mortgage given by the widow of a former owner was set up as a charge against the property by the executors of the deceased mortgagee. Held, that such executor was incompetent to testify to conversations with one of the heirs since deceased to show knowledge of the giving of the mortgage on the part of such heir as against the children of the latter. Gennerich v Ulrich, 12 N.Y.S. 353, 58 Hun 609, 1890 N.Y. Misc. LEXIS 3584 (N.Y. Sup. Ct. 1890).

Proponent of will, who would gain by probate of proffered paper, is incompetent. In re Beckerle's Will, 46 N.Y.S.2d 271, 1943 N.Y. Misc. LEXIS 2762 (N.Y. Sur. Ct. 1943).

Oral proof explaining deceased mortgagee’s writings or relating his conversations with reference thereto, by those interested in foreclosure of mortgage by his executors, was excluded. Woolley v Hoffman, 99 N.Y.S.2d 293, 1950 N.Y. Misc. LEXIS 1927 (N.Y. Sup. Ct. 1950).

In action against executors by broker for commissions for selling deceased’s realty, they waived prohibition of CPA § 347 by giving in evidence testimony of deceased. Brown, Harris, Stevens, Inc. v Bauer, 103 N.Y.S.2d 10, 1951 N.Y. Misc. LEXIS 1589 (N.Y. Sup. Ct. 1951).

In action by administrator of estate against defendant who filed counterclaim, his mother was competent as witness for him. Chemical Bank & Trust Co. v Gould, 134 N.Y.S.2d 631, 1954 N.Y. Misc. LEXIS 2800 (N.Y. App. Term 1954).

CPA § 347 did not apply to an action against one who though an executor was sued in his individual character and not as executor. Hall v Richardson, 22 Hun 444 (N.Y.), aff'd, 89 N.Y. 636, 89 N.Y. (N.Y.S.) 636, 1882 N.Y. LEXIS 323 (N.Y. 1882).

Where the action was brought against the executor, not in his representative capacity, but for a claim against him individually, although growing out of matters in which he acted for the estate, held, that the plaintiff might testify as to personal transactions with the deceased. Hall v Richardson, 22 Hun 444 (N.Y.), aff'd, 89 N.Y. 636, 89 N.Y. (N.Y.S.) 636, 1882 N.Y. LEXIS 323 (N.Y. 1882).

An administrator who is also a plaintiff cannot testify to conversations had with defendant's testator before he was appointed administrator. Poucher v Scott, 33 Hun 223 (N.Y.), aff'd, 98 N.Y. 422, 98 N.Y. (N.Y.S.) 422, 1885 N.Y. LEXIS 620 (N.Y. 1885).

In an action by executor of deceased judgment debtor against judgment creditor, the latter is not a competent witness as to personal transactions with deceased. Geissmann v Wolf, 46 Hun 289, 11 N.Y. St. 306 (N.Y.).

In an action against an administrator and a grantee of the decedent to set aside the deed as made in fraud of creditors, the administrator is not incompetent to testify in behalf of such grantee to declarations made by decedent concerning her indebtedness to the grantee. Swan v Morgan, 34 N.Y.S. 829, 88 Hun 378 (1895).

An executor is not an interested party. Re Gagan's Will, Powers 231, affd 21 N.Y.S. 350, 49 N.Y. St. 366.

32. Husband and wife

A widow is a competent witness as to a transaction between her and her husband at the time she assigned a policy of insurance on his life held by her as security for his debt, in an action by her against one claiming under such assignment. Barry v Equitable Life Assurance Soc., 59 N.Y. 587, 59 N.Y. (N.Y.S.) 587, 1875 N.Y. LEXIS 299 (N.Y. 1875).

In action against administratrix to cancel a mortgage given to intestate on the ground of want of consideration, it appeared that the property mortgaged had been conveyed by plaintiff and her husband to a person who subsequently conveyed it back and vacated the mortgage. Held, that husband was not incompetent to prove want of consideration and that a mere averment in answer that he had an interest did not render him incompetent. Pratt v Elkins, 80 N.Y. 198, 80 N.Y. (N.Y.S.) 198, 1880 N.Y. LEXIS 83 (N.Y. 1880).

In action brought by heirs of a deceased grantor, to set aside his conveyance on ground of undue influence, his widow, who, as his wife, joined in the conveyance, is incompetent to testify as to personal transactions between her and deceased. Sanford v Ellithorp, 95 N.Y. 48, 95 N.Y. (N.Y.S.) 48, 1884 N.Y. LEXIS 623 (N.Y. 1884).

A widow is incompetent to testify as to transactions and communications with her deceased husband, as to execution of his deed of land in which she joined, in her action to set aside said deed for fraud. Witthaus v Schack, 105 N.Y. 332, 11 N.E. 649, 105 N.Y. (N.Y.S.) 332, 7 N.Y. St. 345, 1887 N.Y. LEXIS 727 (N.Y. 1887).

Where a husband and wife united in a mortgage of land owned by the former, and the former died, devising lands to wife, held, that the wife was not prohibited from testifying as against the assignee of the mortgage as to transactions between the husband and the mortgagee in relation to the mortgage. Holcomb v Campbell, 118 N.Y. 46, 22 N.E. 1107, 118 N.Y. (N.Y.S.) 46, 1889 N.Y. LEXIS 1552 (N.Y. 1889).

In an action by the administratrix of a creditor to recover on a note signed by a husband for money borrowed by himself and wife, the wife is not disqualified from testifying as to payment on

the ground that she was interested in the fund. Laka v Krystek, 261 N.Y. 126, 184 N.E. 732, 261 N.Y. (N.Y.S.) 126, 1933 N.Y. LEXIS 1265 (N.Y. 1933).

Testimony of the husbands of grantees as to statements made by the grantor to them regarding the delivery of the deed was improperly excluded on the ground that sections 18 and 83 of the Decedent Estate Law, giving them an interest in any properties left by their wives at death, made them parties in interest. The interests given by the Decedent Estate Law are too remote and contingent to disqualify the husbands as interested witnesses though such interests may be considered as affecting their credibility. Herrmann v Jorgenson, 263 N.Y. 348, 189 N.E. 449, 263 N.Y. (N.Y.S.) 348, 1934 N.Y. LEXIS 1282 (N.Y.), reh'g denied, 264 N.Y. 529, 191 N.E. 549, 264 N.Y. (N.Y.S.) 529, 1934 N.Y. LEXIS 1568 (N.Y. 1934).

In action to recover on a promissory note, where the complaint contained no allegation that plaintiff derived his title or interest from, through or under anyone except defendant, and the answer alleged that defendant signed the instrument in blank upon representations by her deceased husband that he would not make or deliver the instrument for an amount in excess of a limited sum but that the husband in violation of her instructions and his agreement, without defendant’s knowledge or assent, inserted the name of plaintiff and an amount much greater than that authorized, it was error to reject offered testimony of defendant as to conversations and transactions between herself and her deceased husband, upon the ground that under CPA § 347, she, being a party interested in the event, was prohibited from testifying against plaintiff, as one “deriving his title or interest from, through or under a deceased person.” Jones v Maloney, 277 N.Y. 437, 14 N.E.2d 782, 277 N.Y. (N.Y.S.) 437, 1938 N.Y. LEXIS 1001 (N.Y. 1938).

A person whose dower interests are affected by the action cannot testify as to conversations with the deceased. Eckert v Eckert, 13 A.D. 490, 43 N.Y.S. 353, 1897 N.Y. App. Div. LEXIS 109 (N.Y. App. Div. 1897).

The plaintiff loaned money to a partnership of which her husband was a member. The other partner died and a new firm was formed. In an action on the note, against the estate of the deceased partner, it was error to permit the plaintiff's husband to testify to partial payments by the deceased, so as to avoid the bar of the statute of limitations. It was to the husband's interest, as jointly liable on the note, to shift the entire debt to the estate of the deceased partner. Hixson v Rodbourn, 67 A.D. 424, 73 N.Y.S. 779, 1901 N.Y. App. Div. LEXIS 2714 (N.Y. App. Div. 1901).

In an action brought by a sister of a decedent to set aside the probate of the latter's will, on the ground of undue influence, the fact that, if the plaintiff is successful, her husband will have a tenancy by the curtesy initiate in the property passing to the plaintiff from the decedent, does not render the husband incompetent to testify to what occurred and what was said on an occasion when the decedent was sick; a witness whose interest is sufficient to disqualify him from testifying to any personal transaction or communication with the deceased, is not, however, to be excluded from testifying to a conversation between the deceased and another in his presence, but in which he took no part. Spindler v Jerolomon, 75 A.D. 444, 78 N.Y.S. 320, 1902 N.Y. App. Div. LEXIS 2181 (N.Y. App. Div. 1st Dep't 1902).

The wife of one who, if a will was rejected, would become vested with the fee title to one-third of the decedent's real estate, subject to the widow's dower, was a "person interested in the event" and so disqualified under CPA § 347. In re Blaine's Will, 143 A.D. 687, 128 N.Y.S. 186, 1911 N.Y. App. Div. LEXIS 903 (N.Y. App. Div. 1911).

On a proceeding, contesting the probate of a will, it is error to allow the wife of the chief devisee and proponent to testify as to personal transactions with the testator. In re Weed's Will, 143 A.D. 822, 127 N.Y.S. 966, 1911 N.Y. App. Div. LEXIS 934 (N.Y. App. Div. 1911), aff'd, 204 N.Y. 611, 97 N.E. 1118 (N.Y. 1912).

Widow as beneficiary under will could not testify as to conversation between deceased husband and father-in-law respecting ownership, as between them, of deposit in bank. Scully v Scully,

154 A.D. 359, 139 N.Y.S. 622, 1912 N.Y. App. Div. LEXIS 11884, 1912 N.Y. App. Div. LEXIS 9945 (N.Y. App. Div. 1912).

In replevin for possession of bonds in safety deposit box which was rented in the names of defendant's intestate husband and plaintiff's deceased mother, defendant could not testify as to conversations between her husband and the mother, but she could testify as to transactions or conversations with her husband, and that she saw the bonds in her husband's possession during his lifetime. Paulovico v Moller, 190 A.D. 3, 179 N.Y.S. 224, 1919 N.Y. App. Div. LEXIS 4056 (N.Y. App. Div. 1919).

An inchoate right of dower in lands is a subsisting and valuable interest which disqualified witness from testifying concerning personal transactions with deceased. In re Eno's Will, 196 A.D. 131, 187 N.Y.S. 756, 1921 N.Y. App. Div. LEXIS 5495 (N.Y. App. Div. 1921).

In an action to have a deed declared a mortgage and for an accounting, wherein a judgment for plaintiff would include an order decreeing him to have a one-half interest in the property conveyed by the deed, his wife was incompetent to testify respecting conversations alleged to have taken place between the maker of the deed, since deceased, and the plaintiff and the defendant, tending to establish plaintiff's version of the transaction, since she was an interested party to the extent of an inchoate dower interest in such land if so decreed to plaintiff. Hines v Hines, 199 A.D. 688, 191 N.Y.S. 859, 1922 N.Y. App. Div. LEXIS 8074 (N.Y. App. Div. 1922).

A decree of the Surrogate's Court directing delivery of certain property to the administrator of an estate pursuant to its trial and determination of an issue raised between such administrator and a claimant under §§ 205 and 206, Surrogate's Court Act, will be reversed and a new trial ordered where the wife of the claimant was not permitted to testify on the ground of interest, pursuant to the section annotated, but she was not made a party to the proceedings. In re Fonda's Estate, 201 A.D. 780, 195 N.Y.S. 188, 1922 N.Y. App. Div. LEXIS 6418 (N.Y. App. Div. 1922).

Testimony of a surviving husband with respect to transactions between his deceased wife and himself whereby he was relieved of his obligation to pay medical expenses incurred during his wife's last illness was incompetent under CPA § 347. In re Burt's Will, 254 A.D. 584, 3 N.Y.S.2d 70 (N.Y. App. Div. 1938).

A widow was not incompetent to testify, under CPA § 347, where she was not called to testify on her own behalf, but on behalf of the contestants of her husband's will, whose interests were opposed to hers. In re Hayden's Will, 261 A.D. 103, 24 N.Y.S.2d 608, 1941 N.Y. App. Div. LEXIS 7262 (N.Y. App. Div. 1941).

A husband was not incompetent under CPA § 347 to testify in an action brought by his wife, because he became a tenant by the curtesy initiate, if his wife's suit succeeded. Leary v Corvin, 60 N.Y.S. 563, 29 Misc. 68, 1899 N.Y. Misc. LEXIS 707 (N.Y. Sup. Ct. 1899), rev'd, 63 A.D. 151, 71 N.Y.S. 335, 1901 N.Y. App. Div. LEXIS 1567 (N.Y. App. Div. 1901).

Husband can testify on judicial settlement of accounts of his wife as executrix, notwithstanding his right of curtesy. In re Percival's Estate, 141 N.Y.S. 180, 79 Misc. 567, 1913 N.Y. Misc. LEXIS 1213 (N.Y. Sur. Ct. 1913), modified, 162 A.D. 923, 146 N.Y.S. 1108 (N.Y. App. Div. 1914).

CPA § 347 did not render the wife of the payee of a note incompetent to testify as to the date when the same was delivered by the maker to her husband, in support of his claim against the estate of the maker after the latter's death. In re Van Vranken's Estate, 198 N.Y.S. 445, 120 Misc. 280, 1923 N.Y. Misc. LEXIS 796 (N.Y. Sur. Ct. 1923).

In suit for specific performance of a contract executed by deceased and another, widow of deceased, who joined in contract only for the purpose of extinguishing dower rights, was competent to testify. Higgins v Exchange Nat'l Bank, 253 N.Y.S. 859, 142 Misc. 69, 1931 N.Y. Misc. LEXIS 1551 (N.Y. Sup. Ct. 1931).

On a claim for the support of decedent's wife and infant son, whom decedent allegedly abandoned, the referee properly excluded testimony by the claimants of the decedent's

transactions in connection with the alleged abandonment. In re Roessler's Estate, 12 N.Y.S.2d 572, 171 Misc. 306, 1939 N.Y. Misc. LEXIS 1929 (N.Y. Sur. Ct. 1939).

Testimony by a wife, appointed temporary administratrix of her absentee husband, that during a certain period she expended a certain sum toward the support of herself out of her own moneys involved no personal transaction between her and the absentee within the meaning of CPA § 347. In re Enggren, 20 N.Y.S.2d 384, 174 Misc. 194, 1940 N.Y. Misc. LEXIS 1792 (N.Y. Sur. Ct. 1940).

In action by wife as beneficiary of life policy against later beneficiary and insurer, she may testify to conversations with husband insured, after execution of separation agreement promising not to change beneficiary. Salinas v Salinas, 62 N.Y.S.2d 385, 187 Misc. 509, 1946 N.Y. Misc. LEXIS 2246 (N.Y. Sup. Ct. 1946), aff'd, 271 A.D. 917, 67 N.Y.S.2d 692, 1947 N.Y. App. Div. LEXIS 5161 (N.Y. App. Div. 1947).

Former wife, after renouncing her interest in decedent’s estate in favor of her daughter, was incompetent to testify to conversation between wife and decedent to establish daughter’s claim to estate. In re Bourne's Estate, 133 N.Y.S.2d 192, 206 Misc. 378, 1954 N.Y. Misc. LEXIS 2147 (N.Y. Sur. Ct. 1954).

Where question was raised as to validity of alleged gift of securities issued in name of decedent but endorsed by him in blank and found in the possession of decedent’s widow at time of his death, testimony of widow against estate was inadmissible in view of fact that she was person interested in the event. In re Estate of Davidson, 5 Misc. 2d 207, 159 N.Y.S.2d 722, 1956 N.Y. Misc. LEXIS 1235 (N.Y. Sur. Ct. 1956).

Testimony by alleged surviving spouse that neither he nor decedent had ever instituted a matrimonial action against each other, is not barred as testimony of a transaction with deceased. In re Estate of Lancaster, 30 Misc. 2d 7, 209 N.Y.S.2d 395, 1960 N.Y. Misc. LEXIS 2369 (N.Y. Sur. Ct. 1960).

In an action by third-party beneficiary to impress a trust upon estate property, plaintiff's mother who was decedent's first wife, was deemed not interested in the event, solely because of her relationship, and was allowed to testify as to oral agreement between decedent and herself that decedent would leave one-half his estate to plaintiff. Curtis v Hennequin, 27 Misc. 2d 1042, 212 N.Y.S.2d 796, 1961 N.Y. Misc. LEXIS 3514 (N.Y. Sup. Ct. 1961) (evidence nevertheless being insufficient to establish agreement, complaint was dismissed).

In an action to enforce specific performance of a contract to convey land with a lease to be given thereof to the grantor and wife for life, the widow of the deceased grantor and husband of plaintiff are incompetent to testify to declarations of deceased made to them as against his heirs at law. Devinney v Corey, 5 N.Y.S. 289, 52 Hun 612, 1889 N.Y. Misc. LEXIS 2940 (N.Y. Sup. Ct. 1889), aff'd, 127 N.Y. 655, 28 N.E. 254, 127 N.Y. (N.Y.S.) 655, 1891 N.Y. LEXIS 1845 (N.Y. 1891).

In an action to enforce a lien on a bond held by a bank of which plaintiff was receiver, as collateral security, the debtor's wife claimed the bond; but there was no evidence that she derived any title or interest therein from the debtor. Held, that the debtor was not disqualified from testifying as to a demand on behalf of his wife, made by him, on plaintiff's deceased predecessor for the bond. Olcott v Kohlsaat, 8 N.Y.S. 116, 55 Hun 607, 1889 N.Y. Misc. LEXIS 2198 (N.Y. Sup. Ct. 1889).

In an action by a married woman to recover back money paid by her on an oral contract for the purchase of real estate from executors of the deceased vendor, her husband, having no interest in the result otherwise than that his feelings may be enlisted in favor of her success, is not "interested in the event," so as to be precluded from testifying to a transaction or conversation with the deceased. Fogal v Page, 13 N.Y.S. 656, 59 Hun 625, 1891 N.Y. Misc. LEXIS 1621 (N.Y. Sup. Ct. 1891).

The wife of a grantor who conveyed property to their son under a prior agreement that in consideration of advances of money made to the husband he would convey the property to her,

is incompetent as a witness for the son after the husband became insane. Roy v Salisbury, 134 N.Y.S. 733 (N.Y. Sup. Ct. 1911).

In action on note made to order of testator, wife of defendant could testify to an agreement entered into between her and testator to the effect that the note should be returned in payment for professional services rendered testator by her husband. Kinnan v Schaub, 176 N.Y.S. 715 (N.Y. App. Term 1919).

Husband, whose wife was interested in event whether will annuities had vested indefeasibly in annuitants, was competent. In re Katz' Will, 49 N.Y.S.2d 604, 1944 N.Y. Misc. LEXIS 2158 (N.Y. Sur. Ct. 1944), app. dismissed, 79 N.Y.S.2d 516 (N.Y. App. Div. 1948), modified, 83 N.Y.S.2d 850, 1948 N.Y. Misc. LEXIS 3457 (N.Y. Sur. Ct. 1948).

In administrator’s discovery proceeding to recover items of jewelry claimed by decedent’s daughter as gift, daughter’s husband was disinterested and so competent to testify to conversations with decedent. In re Corn's Estate, 141 N.Y.S.2d 16, 1955 N.Y. Misc. LEXIS 2460 (N.Y. Sur. Ct. 1955).

In an action by testator’s son to enforce an agreement made by testator to convey certain real estate to the former, held, that the widow of testator, to whom he had given a life estate in the lands in question, but who had allowed a default to be taken against her as defendant, could testify for plaintiff as to the agreement. Brown v Brown, 29 Hun 498 (N.Y.).

An inchoate right of dower dependent upon the event of the action is such an interest as will disqualify a witness. Steele v Ward, 30 Hun 555 (N.Y.).

A possible interest as tenancy by the curtesy, is not such interest as will disqualify a witness. In re Clark, 40 Hun 233 (N.Y.).

A question to widow as to who provided for family not admissible. Denise v Denise, 41 Hun 9, 2 N.Y. St. 175 (N.Y.), aff'd, 110 N.Y. 562, 18 N.E. 368, 110 N.Y. (N.Y.S.) 562, 18 N.Y. St. 873, 1888 N.Y. LEXIS 911 (N.Y. 1888).

In an action against an executor for an accounting, a husband and wife sought to avail themselves of an agreement made between them and plaintiff's intestate averring that they were induced to sign it by false representations made by plaintiff's intestate, each testifying to hearing the representations made to the other. Held, that the evidence was incompetent. Hard v Davison, 6 N.Y.S. 69, 53 Hun 112, 1889 N.Y. Misc. LEXIS 401 (N.Y. Sup. Ct. 1889), rev'd, 117 N.Y. 606, 23 N.E. 177, 117 N.Y. (N.Y.S.) 606, 1890 N.Y. LEXIS 951 (N.Y. 1890).

The wife of plaintiff in an action for specific performance of a contract to convey land is an interested person. Erwin v Erwin, 7 N.Y.S. 365, 54 Hun 166, 1889 N.Y. Misc. LEXIS 1085 (N.Y. Sup. Ct. 1889).

A tenant by the curtesy initiate is not an incompetent witness. Bowen v Sweeney, 17 N.Y.S. 752, 63 Hun 224, 1892 N.Y. Misc. LEXIS 499 (N.Y. App. Term 1892).

A husband did not have such an interest in the real property of his wife as disqualified him under CPA § 347 from testifying as a witness in her behalf in regard to the same. Cooper v Monroe, 28 N.Y.S. 222, 77 Hun 1 (1894).

The husband of the mortgagor who was made a party to an action of foreclosure, was not an interested person within the meaning of CPA § 347. Humphrey v Sweeting, 36 N.Y.S. 967, 92 Hun 447 (1895).

33. —On claim by spouse for services

A husband does not derive his right to recover against the estate of a deceased person, through or under her, but by virtue of his common-law right, and his wife is not disqualified to testify, in such an action, as to the circumstances of her engagement. Porter v Dunn, 131 N.Y. 314, 30 N.E. 122, 131 N.Y. (N.Y.S.) 314, 1892 N.Y. LEXIS 1027 (N.Y. 1892).

Upon a claim against an estate by husband for services rendered by wife as nurse of decedent, her evidence as to the contract was competent. Porter v Dunn, 131 N.Y. 314, 30 N.E. 122, 131 N.Y. (N.Y.S.) 314, 1892 N.Y. LEXIS 1027 (N.Y. 1892).

Plaintiff presented a claim against estate of defendant's testator for services performed by his wife for the testator. As it appeared that the wife performed the services in behalf of her husband, and made no claim for herself she was not incompetent to testify to the contract made for their performance. Porter v Dunn, 131 N.Y. 314, 30 N.E. 122, 131 N.Y. (N.Y.S.) 314, 1892 N.Y. LEXIS 1027 (N.Y. 1892).

In an action by a wife, the husband, who testifies that moneys earned by either of them were held in common, is a party interested in the event and his testimony is inadmissible to establish the claim. Scheu v Blum, 136 A.D. 592, 121 N.Y.S. 122, 1910 N.Y. App. Div. LEXIS 85 (N.Y. App. Div. 1910).

In action against executor for services rendered decedent, plaintiff's husband was not disqualified from testifying. Frisbie v Lucas, 192 A.D. 583, 183 N.Y.S. 308, 1920 N.Y. App. Div. LEXIS 7515 (N.Y. App. Div. 1920), modified, 233 N.Y. 248, 135 N.E. 321, 233 N.Y. (N.Y.S.) 248, 1922 N.Y. LEXIS 867 (N.Y. 1922), modified, 235 N.Y. 209, 139 N.E. 243, 235 N.Y. (N.Y.S.) 209, 1923 N.Y. LEXIS 1168 (N.Y. 1923).

In an action by a wife to recover for services rendered by her personally to the deceased, the plaintiff's husband was not legally interested in the event within the meaning of this section and it was error to exclude evidence of services rendered to the decedent by him. Walsh v Herrick, 248 A.D. 799, 289 N.Y.S. 42, 1936 N.Y. App. Div. LEXIS 7364 (N.Y. App. Div. 1936).

Claimant's wife may testify as to board and lodging furnished to deceased's wife, though she had presented claim against estate for nursing deceased's wife. In re Manchester's Estate, 279 A.D. 254, 110 N.Y.S.2d 107, 1952 N.Y. App. Div. LEXIS 4648 (N.Y. App. Div. 1952).

Husband testifying that he emancipated his wife prior to rendition of services to her father was competent to testify in support of her claim against father's estate. In re Grogan's Estate, 145 N.Y.S. 285, 82 Misc. 555, 1913 N.Y. Misc. LEXIS 1127 (N.Y. Sur. Ct. 1913).

In action by husband to recover for nursing services performed for decedent by wife, wife was an interested witness who could not testify. Janz v Schwender, 159 N.Y.S. 200, 95 Misc. 142, 1916 N.Y. Misc. LEXIS 840 (N.Y. App. Term 1916).

In action for wife's services to estate, husband of claimant is competent to testify. In re Bluford's Estate, 108 N.Y.S.2d 742, 201 Misc. 138, 1951 N.Y. Misc. LEXIS 2587 (N.Y. Sur. Ct. 1951).

Husband, whose wife filed claim for personal services against decedent's estate, was competent witness. In re Taylor's Estate, 132 N.Y.S.2d 686, 206 Misc. 69, 1954 N.Y. Misc. LEXIS 2670 (N.Y. Sur. Ct. 1954).

Where claim made for services to defendant's deceased wife CPA § 347 prohibited testimony of a witness as to conversations and transactions between such witness of the deceased and testimony by the plaintiff as to direct conversations and transactions with deceased was excluded. Estenes v McCaughin, 11 Misc. 2d 748, 174 N.Y.S.2d 629, 1958 N.Y. Misc. LEXIS 3185 (N.Y. County Ct. 1958).

Husband of wife who sued for services as practical nurse to decedent before his death was competent witness. In re Pierce's Will, 61 N.Y.S.2d 469, 1946 N.Y. Misc. LEXIS 2064 (N.Y. Sur. Ct. 1946), aff'd, 271 A.D. 934, 67 N.Y.S.2d 383, 1947 N.Y. App. Div. LEXIS 5268 (N.Y. App. Div. 1947).

Son's wife was competent to testify in support of his claim against his mother's estate for room and board furnished to her. In re Harvey's Estate, 102 N.Y.S.2d 725, 1951 N.Y. Misc. LEXIS 1541 (N.Y. Sur. Ct. 1951).

Where a wife brings an action against an executor to recover for services rendered to his testator, the husband is not incompetent as a witness. Burley v Barnhard, 9 N.Y. St. 587.

A husband who consented to his wife's taking boarders and receiving the compensation therefor is not an assignor of a claim for board or interested therein, and is not incompetent to testify as to personal transactions with the deceased boarder. Sands v Sparling, 31 N.Y.S. 251, 82 Hun 401 (1894).

Where a wife renders services and furnishes meals to a stranger under an agreement made between herself and her husband that in case she renders such services and furnishes such meals she alone shall receive the recompense therefor, and that it shall become her separate property, the common-law rights of the husband to his wife's services are abrogated, and she may enforce the claim in her own name and right. Lashaw v Croissant, 34 N.Y.S. 667, 88 Hun 206 (1895).

In an action by a wife to recover for services rendered by her to a third party after an agreement with her husband that whatever she received therefor should be her property, she does not claim as assignee, and her husband is not an incompetent witness. Lashaw v Croissant, 34 N.Y.S. 667, 88 Hun 206 (1895).

A husband who sues for services of his wife to a decedent does not claim through or under her, but by virtue of his marital rights, and the wife is not incompetent to testify to conversations with the decedent in which she took part. Hopkins v Clark, 35 N.Y.S. 360, 90 Hun 4 (1895).

34. Insurance beneficiaries

In an action on policies of life insurance the agent of the insurer is not disqualified from testifying as to conversations with the insured as to the latter's health. Bonacci v Prudential Ins. Co., 242 A.D. 475, 276 N.Y.S. 27, 1934 N.Y. App. Div. LEXIS 6093 (N.Y. App. Div. 1934).

Where a will referred to annuity income arranged for testator's wife, surrogate erroneously refused to receive testimony of agents of the insurance company on the ground that they were incompetent to testify under CPA § 347. The agents were not interested in the determination of the question as to who had applied for the policies. In re Lapp's Will, 3 A.D.2d 55, 158 N.Y.S.2d

215, 1956 N.Y. App. Div. LEXIS 3489 (N.Y. App. Div. 4th Dep't 1956), aff'd, 3 N.Y.2d 735, 163 N.Y.S.2d 972, 143 N.E.2d 519, 1957 N.Y. LEXIS 1046 (N.Y. 1957).

In action upon a life insurance policy, proofs of loss may be made by a party interested, though they relate to personal transactions with the deceased. Cannon v Northwestern Mut. Life Ins. Co., 29 Hun 470 (N.Y.).

In action in interpleader by a life insurance company brought after death of insured, a party to the action, to whom life policies were delivered by the insured for the benefit of said party's daughter is not incompetent to testify concerning transactions with the insured. Metropolitan Life Ins. Co. v Dunne, 2 F. Supp. 165, 1931 U.S. Dist. LEXIS 2110 (D.N.Y. 1931).

Testimony of beneficiary under life insurance policy as to oral communications with the insured was admissible. The other beneficiaries did not derive their interests in the proceeds of the policy "from, through or under deceased," within the meaning of CPA § 347. New York Life Ins. Co. v Cross, 7 F. Supp. 130, 1934 U.S. Dist. LEXIS 1577 (D.N.Y. 1934).

35. Legatee, distributee or next of kin

One heir, not a party to an action brought by another heir of deceased grantor, to set aside deeds because of incompetency and fraud, is not incompetent to testify to personal transactions between him and deceased. Hobart v Hobart, 62 N.Y. 80, 62 N.Y. (N.Y.S.) 80, 1875 N.Y. LEXIS 477 (N.Y. 1875).

In an action by the son, after death of father, against executors to compel cancellation of a mortgage executed by the son to his father, one who is not a party to the action, but a special and residuary legatee, may prove declarations of deceased, as witness is not testifying in her own "behalf or interest." Carpenter v Soule, 88 N.Y. 251, 88 N.Y. (N.Y.S.) 251, 1882 N.Y. LEXIS 98 (N.Y. 1882).

The next of kin of an intestate were interested in the event of a suit brought by the administrator, within the meaning of CPA § 347. Holcomb v Holcomb, 95 N.Y. 316, 95 N.Y. (N.Y.S.) 316, 1884 N.Y. LEXIS 654 (N.Y. 1884).

A son of the deceased, who is not a party to the action and has no present or vested interest in the agreement in controversy, is not so interested as to be incompetent to testify to conversations had with his father. Hirsh v Auer, 146 N.Y. 13, 40 N.E. 397, 146 N.Y. (N.Y.S.) 13, 1895 N.Y. LEXIS 631 (N.Y. 1895).

Upon trial of objections to the probate of a will the interest of a person named as legatee in a prior will is so remote and contingent that it does not come within the excluded class where another will, in which she is not mentioned, intervenes between the will offered for probate and the one under which she would take. Where, however, she is a party to the proceedings and has filed objections asking for affirmative relief, thus becoming chargeable with or entitled to an award of costs, she is disqualified as a party interested. In re McCulloch's Will, 263 N.Y. 408, 189 N.E. 473, 263 N.Y. (N.Y.S.) 408, 1934 N.Y. LEXIS 1289 (N.Y.), reh'g denied, 264 N.Y. 598, 191 N.E. 583, 264 N.Y. (N.Y.S.) 598, 1934 N.Y. LEXIS 1625 (N.Y. 1934).

A brother of the deceased husband of testatrix who, as statutory next of kin, would take her property should there be no relatives of her blood surviving, is not thereby disqualified as a witness, where four wills of testatrix are extant in which he is not mentioned. His interest is too remote and contingent to constitute a bar. In re McCulloch's Will, 263 N.Y. 408, 189 N.E. 473, 263 N.Y. (N.Y.S.) 408, 1934 N.Y. LEXIS 1289 (N.Y.), reh'g denied, 264 N.Y. 598, 191 N.E. 583, 264 N.Y. (N.Y.S.) 598, 1934 N.Y. LEXIS 1625 (N.Y. 1934).

Where each legatee entered appearance pro se but took no active part in litigation, he was not competent to testify to acts of decedent. In re Reckford's Will, 307 N.Y. 165, 120 N.E.2d 696, 307 N.Y. (N.Y.S.) 165, 1954 N.Y. LEXIS 990 (N.Y.), reh'g denied, 307 N.Y. 842, 122 N.E.2d 334, 307 N.Y. (N.Y.S.) 842, 1954 N.Y. LEXIS 1542 (N.Y. 1954).

A daughter of a decedent is incompetent to testify to conversations had in her presence between third parties and her deceased father, which testimony would be in effect that certain bank books were part of the estate and would therefore increase it and her share in it. In re Meehan, 59 A.D. 156, 69 N.Y.S. 9, 1901 N.Y. App. Div. LEXIS 358 (N.Y. App. Div. 1901).

A legatee under a will, bringing an action under former Code Civ Proc § 2653a to determine the validity of an alleged subsequent will, was interested within CPA § 347 and could not on the trial of the action testify to personal transactions with the deceased, nor could she testify on behalf of the testator's sisters, who are defendants and also legatees under the former will. Pringle v Burroughs, 100 A.D. 366, 91 N.Y.S. 750, 1905 N.Y. App. Div. LEXIS 53 (N.Y. App. Div. 1905), aff'd, 185 N.Y. 375, 78 N.E. 150, 185 N.Y. (N.Y.S.) 375, 1906 N.Y. LEXIS 907 (N.Y. 1906).

One who was attorney for two legatees from the death of the testator until the death of the legatees and was also executor, specific legatee and residuary legatee under the will of one of such legatees is incompetent, in an action by him as executor to impress a legacy on the property, to testify as to payments made by him to the two legatees from rents of the property. Appell v Halbe, 207 A.D. 315, 202 N.Y.S. 364, 1923 N.Y. App. Div. LEXIS 5955 (N.Y. App. Div. 1923).

A legatee is incompetent to testify for the proponent in a will contest. In re Radley's Will, 228 A.D. 119, 239 N.Y.S. 44, 1930 N.Y. App. Div. LEXIS 12116 (N.Y. App. Div. 1930).

Son of testator was incompetent to testify to content of father's will. In re Jensen's Will, 271 A.D. 1052, 69 N.Y.S.2d 5, 1947 N.Y. App. Div. LEXIS 5805 (N.Y. App. Div. 1947).

In action by remainderman, under will devising life estate plus absolute power of disposition, to cancel claims of life tenant's grantees, plaintiff's remainder was created by will and not derived from life tenant, who terminated fee of his grantees because they breached condition to support him, and life tenant's grantees were competent to explain circumstances under which they left premises and ceased to care for life tenant. Agluzzi v Aluzzo, 286 A.D. 399, 143 N.Y.S.2d 51, 1955 N.Y. App. Div. LEXIS 4052 (N.Y. App. Div. 1955).

The “event” as mentioned in CPA § 347, as applied to a proceeding to construe the residuary clause of a will, was the decision of the question before the court, namely, the construction of such clause for the purpose of determining who are the beneficiaries thereunder. In re Milliette's Estate, 206 N.Y.S. 342, 123 Misc. 745, 1924 N.Y. Misc. LEXIS 1207 (N.Y. Sur. Ct. 1924).

Beneficiaries in prior wills are incompetent to testify as to personal transactions with decedent. In re Martin's Estate, 273 N.Y.S. 123, 151 Misc. 94, 1934 N.Y. Misc. LEXIS 1450 (N.Y. Sur. Ct.), aff'd, 243 A.D. 513, 276 N.Y.S. 796, 1934 N.Y. App. Div. LEXIS 5597 (N.Y. App. Div. 1934).

Legatees of stock were incompetent in executor’s proceeding to determine ownership of stock claimed by widow as gift inter vivos. In re Maijgren's Estate, 84 N.Y.S.2d 664, 193 Misc. 814, 1948 N.Y. Misc. LEXIS 3646 (N.Y. Sur. Ct. 1948).

Residuary devisee and legatee was incompetent to testify in proceeding to probate will. In re Betts' Will, 107 N.Y.S.2d 626, 200 Misc. 633, 1951 N.Y. Misc. LEXIS 2399 (N.Y. Sur. Ct. 1951).

A contestant, unrelated by blood to decedent, is competent to testify though she had been named as legatee under a prior will, where another will, in which she was not named intervened, between such prior will and the propounded instrument, her interest being too remote and contingent to disqualify her. Estate of Saxl, 32 Misc. 2d 481, 222 N.Y.S.2d 765, 1961 N.Y. Misc. LEXIS 2076 (N.Y. Sur. Ct. 1961).

In action by executor to recover money due estate, a legatee was interested in the event within CPA § 347. Brigham v Gott, 3 N.Y.S. 518, 51 Hun 636, 1889 N.Y. Misc. LEXIS 27 (N.Y. Sup. Ct. 1889).

A legatee who has been paid her legacy and released the administrator and estate from any claim, is not disqualified from testifying in an action against an insane person as to transactions with such person. Brown v Klock, 5 N.Y.S. 245, 52 Hun 613, 1889 N.Y. Misc. LEXIS 2916 (N.Y. Sup. Ct.), rev'd, 117 N.Y. 340, 22 N.E. 944, 117 N.Y. (N.Y.S.) 340, 1889 N.Y. LEXIS 1438 (N.Y. 1889).

A legatee under will of plaintiff's testatrix and an heir, who has been paid her legacy and has released the estate from all claim, is not, in case of plaintiff's solvency, incompetent to testify to a communication with an insane defendant nor is an heir or legatee who takes no part in the conversation with an insane person, incompetent to testify as to such matter in an action between the executor and such insane person. Brown v Klock, 5 N.Y.S. 245, 52 Hun 613, 1889 N.Y. Misc. LEXIS 2916 (N.Y. Sup. Ct.), rev'd, 117 N.Y. 340, 22 N.E. 944, 117 N.Y. (N.Y.S.) 340, 1889 N.Y. LEXIS 1438 (N.Y. 1889).

One to whom was given right of nomination to beds endowed in hospitals was not a legatee with beneficial interest such as would make him incompetent to testify. In re Campbell's Will, 136 N.Y.S. 1086 (N.Y. Sur. Ct. 1912).

Stockholder of legatee membership corporation is competent to testify in probate proceeding. In re Alexieff's Will, 94 N.Y.S.2d 32, 1949 N.Y. Misc. LEXIS 3037 (N.Y. Sur. Ct. 1949), aff'd, 277 A.D. 790, 97 N.Y.S.2d 532, 1950 N.Y. App. Div. LEXIS 3329 (N.Y. App. Div. 1950).

Legatee, who had affirmed wish that paper be admitted to probate and who would profit if contestant failed, was interested in outcome of probate proceeding and so incompetent to testify. In re Alexander's Will, 144 N.Y.S.2d 530, 1955 N.Y. Misc. LEXIS 3775 (N.Y. Sur. Ct. 1955).

When heir at law not a party to the action may testify as to personal transaction with deceased tending to sustain validity of a deed. Smith v Meaghan, 28 Hun 423 (N.Y.).

A party claiming title through and under deceased as heir at law and in hostility to the deed sought to be set aside cannot testify as to act and appearance of deceased person. Smith v Meaghan, 40 Hun 401 (N.Y.).

The fact that a witness, upon a contested application for administration by husband of decedent, is a second cousin of decedent and entitled as next of kin to participate in the estate in the event

of the decease of the first cousins, who are numerous, does not disqualify the witness on the ground of interest. In re Estate of Hanley, 44 Hun 559 (N.Y. 1887).

Heirs at law cannot testify to declaration in their own favor made by their father under whom they claim. Shannon v Pickell, 2 N.Y. St. 160.

36. Parties to mortgage

A prior mortgagee might prove notice by the mortgagor, to a person who takes a second mortgage on the property without falling under CPA § 347. Clark v McNeal, 114 N.Y. 287, 21 N.E. 405, 114 N.Y. (N.Y.S.) 287, 1889 N.Y. LEXIS 1096 (N.Y. 1889).

In action to foreclose a mortgage, a defendant who executed a second mortgage was permitted to testify to conversations between him and one of his mortgagees since deceased; under objection, held, that he was not so interested as to be disqualified under CPA § 347. Clark v McNeal, 114 N.Y. 287, 21 N.E. 405, 114 N.Y. (N.Y.S.) 287, 1889 N.Y. LEXIS 1096 (N.Y. 1889).

Plaintiff produced on the trial a writing, in form an assignment of the mortgage which purported to have been executed by deceased, and as a witness testified that he knew the handwriting of the signature. He was asked whether he saw the instrument signed. Held, incompetent as involving a personal transaction. Howell v Mainwaring, 118 N.Y. 682, 23 N.E. 1147, 118 N.Y. (N.Y.S.) 682, 1890 N.Y. LEXIS 1039 (N.Y. 1890).

In an action to foreclose a mortgage upon a judgment against joint obligors for any deficiency; one of the two joint obligors cannot testify as to the fact that the mortgage was given as payment of a gambling debt owed by him to the mortgagor, who died prior to the commencement of the action, as the effect of such testimony would be to render the bond void and release the obligation of such obligor. Luetchford v Lord, 132 N.Y. 465, 30 N.E. 859, 132 N.Y. (N.Y.S.) 465, 1892 N.Y. LEXIS 1215 (N.Y. 1892).

A co-obligee on his wife's bond secured by mortgage on her property, who is also administrator of her estate and entitled to one-third of the net assets, is not, in a suit to foreclose such mortgage, in which he has served no answer, either personally or as administrator, incompetent to testify on behalf of his children, whose interest in the property is derived by direct inheritance from their mother. Albany County Sav. Bank v McCarty, 149 N.Y. 71, 43 N.E. 427, 149 N.Y. (N.Y.S.) 71, 1896 N.Y. LEXIS 1057 (N.Y. 1896).

In an action against a husband and wife by the executor of a decedent to foreclose a mortgage given by the husband to secure part of purchase price, in which wife claimed as a defense that mortgage was to be her property after decedent's death, the husband may withdraw his answer and testify that at time of execution of mortgage decedent promised that mortgage should be property of the wife upon his death. Bouton v Welch, 170 N.Y. 554, 63 N.E. 539, 170 N.Y. (N.Y.S.) 554, 1902 N.Y. LEXIS 1087 (N.Y. 1902).

In an action of foreclosure brought against a husband and wife to foreclose a mortgage given by the husband to the plaintiff's testator, the answer of the wife set up an oral agreement between her and the testator by which testator agreed to have signed the mortgage to her or bequeathed it to her; the husband withdrew his answer and therefore was not interested in the event of the action, but within the meaning of CPA § 347 might testify as to the said oral agreement. Bouton v Welch, 59 A.D. 288, 69 N.Y.S. 407, 1901 N.Y. App. Div. LEXIS 385 (N.Y. App. Div. 1901), aff'd, 170 N.Y. 554, 63 N.E. 539, 170 N.Y. (N.Y.S.) 554, 1902 N.Y. LEXIS 1087 (N.Y. 1902).

A mortgagee, who was also widow of the mortgagor, was not disqualified by CPA § 347 from testifying in a foreclosure action brought by his assignee, that she gave no consideration for the mortgage. Schlitz v Koch, 138 A.D. 535, 123 N.Y.S. 302, 1910 N.Y. App. Div. LEXIS 1573 (N.Y. App. Div. 1910).

Person through whom plaintiff claimed mortgage could not testify as to a personal transaction with deceased who assumed the mortgage. McCarthy v Stanley, 151 A.D. 358, 136 N.Y.S. 386, 1912 N.Y. App. Div. LEXIS 7746 (N.Y. App. Div. 1912).

The holder of a second mortgage covering realty was incompetent, in view of CPA § 347, to testify to facts tending to establish the invalidity of a first mortgage covering the same property, given by a deceased person, under circumstances such that a judgment in the action was res adjudicata of the validity of the mortgage in an action to foreclose the same, thus tending to enhance the value of the second mortgage. Kerwood v Hall, 201 A.D. 89, 193 N.Y.S. 811, 1922 N.Y. App. Div. LEXIS 6259 (N.Y. App. Div. 1922).

In an action to foreclose a mortgage, evidence as to personal transactions between respondent, who claims life use prior to lien of mortgage, and the deceased mortgagors, through whom the plaintiff derived its title, was inadmissible. Schenectady Sav. Bank v Wertheim, 237 A.D. 311, 261 N.Y.S. 193, 1932 N.Y. App. Div. LEXIS 5337 (N.Y. App. Div. 1932), aff'd, 263 N.Y. 585, 189 N.E. 710, 263 N.Y. (N.Y.S.) 585, 1933 N.Y. LEXIS 882 (N.Y. 1933).

In an action to foreclose a mortgage and to secure an original mortgagee who was indorser of certain notes, the wife of the mortgagee, who was maker of the notes also, a mortgagor, and who took part in the transaction, which it was claimed was usurious, is incompetent to testify as she is the party interested in the event. Danziger v Deline, 56 N.Y.S. 354, 25 Misc. 635, 1898 N.Y. Misc. LEXIS 869 (N.Y. Sup. Ct. 1898), aff'd, 51 A.D. 617, 64 N.Y.S. 1134 (N.Y. App. Div. 1900).

The grantor of premises, conveyed to a husband and wife, who was also the holder of a purchase money mortgage covering the same, held not a person interested in the event as to an action between the wife and the administrator of the husband to quiet title to the property in the wife, and hence could testify as to the transactions between the parties resulting in the conveyance and mortgage aforesaid, such action having no possible effect upon the mortgage or the mortgagee’s interest therein. Bishop v Bishop, 201 N.Y.S. 256, 121 Misc. 509, 1923 N.Y. Misc. LEXIS 1248 (N.Y. Sup. Ct. 1923).

Conversations between officials of bank-mortgagee and decedent mortgagor pertaining to banking transactions were exempted from the prohibitions of CPA § 347. Domestic Finance

Corp. v Tinney Cadillac Corp., 23 Misc. 2d 153, 197 N.Y.S.2d 693, 1960 N.Y. Misc. LEXIS 3485 (N.Y. City Ct. 1960).

A husband who joined with wife in executing a mortgage on land belonging to wife, and who is made a party defendant and ought to be charged for any deficiency, in action by executor of assignee of the mortgagee to foreclose the same, cannot testify as to personal transaction with deceased mortgagee to prove usury. Whitehead v Smith, 14 Hun 531 (N.Y.), aff'd, 81 N.Y. 151, 81 N.Y. (N.Y.S.) 151, 1880 N.Y. LEXIS 211 (N.Y. 1880).

A mortgagor who, after conveying the mortgaged premises, has been made a defendant in foreclosure, but against whom no money judgment is asked, and by whom no answer has been put in, is incompetent to testify in favor of his grantee, in regard to a personal transaction between himself and plaintiff’s intestate. Smith v Hathorn, 25 Hun 159 (N.Y.), rev'd, 88 N.Y. 211, 88 N.Y. (N.Y.S.) 211, 1882 N.Y. LEXIS 90 (N.Y. 1882).

In an action by an executor to foreclose a mortgage given to the deceased, the defense was that it was given as collateral security for the performance of a written agreement, performance of which had been tendered. On the trial, the mortgagor testified that he had seen a paper signed by the deceased and himself, and that it was lost. He was then allowed, against the plaintiff’s objections, to testify as to the contents of the paper. A subsequent mortgagee, also a defendant, was allowed against the like objection to testify, in his own behalf, as to a conversation with the deceased. Held, that both these rulings were erroneous, and a judgment for the defendant was reversed. Hadsall v Scott, 26 Hun 617 (N.Y.).

In action by judgment creditor of fraudulent grantor against administratrix of deceased mortgagee to set aside mortgage as fraudulent, neither the fraudulent grantor nor fraudulent grantee who covenanted to pay the grantor’s debt are competent to testify as to consideration of mortgage. Wilcox v Dodge, 6 N.Y.S. 368, 53 Hun 565, 1889 N.Y. Misc. LEXIS 582 (N.Y. App. Term 1889); see Brooks v Wilson, 6 N.Y.S. 116, 53 Hun 173, 1889 N.Y. Misc. LEXIS 433 (N.Y.

Sup. Ct. 1889), rev'd, 125 N.Y. 256, 26 N.E. 258, 125 N.Y. (N.Y.S.) 256, 1891 N.Y. LEXIS 1480 (N.Y. 1891).

A mortgagee cannot testify as to the nonpayment of any money as principal or interest on a bond and mortgage as against the representatives of a deceased mortgagee. McMurray v McMurray, 17 N.Y.S. 657, 63 Hun 183, 1892 N.Y. Misc. LEXIS 438 (N.Y. Sup. Ct. 1892).

In an action by a creditor against the devisee of real estate to reach the same for the debts of the testator, where the representatives of a mortgagee of such devisee are made parties, the creditor may call as a witness the devisee to show that the mortgagee did not accept the mortgage in good faith and without any knowledge of the debts of the testator, and such devisee is not disqualified to testify to personal transactions with such mortgagee, who had died prior to the commencement of the action. Cunningham v Whitford, 26 N.Y.S. 575, 74 Hun 273 (1893).

37. Parties to partition

In partition action against heirs at law and one who lived with plaintiff's deceased sister as her husband, testimony of the latter taken before trial was incompetent against plaintiff to show an agreement that property conveyed to "husband and wife" was intended to be held as an estate by the entirety. Bambauer v Schleider, 176 A.D. 562, 163 N.Y.S. 186, 1917 N.Y. App. Div. LEXIS 5113 (N.Y. App. Div. 1917).

In partition defendant claimed title under an arrangement with his deceased father, and was allowed to testify to a conversation between his father and another in relation to such arrangement, in which he also participated. Held, that, being interested in the event of the action and having participated in the conversation, his testimony was inadmissible. Smith v Ulman, 26 Hun 386 (N.Y.).

In an action of partition by a daughter and granddaughter of deceased owner against his son and widow, where the latter interposed no answer, and the son alleged that the land had been

conveyed by deceased to the granddaughter's father, as an advancement, the son may call the widow who joined in the deed as witness to prove this fact. Moore v Oviatt, 35 Hun 216 (N.Y.).

38. Person situated similarly to litigant

Where the interests of certain defendants and the plaintiff are precisely the same so far as they can be affected by the action, the plaintiff is as incompetent to testify in their behalf in reference to any personal transaction between herself and the decedent as she is to give such testimony in her own behalf. Pringle v Burroughs, 185 N.Y. 375, 78 N.E. 150, 185 N.Y. (N.Y.S.) 375, 1906 N.Y. LEXIS 907 (N.Y. 1906).

The person who had a similar claim against the estate to that which is being tried, was not one who was "a person interested in the event" within the meaning of CPA § 347. Rix v Hunt, 16 A.D. 540, 44 N.Y.S. 988, 1897 N.Y. App. Div. LEXIS 744 (N.Y. App. Div. 1897).

Where property owners along a certain street sued to restrain the successors in interest of a deceased owner of other property thereon from conveying the same without incorporating in the deed a provision for a set-back pursuant to an alleged agreement of the deceased, another property owner on the street, although a party to other agreements having the same object, was not a "party interested" within the meaning of CPA § 347, not being a party to the present action or the agreement upon which it was based. Nissen v McCafferty, 202 A.D. 528, 195 N.Y.S. 549, 1922 N.Y. App. Div. LEXIS 4928 (N.Y. App. Div. 1922).

Subscribing witnesses to a will were competent irrespective of any "interest in the event," which otherwise might disqualify, under CPA § 347, a witness in another type of proceeding. In re George's Estate, 25 N.Y.S.2d 333, 175 Misc. 804, 1940 N.Y. Misc. LEXIS 2580 (N.Y. Sur. Ct. 1940).

39. Principal and agent

A party may testify in an action in which the legal representatives of decedent are adverse parties to a transaction between himself and a deceased agent of the opposite party, also to a conversation heard by him between a principal and agent, both deceased, as against a successor in interest of the principal. Hildebrant v Crawford, 65 N.Y. 107, 65 N.Y. (N.Y.S.) 107, 1875 N.Y. LEXIS 327 (N.Y. 1875).

CPA § 347 did not prevent a party from testifying respecting transactions between him and the adverse party's agent, who had died. Platner v Platner, 78 N.Y. 90, 78 N.Y. (N.Y.S.) 90, 1879 N.Y. LEXIS 885 (N.Y. 1879); Pratt v Elkins, 80 N.Y. 198, 80 N.Y. (N.Y.S.) 198, 1880 N.Y. LEXIS 83 (N.Y. 1880).

A party may testify to transactions had with agent of deceased. Pratt v Elkins, 80 N.Y. 198, 80 N.Y. (N.Y.S.) 198, 1880 N.Y. LEXIS 83 (N.Y. 1880).

A party may testify to personal transactions and communications with an agent who makes or lawfully modifies a contract for his principal, although both the principal and agent are dead. Warth v Kastriner, 114 A.D. 766, 100 N.Y.S. 279, 1906 N.Y. App. Div. LEXIS 2180 (N.Y. App. Div. 1906).

One may testify to personal transaction with agent of one since deceased, though agent is also dead. McCarthy v Stanley, 151 A.D. 358, 136 N.Y.S. 386, 1912 N.Y. App. Div. LEXIS 7746 (N.Y. App. Div. 1912).

Transaction between third party and deceased agent was not a personal transaction with deceased. Burke v Higgins, 178 A.D. 816, 166 N.Y.S. 199, 1917 N.Y. App. Div. LEXIS 7346 (N.Y. App. Div. 1917).

CPA § 347 did not prevent party from testifying with respect to transactions with adversary's deceased agent. Masone v Ferino, 32 Misc. 2d 15, 221 N.Y.S.2d 472, 1961 N.Y. Misc. LEXIS 2023 (N.Y. City Ct. 1961).

One dealing with an agent could testify to transaction, though agent was dead. Block v Brinn, 176 N.Y.S. 763 (N.Y. App. Term 1919).

An agent sued for wrongful taking of property who justifies under a chattel mortgage executed by his principal by deceased mortgagor may avail himself of the section to exclude personal transactions with deceased by plaintiff to the same extent as his principals. Gordon v Barney, 6 N.Y. St. 181.

40. Relationship

The mother of a bastard child is competent in an action in which she was not a party nor interested to testify as to an alleged promise of its father to pay for its support, as to conversations at which the agreement was made, although the father has since died. Connolly v O'Connor, 117 N.Y. 91, 22 N.E. 753, 117 N.Y. (N.Y.S.) 91, 1889 N.Y. LEXIS 1410 (N.Y. 1889).

Plaintiff, in an action of ejectment, in which he claimed title as the son and heir of one E, offered to prove the marriage of said E with his mother by her as a witness. Held, that she was a competent witness. Eisenlord v Clum, 126 N.Y. 552, 27 N.E. 1024, 126 N.Y. (N.Y.S.) 552, 1891 N.Y. LEXIS 1663 (N.Y. 1891).

Upon an application for the revocation of letters of administration issued to one who claimed to be the common-law wife of the deceased, held that the petitioner could not establish the fact that deceased never lived with the administratrix, but lived all the years at home with his mother, by the testimony of interested witnesses. In re Kelly's Estate, 238 N.Y. 71, 143 N.E. 795, 238 N.Y. (N.Y.S.) 71, 1924 N.Y. LEXIS 650 (N.Y.), reh'g denied, 238 N.Y. 581, 144 N.E. 900, 238 N.Y. (N.Y.S.) 581, 1924 N.Y. LEXIS 757 (N.Y. 1924).

In action by illegitimate child against administrators of her alleged father to enforce his agreement to support her until she became twenty-one, her grandmother was incompetent to testify that such agreement was made. Duncan v Clarke, 308 N.Y. 282, 125 N.E.2d 569, 308 N.Y. (N.Y.S.) 282, 1955 N.Y. LEXIS 1004 (N.Y. 1955).

In action by child born out of wedlock against administratrix of estate of alleged father to support such child until she became 21 years old mother was competent, but grandmother was incompetent, to testify to agreement between father and grandmother for grandmother to bring up the child. Duncan v Clarke, 308 N.Y. 282, 125 N.E.2d 569, 308 N.Y. (N.Y.S.) 282, 1955 N.Y. LEXIS 1004 (N.Y. 1955).

In an appraisal under the transfer tax act, a beneficiary may, in order to show an adoption of him by the deceased, testify as to conversations and relations with the deceased. In re Brundage, 31 A.D. 348, 52 N.Y.S. 362, 1898 N.Y. App. Div. LEXIS 1494 (N.Y. App. Div. 1898).

On the question whether a deceased executrix was paid by her coexecutor, also dead, a certain legacy left her by her mother, evidence that the executrix's will bequeathed to her children the amount of the legacy which was to come to her from her mother is not admissible in favor of her executor; the testimony of her husband that the coexecutor read her will and was satisfied is inadmissible as the husband is an interested party, since the money was left for the support of the children, which burden rested on him. In re Rossell, 126 A.D. 607, 110 N.Y.S. 706, 1908 N.Y. App. Div. LEXIS 3413 (N.Y. App. Div. 1908).

A son-in-law of an intestate asserting title to certificates of his wife, the daughter of the intestate, cannot give evidence of statements made by the intestate to his daughter in his presence. Griswold v Hart, 142 A.D. 106, 126 N.Y.S. 1011, 1911 N.Y. App. Div. LEXIS 256 (N.Y. App. Div. 1911), aff'd, 205 N.Y. 384, 98 N.E. 918, 205 N.Y. (N.Y.S.) 384, 1912 N.Y. LEXIS 1230 (N.Y. 1912).

Error to refuse plaintiff an opportunity to show that at the time of the alleged conversation the relation of attorney and client did not exist between the witness and decedent. Joseph v Rosen, 228 A.D. 674, 239 N.Y.S. 603, 1930 N.Y. App. Div. LEXIS 12231 (N.Y. App. Div. 1930).

In proceedings to revoke letters of administration petitioner claiming to be the widow of deceased by virtue of a common-law marriage was erroneously permitted to testify to conversations had with him. In re Murtha's Estate, 232 A.D. 285, 249 N.Y.S. 537, 1931 N.Y.

App. Div. LEXIS 13791 (N.Y. App. Div. 1931), rev'd, 259 N.Y. 456, 182 N.E. 82, 259 N.Y. (N.Y.S.) 456, 1932 N.Y. LEXIS 969 (N.Y. 1932).

In action by executor for loan to decedent's daughter, members of decedent's family may testify that decedent stated that daughter owed nothing. In re Rosenthal's Estate, 269 A.D. 139, 54 N.Y.S.2d 507, 1945 N.Y. App. Div. LEXIS 2942 (N.Y. App. Div. 1945).

In action on note by payee against deceased maker's administrator, involving issue whether note was void for want of consideration, payee's brother was competent to testify to conversations with deceased maker as to making of note. Frieder v Fuchs, 2 A.D.2d 772, 154 N.Y.S.2d 483, 1956 N.Y. App. Div. LEXIS 4576 (N.Y. App. Div. 2d Dep't 1956).

Where land has been purchased by plaintiffs and the conveyance taken in their father's name in consideration of his oral agreement to devise it to them on his death; and the father having devised the land to them by will, which had subsequently been lost or destroyed; and two sisters, heirs of decedent, had conveyed their interest to the plaintiffs; in an action against a third heir to compel him to execute a conveyance of his interest as heir, the two sisters are not disqualified to testify as to the personal transaction of the agreement, as they are not interested and plaintiffs did not derive their title or interest from or through them. Korminsky v Korminsky, 21 N.Y.S. 611, 2 Misc. 138, 1893 N.Y. Misc. LEXIS 15 (N.Y. Super. Ct. 1893).

It is to be presumed that services rendered by two daughters to their father, while living with him in the family relation, were gratuitous, and where they occupy the position of claimants against their father's estate independent of each other, each may, in order to rebut the above presumption, testify for the other than she heard her father say that "if we stayed there and worked we should have what he had left after his death." In re Sworthout's Estate, 76 N.Y.S. 961, 38 Misc. 56, 1902 N.Y. Misc. LEXIS 303 (N.Y. Sur. Ct. 1902).

Relatives of a claimant against an estate, while competent, are interested witnesses so that without the support of evidence of disinterested witnesses, their testimony will not prove an oral

intention to bequeath property in return for goods and services rendered decedent. In re Otis' Estate, 215 N.Y.S. 419, 126 Misc. 741, 1926 N.Y. Misc. LEXIS 944 (N.Y. Sur. Ct. 1926).

On trial of claim of persons who claimed to be accommodation makers of note of decedent and who paid same, extrinsic evidence was admissible to show relation of the parties in so far as it did not infringe upon the provisions of CPA § 347. In re Faigelman's Estate, 254 N.Y.S. 161, 142 Misc. 167, 1931 N.Y. Misc. LEXIS 925 (N.Y. Sur. Ct. 1931).

Testimony of executor and of cousin of testator, respecting transactions with deceased donee of power on that phase of the case involving validity of appointment to the cousin, not incompetent. In re Carroll's Estate, 275 N.Y.S. 911, 153 Misc. 649, 1934 N.Y. Misc. LEXIS 1847 (N.Y. Sur. Ct. 1934), modified, 247 A.D. 11, 286 N.Y.S. 307, 1936 N.Y. App. Div. LEXIS 8168 (N.Y. App. Div. 1936).

On examination under SCA § 141, subscribing witnesses to will who were sons of sole legatee who in turn was testator’s brother, were competent irrespective of interest in event which otherwise might disqualify them in another type of proceeding. In re George's Estate, 25 N.Y.S.2d 333, 175 Misc. 804, 1940 N.Y. Misc. LEXIS 2580 (N.Y. Sur. Ct. 1940).

In accounting proceeding, claimant’s son, said to have bargained for his mother’s benefit with deceased, was incompetent. In re Cassola's Estate, 47 N.Y.S.2d 90, 183 Misc. 66, 1944 N.Y. Misc. LEXIS 1723 (N.Y. Sur. Ct. 1944).

In action for specific performance of joint will, grandchildren who had received checks as gifts from their grandfather, were competent to testify as to their opinion of whether signature on the will was his. Schweizer v Schweizer, 16 Misc. 2d 592, 184 N.Y.S.2d 84, 1959 N.Y. Misc. LEXIS 4442 (N.Y. Sup. Ct.), aff'd, 8 A.D.2d 946, 190 N.Y.S.2d 481, 1959 N.Y. App. Div. LEXIS 7696 (N.Y. App. Div. 2d Dep't 1959).

In an action by third-party beneficiary to impress a trust upon estate property, plaintiff’s mother who was decedent’s first wife, was deemed not interested in the event, solely because of her

relationship, and was allowed to testify as to oral agreement between decedent and herself that decedent would leave one-half his estate to plaintiff. Curtis v Hennequin, 27 Misc. 2d 1042, 212 N.Y.S.2d 796, 1961 N.Y. Misc. LEXIS 3514 (N.Y. Sup. Ct. 1961) (evidence nevertheless being insufficient to establish agreement, complaint was dismissed).

A son of defendant is not such a person interested in the event of the action, and where he is not a party, or a person interested in the event or one from whom defendant acquired an interest, is not incompetent as a witness to a transaction with deceased agent or plaintiff. New York Smelting & Refining Co. v Lieb, 4 N.Y.S. 545, 56 N.Y. Super. Ct. 308, 1889 N.Y. Misc. LEXIS 1585 (N.Y. Super. Ct. 1889), aff'd, 121 N.Y. 674, 24 N.E. 1095, 121 N.Y. (N.Y.S.) 674, 1890 N.Y. LEXIS 1499 (N.Y. 1890).

Son’s wife is competent to testify in proceeding by him to compel executor of estate of deceased mother to deliver to son deed under oral agreement between him and his mother. In re Turk's Estate, 22 N.Y.S.2d 4, 1940 N.Y. Misc. LEXIS 2053 (N.Y. Sur. Ct. 1940).

Brother of administratrix, claiming estate property as co-owner with administratrix under assignment by deceased to them is incompetent to testify as to receipt of such assignment, on administratrix’s accounting. In re Kellas' Estate, 40 N.Y.S.2d 655, 1943 N.Y. Misc. LEXIS 1724 (N.Y. Sur. Ct. 1943), aff'd, 267 A.D. 924, 46 N.Y.S.2d 884, 1944 N.Y. App. Div. LEXIS 5537 (N.Y. App. Div. 1944).

Father of child, suing for injuries by fall in hotel ballroom, was not person interested in event of child’s action against hotel, and was competent to testify that hotel manager authorized use of ballroom. Benson v Hotel Onondaga Operating Co., 100 N.Y.S.2d 805, 1950 N.Y. Misc. LEXIS 2191 (N.Y. Sup. Ct. 1950).

In proceeding to revoke letters of temporary administration for changed domicile, son of decedent was competent to testify to her domicile. In re Fisher's Estate, 112 N.Y.S.2d 59, 1952 N.Y. Misc. LEXIS 2603 (N.Y. Sur. Ct. 1952), aff'd, 281 A.D. 795, 118 N.Y.S.2d 558, 1953 N.Y. App. Div. LEXIS 3318 (N.Y. App. Div. 1953).

Daughter of testator was incompetent to testify to conversations with father that deed to son, reciting consideration of love and affection, was intended as advancement, on application to re-open decree settling executor's account. In re Jones' Will, 116 N.Y.S.2d 611, 1952 N.Y. Misc. LEXIS 1918 (N.Y. Sur. Ct.), app. dismissed, 117 N.Y.S.2d 677 (N.Y. App. Div. 1952).

Adopted child of grandniece of testatrix was incompetent to testify to conversations with such grandniece, in proceeding to construe will, providing trust income should go to grandniece for life. In re Hall's Will, 127 N.Y.S.2d 445, 1954 N.Y. Misc. LEXIS 1955 (N.Y. Sur. Ct. 1954).

A witness was not disqualified under CPA § 347 by reason of relationship to a party interested. Parties interested in resisting a disposition of property had no right to testify themselves as to personal transactions between the testator and themselves tending to show that the facts stated by the testator as the reason for his testamentary disposition were untrue. In re Bedlow's Will, 22 N.Y.S. 290, 67 Hun 408 (1893).

41. Stocks and stockholders

Stockholder in defendant company which was a grantee in deed of land encumbered by mortgage is a competent witness in behalf of mortgagor, to testify to personal transactions with deceased mortgagee tending to show payments. Murray v Fox, 104 N.Y. 382, 10 N.E. 864, 104 N.Y. (N.Y.S.) 382, 5 N.Y. St. 749, 1887 N.Y. LEXIS 602 (N.Y. 1887).

In an action by a corporation against executors to recover the balance due on a running account of their decedent, the testimony of a bookkeeper of the corporation, who was a stockholder thereof, as to the accuracy of the books of account was not objectionable as relating to a personal transaction between the witness and the deceased. William L. Mantha Co. v De Graff, 266 N.Y. 581, 195 N.E. 209, 266 N.Y. (N.Y.S.) 581, 1935 N.Y. LEXIS 1462 (N.Y. 1935).

In action by corporation against executors of deceased vice-president for misappropriation of its funds, testimony of plaintiff's sole stockholder that he was ignorant of decedent's cash

withdrawals until after his death, was incompetent. John A. McCarthy & Co. v Hill, 295 N.Y. 320, 67 N.E.2d 375, 295 N.Y. (N.Y.S.) 320, 1946 N.Y. LEXIS 837 (N.Y. 1946).

A member of a benefit society who is liable to be assessed for a death claim is not a person "interested in the event" in an action brought against said society by beneficiaries to recover a claim arising out of his death. Bopple v Supreme Tent of Knights of MacCabees, 18 A.D. 488, 45 N.Y.S. 1096, 1897 N.Y. App. Div. LEXIS 1242 (N.Y. App. Div. 1897).

A stockholder of a defendant business corporation was an interested party within the meaning of CPA § 347 in an action brought by the representatives of a decedent to recover damages from the corporation for negligence causing the death of such decedent. Andrews v Reiners, 112 A.D. 378, 98 N.Y.S. 658, 1906 N.Y. App. Div. LEXIS 684 (N.Y. App. Div. 1906).

In action to recover purchase price of stock where defense was payment, president and stockholder of corporation who had signed the certificate of stock and delivered it was not a person "interested in the event," having sold his stock prior to the action. Kalman v Reubel, 191 A.D. 402, 181 N.Y.S. 471, 1920 N.Y. App. Div. LEXIS 4729 (N.Y. App. Div. 1920).

Where bank president to satisfy State Banking Department's demand for a change in control of bank, induced plaintiffs to invest in bank promising to purchase additional block of stock for them to insure at least shared control then purchased stock in his wife's name, and where during pendency of plaintiffs' action to impress trust on such stock, both bank president and his wife died, witness who once held some shares in bank, and who was interested in the question of who would be entitled to the stock in issue, but who was not interested in the judgment sought was not barred by dead man's statute from testifying as to transaction. Reynolds v Snow, 10 A.D.2d 101, 197 N.Y.S.2d 590, 1960 N.Y. App. Div. LEXIS 11299 (N.Y. App. Div. 1st Dep't), aff'd, 8 N.Y.2d 899, 204 N.Y.S.2d 146, 168 N.E.2d 822, 1960 N.Y. LEXIS 1171 (N.Y. 1960).

In an action by one of the three owners of a corporation against another of such owners and the executrix of the remaining to compel the delivery to plaintiff of his proportion of the stock of another corporation, alleged to have been financed by funds of the first corporation, of which the

individual defendant and the intestate of the executrix defendant were directors, the binding force on the executrix defendant of the evidence that such funds came from the first corporation was not destroyed by CPA § 347. Gallagher v Perot, 202 N.Y.S. 441, 122 Misc. 845, 1923 N.Y. Misc. LEXIS 1415 (N.Y. Sup. Ct. 1923).

Where notes in suit were indorsed to plaintiff by deceased, principal stockholders of defendant corporation were incompetent to testify as to his admissions of liability, but cashier of plaintiff bank was a competent witness and his testimony did not open the door, since the rule must be applied strictly to the same communication or transaction. Merchants' Nat'l Bank v R. Prescott & Son, Inc., 249 N.Y.S. 6, 139 Misc. 603, 1931 N.Y. Misc. LEXIS 1186 (N.Y. Sup. Ct. 1931), aff'd, 235 A.D. 878, 257 N.Y.S. 900, 1932 N.Y. App. Div. LEXIS 10213 (N.Y. App. Div. 1932).

Witness who was officer but not a stockholder of defendant corporation was not an interested person and therefore not disqualified. Jewell v Irvmac Shoe Shops, Inc., 19 Misc. 2d 815, 187 N.Y.S.2d 412, 1959 N.Y. Misc. LEXIS 3721 (N.Y. Sup. Ct. 1959).

Sister of decedent, entitled as distributee to share assets of decedent, is disqualified to testify, over objection of special guardian of incompetent sister, that such sister once owned stock in cooperative apartment house corporation and that she transferred it to decedent prior to her death. In re Olson's Estate, 119 N.Y.S.2d 207, 1952 N.Y. Misc. LEXIS 2240 (N.Y. Sur. Ct. 1952).

A stockholder of a corporation is so interested in the action to which he is a party as to render his testimony as to personal transaction with deceased trustee inadmissible. Keller v West, Bradley & Cary Mfg. Co., 39 Hun 348 (N.Y.).

The plaintiff, in an action against a corporation, may testify to a transaction with the president of defendant as its agent, notwithstanding the death of such president, it not appearing that the president was pecuniarily interested in the action. Hunt v Providence & S. S. S. Co..

42. Sureties and guarantors

The surety on a nonresident executor's bond is interested, and incompetent to testify against the legatees, on an accounting in behalf of the executor, as to personal transactions with the deceased, and the legatees do not waive the right to object, by calling him as their witness as to other matters. Miller v Montgomery, 78 N.Y. 282, 78 N.Y. (N.Y.S.) 282, 1879 N.Y. LEXIS 908 (N.Y. 1879); see Barton v Scramling, 31 Hun 467 (N.Y.).

In action by executors against sureties on a lease, where defense is false representations of lessor, inducing them to sign, a tenant was competent to testify that representations of deceased lessor were communicated to sureties as to value of business done on the premises. Hill v Woolsey, 113 N.Y. 391, 21 N.E. 127, 113 N.Y. (N.Y.S.) 391, 1889 N.Y. LEXIS 956 (N.Y. 1889).

Where a person is not a party to an action but has indemnified defendant against loss he cannot testify to a conversation with plaintiff's predecessor as to matters involved in issues of the action. Carpenter v Romer & Tremper S.B. Co., 48 A.D. 363, 63 N.Y.S. 274, 1900 N.Y. App. Div. LEXIS 450 (N.Y. App. Div. 1900).

Plaintiff assigned a mortgage to defendant's firm to secure an indebtedness of her brother. In an action to compel a reassignment, it was claimed to have been agreed that upon payment of a specified amount the mortgage should be assigned. Held that the brother was incompetent to testify to an agreement made by him with defendant's partner, since deceased, or to terms upon which mortgage was to be reassigned. Lawton v Sayles, 40 Hun 252 (N.Y.).

43. Surviving partners

In an action against the surviving partner of a firm, plaintiff cannot testify to a conversation between him and the deceased partner. Green v Edick, 56 N.Y. 613, 56 N.Y. (N.Y.S.) 613, 1874 N.Y. LEXIS 188 (N.Y. 1874).

W quitclaimed his interest in the partnership to C and took back a bond and mortgage, which he sold to S. Plaintiffs were executors of S. In an action to foreclose it was claimed that the

mortgage was usurious, and was made at the request of S who loaned money for the benefit of the firm. Held, that W was incompetent to testify as to conversations with S at the time the mortgage was given. Smith v Cross, 90 N.Y. 549, 90 N.Y. (N.Y.S.) 549, 1882 N.Y. LEXIS 422 (N.Y. 1882).

In an action for money loaned to defendant, the latter is incompetent to testify to an agreement between him and plaintiff's partner, since deceased, under which he received the money. Corning v Walker, 100 N.Y. 547, 3 N.E. 290, 100 N.Y. (N.Y.S.) 547, 1885 N.Y. LEXIS 1009 (N.Y. 1885).

In ejectment where plaintiff claims under the will of one G and defendants that G was grantee for a partnership, the surviving partners of which were owners, held, that evidence of G's grantor as to what took place at the execution of the deed was competent. Rank v Grote, 110 N.Y. 12, 17 N.E. 665, 110 N.Y. (N.Y.S.) 12, 16 N.Y. St. 724, 1888 N.Y. LEXIS 845 (N.Y. 1888).

In action by survivor of alleged partnership against personal representatives of deceased partner to establish the partnership, plaintiff is incompetent to testify to who received the receipts of the office and paid charges attending the business. Adams v Morrisson, 113 N.Y. 152, 20 N.E. 829, 113 N.Y. (N.Y.S.) 152, 1889 N.Y. LEXIS 930 (N.Y. 1889).

Also that at time of formation of alleged partnerships deceased made an entry in presence of witness in form book, for purpose of establishing commencement of partnership at that time. Adams v Morrisson, 113 N.Y. 152, 20 N.E. 829, 113 N.Y. (N.Y.S.) 152, 1889 N.Y. LEXIS 930 (N.Y. 1889).

Evidence as to a warranty by parol, given by the defendant who testified in regard to interviews between himself and one of the plaintiff's deceased, who was a member of the plaintiff's firm, was inadmissible under CPA § 347. Manning v Schmitt, 4 A.D. 131, 38 N.Y.S. 640, 1896 N.Y. App. Div. LEXIS 1498 (N.Y. App. Div. 1896).

In an action against the administrator of a deceased member of a firm, upon a promissory note made by the firm, the surviving partner is incompetent to testify, for the purpose of taking the note out of the statute of limitations, that some years after the dissolution of the firm he made, with the consent and by the direction of the deceased partner, a payment on the note from assets of the firm. Hixson v Rodbourn, 67 A.D. 424, 73 N.Y.S. 779, 1901 N.Y. App. Div. LEXIS 2714 (N.Y. App. Div. 1901).

In action by administratrix on the theory that partnership existed between plaintiff and defendant, court properly excluded evidence under CPA § 347. Ellis v Ellis, 196 A.D. 896, 187 N.Y.S. 316, 1921 N.Y. App. Div. LEXIS 5789 (N.Y. App. Div. 1921).

One cannot testify in an action by a partnership as to transactions with a deceased partner. Morse v Dayton, 147 N.Y.S. 68, 85 Misc. 12, 1914 N.Y. Misc. LEXIS 663 (N.Y. App. Term 1914).

Plaintiff could not testify to transactions with defendant’s deceased partner. Weiss v Meyer, 159 N.Y.S. 211, 95 Misc. 145, 1916 N.Y. Misc. LEXIS 846 (N.Y. App. Term 1916).

In action against surviving partner to recover back money paid for goods which are not as represented, plaintiff is incompetent to testify that purchase was made in reliance on representations made to her by deceased partner. Merrill v Brunner, 9 N.Y. St. 47.

In an action against the surviving partner of a firm, upon a contract made with it, plaintiff is a competent witness to testify to a personal transaction had with the deceased partner, if the defendant was present at the time of its occurrence. Kale v Elliott, 18 Hun 198 (N.Y.); see Comstock v Hier, 73 N.Y. 269, 73 N.Y. (N.Y.S.) 269, 1878 N.Y. LEXIS 611 (N.Y. 1878).

After judgment upon a firm note against the surviving members of the firm, and the return unsatisfied of an execution thereupon, the holder sued the executors of a deceased partner. Held, that a surviving partner could not testify in behalf of the plaintiff to personal transactions

with the deceased, tending to show that he was a member of the firm. Hunter v Herrick, 26 Hun 272 (N.Y.), aff'd, 92 N.Y. 626, 92 N.Y. (N.Y.S.) 626, 1883 N.Y. LEXIS 190 (N.Y. 1883).

In an action upon a firm note against the executors of a deceased member of the firm, a surviving member is incompetent to testify as to personal transactions had with deceased which tend to show that deceased was a member of the firm. Hunter v Herrick, 26 Hun 272 (N.Y.), aff'd, 92 N.Y. 626, 92 N.Y. (N.Y.S.) 626, 1883 N.Y. LEXIS 190 (N.Y. 1883).

In action against surviving partner a general question concerning transaction with firm, which will permit plaintiff to testify to transactions with deceased partner, inadmissible against special objection. Bristol v Sears.

The doctrine that a surviving partner may claim the protection of this section as to conversations with his deceased partner applied and extended in favor of one who was not in fact a partner but who held himself out and was alleged to be such in the complaint. Farley v Norton, 67 How. Pr. 438.

44. Surviving party to transaction

The testimony of the survivor of two parties excluded when it is in effect a disclosure of what has occurred between witness and deceased in relation to subject in controversy. Nay v Curley, 113 N.Y. 575, 21 N.E. 698, 113 N.Y. (N.Y.S.) 575, 1889 N.Y. LEXIS 979 (N.Y. 1889).

Testimony by a person interested as to personal transaction with deceased incompetent against a survivor. In re Conklin's Estate, 259 A.D. 432, 20 N.Y.S.2d 59, 1940 N.Y. App. Div. LEXIS 6165 (N.Y. App. Div. 1940).

Beneficiary in trust who purchased the property from the trustee and took title for herself and another beneficiary held incompetent to testify with respect to her transaction with the other beneficiary since deceased. In re Wentworth, 181 N.Y.S. 435, 1919 N.Y. Misc. LEXIS 695 (N.Y.

Sur. Ct. 1919), aff'd, 190 A.D. 829, 181 N.Y.S. 442, 1920 N.Y. App. Div. LEXIS 4265 (N.Y. App. Div. 1920).

When a party to a transaction cannot testify as to what was said and done in his presence. Wilson v Reynolds, 31 Hun 46 (N.Y.), aff'd, 98 N.Y. 640, 98 N.Y. (N.Y.S.) 640, 1885 N.Y. LEXIS 701 (N.Y. 1885).

45. Trustees

In action between trustee and executor of co-trustee to have lands standing in name of deceased declared part of the trust estate, one not personally interested in the trust estate, but whose children are, is incompetent to testify to conversations with deceased. Conklin v Snider, 104 N.Y. 641, 9 N.E. 880, 104 N.Y. (N.Y.S.) 641, 5 N.Y. St. 556, 1887 N.Y. LEXIS 636 (N.Y. 1887).

In action by trust income beneficiaries against trustee's successors to set aside trust instruments for trustee's fraud, plaintiffs were incompetent to testify to transactions with original trustee although they made no claim against his estate. Brundige v Bradley, 294 N.Y. 345, 62 N.E.2d 385, 294 N.Y. (N.Y.S.) 345, 1945 N.Y. LEXIS 758 (N.Y. 1945).

In an action to have a deed executed by the plaintiff's father and mother, to the defendant, declared a deed of trust for the benefit of the plaintiff, testimony given by the plaintiff that just before the deed was executed she was called into her mother's room, who told the agent of the grantee under the deed that this was the person she wanted the property held in trust for, is incompetent. Leary v Corvin, 63 A.D. 151, 71 N.Y.S. 335, 1901 N.Y. App. Div. LEXIS 1567 (N.Y. App. Div. 1901).

In an action by the committee of an incompetent to compel defendant to account for a certain sum received from the incompetent, in which the defendant alleged as an affirmative defense that the incompetent had created an oral trust of the fund still remaining in his possession and had named him as trustee, it was reversible error to admit the testimony of the defendant and

the beneficiary of the trust as to the creation thereof. Stein v Strack, 240 A.D. 548, 270 N.Y.S. 650, 1934 N.Y. App. Div. LEXIS 10698 (N.Y. App. Div. 1934).

In action to establish that intestate held title to realty in trust for plaintiff, plaintiff's testimony as to personal transaction and communications with deceased was inadmissible as against administratrix of deceased. Davis v Caldwell, 1 A.D.2d 827, 148 N.Y.S.2d 512, 1956 N.Y. App. Div. LEXIS 6429 (N.Y. App. Div. 2d Dep't), reh'g denied, 1 A.D.2d 964, 150 N.Y.S.2d 504, 1956 N.Y. App. Div. LEXIS 5758 (N.Y. App. Div. 2d Dep't 1956).

Where plaintiffs had delivered money to their mother for certain purposes which she agreed should be returned to them on her death after payment of her funeral expenses, and the mother subsequently became insane and the money found on her turned over to the defendant; such plaintiffs are incompetent to testify as to transactions with their mother, as against the defendant. Peters v Peters, 22 N.Y.S. 764, 3 Misc. 264, 1893 N.Y. Misc. LEXIS 248 (N.Y.C.P. 1893).

Testamentary trustee, who was brother of testatrix, was competent in executor's accounting to testify to conversations between testatrix and deceased husband that he was holding her money for her benefit, since trustee had no beneficial interest in estate. In re Faeth's Will, 106 N.Y.S.2d 280, 200 Misc. 143, 1951 N.Y. Misc. LEXIS 2048 (N.Y. Sur. Ct. 1951).

Where trust indenture grants share of income to settlor's son and on his death to his issue, son and wife have no personal interest in question whether "issue" includes adopted children, and they are not persons "from, through or under whom" infants derive their interest, and so may testify to acts or statements of settlor subsequent to date of trust indenture. In re Nicol's Trust, 3 Misc. 2d 898, 148 N.Y.S.2d 854, 1956 N.Y. Misc. LEXIS 2244 (N.Y. Sup. Ct. 1956).

The testimony of the son of deceased settlor of a trust and the son's wife as to conversations with the settlor was held not barred by CPA § 347. The proceeding involved whether the witnesses' children would take the remainder of the trust per stirpes and whether an adopted

child would be included. In re Nicol's Trust, 3 Misc. 2d 898, 148 N.Y.S.2d 854, 1956 N.Y. Misc. LEXIS 2244 (N.Y. Sup. Ct. 1956).

A subscribing witness to a codicil, by an appointment as trustee under the will by the surrogate's court, is not rendered incompetent to testify to personal transactions with the testator. In re Palmer's Will, 5 N.Y.S. 213, 52 Hun 612, 1889 N.Y. Misc. LEXIS 2895 (N.Y. Sup. Ct. 1889).

Subscribing witness to will who has been appointed a trustee by surrogate's court competent to testify to personal transactions with testator. In re Palmer's Will, 5 N.Y.S. 213, 52 Hun 612, 1889 N.Y. Misc. LEXIS 2895 (N.Y. Sup. Ct. 1889).

Where it was sought to impress a trust on defendant's property, on ground of association as coadventurer with defendant's deceased associate, a witness interested in plaintiff's recovery could not testify as to statements made by deceased concerning plaintiff's interest. Harris v Morse, 54 F.2d 109, 1931 U.S. Dist. LEXIS 1862 (D.N.Y. 1931).

C. What Is Personal Transaction Or Communication

46. Generally

The death of one of the defendants, before the plaintiff's examination is completed, does not justify the striking out of the latter's testimony already taken. In an action against railroad contractors, to recover for services rendered to them in building bridges, etc., the plaintiff testified that he had a diagram for one of the bridges, furnished by the defendants, which he had used. He could not recollect from whose hands he received it, and could not say he did not receive it from the defendant C, since deceased; but it was not shown that it came from C and the witness used it in the presence of the defendants' engineer, or of the surviving defendant. Held, that the diagram could not be excluded as a personal transaction with the deceased; also that where a transaction was with a defendant who is living, the evidence is not incompetent

because the other defendant is dead. Comins v Hetfield, 80 N.Y. 261, 80 N.Y. (N.Y.S.) 261, 1880 N.Y. LEXIS 93 (N.Y. 1880).

CPA § 347 only rendered a party incompetent as to personal transactions and communications between witness and deceased. Ham v Van Orden, 84 N.Y. 257, 84 N.Y. (N.Y.S.) 257, 1881 N.Y. LEXIS 395 (N.Y. 1881).

In an action, originally brought by one Hill, to recover two negotiable town bonds, which the defendant claimed, as assignee of one Fellows, who was dead, the question was whether the bonds were originally Hill's own property, or whether he held them as agent for Fellows. It appeared on the trial, that the blank indorsement thereon had been filled up with Fellows' name, and in his handwriting. It appeared that Hill, before going to Europe, had put them in his drawer in the safe of Hill & Fellows. Hill was sworn in his own behalf, and was asked whether Fellows' name was on the bonds, when he put them in the safe. The question was objected to as incompetent under this section, but the objection was overruled. Held, "that the inquiry did not involve any personal transaction between Hill and Fellows. It respected merely the then condition of the bonds, and the courts below applied the rule fairly, and committed no error in overruling the objections." Wadsworth v Heermans, 85 N.Y. 639, 85 N.Y. (N.Y.S.) 639, 1881 N.Y. LEXIS 159 (N.Y. 1881).

The "transactions" or "communications," respecting which an interested party cannot testify, include every method by which one person can derive any impression or information from the conduct, condition or language of another. These must have been "personal," but not necessarily private or confidential. Holcomb v Holcomb, 95 N.Y. 316, 95 N.Y. (N.Y.S.) 316, 1884 N.Y. LEXIS 654 (N.Y. 1884); see Campbell v Maginn, 53 N.Y. Super. Ct. 514 (1886).

On the reference of a claim presented by the wife after death of her husband for a balance alleged to be due under an ante-nuptial agreement, she as witness in her own behalf was asked, "from the date of your marriage who provided the necessaries of the house and support of the family?" Held, that the question did not necessarily call for any personal transaction with

deceased. Denise v Denise, 110 N.Y. 562, 18 N.E. 368, 110 N.Y. (N.Y.S.) 562, 18 N.Y. St. 873, 1888 N.Y. LEXIS 911 (N.Y. 1888).

The words “transactions and communications” embrace every variety of affairs which can form the subject of negotiations, interviews or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition or language of another. Heyne v Doerfler, 124 N.Y. 505, 26 N.E. 1044, 124 N.Y. (N.Y.S.) 505, 1891 N.Y. LEXIS 1391 (N.Y. 1891).

A survivor cannot by disconnecting a particular fact from its surroundings, testify to what on its face seemed to be an independent fact, when in truth it had its origin in or directly resulting from a personal transaction with the decedent. Moses v Hatch, 38 A.D. 140, 56 N.Y.S. 561, 1899 N.Y. App. Div. LEXIS 475 (N.Y. App. Div. 1899).

Testimony by an executor involving a conclusion which was based on a conversation with testator, who was the executor’s father, is inadmissible where it is manifest that the witness had in mind the conversation with his father. In re Arkenburgh's Estate, 58 A.D. 583, 69 N.Y.S. 125, 1901 N.Y. App. Div. LEXIS 3040 (N.Y. App. Div. 1901).

Testimony to any knowledge gained by use of senses from personal presence of decedent was incompetent. Griswold v Hart, 142 A.D. 106, 126 N.Y.S. 1011, 1911 N.Y. App. Div. LEXIS 256 (N.Y. App. Div. 1911), aff'd, 205 N.Y. 384, 98 N.E. 918, 205 N.Y. (N.Y.S.) 384, 1912 N.Y. LEXIS 1230 (N.Y. 1912).

One seeking to establish dower right cannot testify she went to place where marriage ceremony was certified to have been performed and met a witness and wife of clergyman. Fisk v Holding, 163 A.D. 85, 148 N.Y.S. 501, 1914 N.Y. App. Div. LEXIS 6925 (N.Y. App. Div. 1914).

In an action by an administratrix for an accounting by the owner of an apartment house, erected under the superintendence of her intestate, testimony of the defendant, in effect denying that

certain information had been given him by the deceased, is incompetent. Komp v Luria, 92 N.Y.S. 569, 46 Misc. 339, 1905 N.Y. Misc. LEXIS 66 (N.Y. Sup. Ct. 1905).

Testimony by alleged surviving spouse that neither he nor decedent had ever instituted a matrimonial action against each other, is not barred as testimony of a transaction with deceased. In re Estate of Lancaster, 30 Misc. 2d 7, 209 N.Y.S.2d 395, 1960 N.Y. Misc. LEXIS 2369 (N.Y. Sur. Ct. 1960).

In action against administratrix for board furnished deceased, the defense was that deceased paid for household supplies in return for board. Sager v Dorr, 4 N.Y.S. 568, 51 Hun 642, 1889 N.Y. Misc. LEXIS 1603 (N.Y. Sup. Ct. 1889).

In action to avoid a deed as to a portion of the premises conveyed, a question put to defendant whether he had stated that if the deed included the fifteen acres, he would correct the mistake by the grantor, since deceased, called for a transaction with a decedent within CPA § 347. Mills v Mills, 8 N.Y.S. 811, 55 Hun 610, 1890 N.Y. Misc. LEXIS 1798 (N.Y. Sup. Ct. 1890), aff'd, 129 N.Y. 624, 29 N.E. 1030, 129 N.Y. (N.Y.S.) 624, 1891 N.Y. LEXIS 1192 (N.Y. 1891).

In an action by an administrator to recover moneys paid after the death of his intestate to the latter’s daughter on checks drawn by him, a question put to the defendant as to whether her father ever promised to repay certain money to her is inadmissible. McMurray v Ennis, 14 N.Y.S. 635, 1891 N.Y. Misc. LEXIS 2438 (N.Y. City Ct. 1891).

In an action against an executor to recover damages for the conversion by his testator of jewelry belonging to the plaintiff, the plaintiff is not incompetent to testify to the value of the jewelry. GREGORY v FICHTNER, 14 N.Y.S. 891, 27 Abb. N. Cas. 86, 1891 N.Y. Misc. LEXIS 3342 (N.Y.C.P. 1891), limited, Hay v Muller, 28 N.Y.S. 57, 7 Misc. 670, 1894 N.Y. Misc. LEXIS 286 (N.Y.C.P. 1894).

A question made for the purpose of qualifying witness to testify to decedent’s signature, “Did you see her at any time sign her name, other than in a personal transaction between you and she?”

was objectionable as calling for a conclusion from the witness as to what would constitute a personal transaction. Gerdy v Tissot, 135 N.Y.S. 559 (N.Y. App. Term 1912).

Personal transaction or communication includes every method by which a person can derive impressions or information from conduct, condition or language of another. In re Katz' Will, 49 N.Y.S.2d 604, 1944 N.Y. Misc. LEXIS 2158 (N.Y. Sur. Ct. 1944), app. dismissed, 79 N.Y.S.2d 516 (N.Y. App. Div. 1948), modified, 83 N.Y.S.2d 850, 1948 N.Y. Misc. LEXIS 3457 (N.Y. Sur. Ct. 1948).

In action against an administrator, testimony of plaintiff that a receipt put in evidence by defendant to show payment, had been changed since plaintiff delivered it to defendant's intestate, is testimony to a personal transaction of plaintiff with deceased, and is inadmissible. Boughton v Bogardus, 35 Hun 198 (N.Y.).

In action of trespass quaere clausum, for cutting trees, testimony of a party in his own behalf that deceased, while witness was cutting timber on the locus in quo knew it and came there, held to be a violation of CPA § 347, although coupled with testimony that nothing more was said than friendly conversation, this not being objected to. Oliver v Freligh, 36 Hun 633 (N.Y.).

To state the names of the persons in a room at a certain time is not testimony connecting a personal transaction between the witness and one of them, and such testimony is admissible although the witness may be interested in the action and one of the parties who was in the room has died before trial. Greer v Greer, 12 N.Y.S. 778, 58 Hun 251, 1890 N.Y. Misc. LEXIS 2669 (N.Y. Sup. Ct. 1890).

Where the mere fact of a conversation between a claimant against the estate of a decedent and the deceased is a material fact to be proved upon the trial of a disputed claim, the proof of such fact by the testimony of the claimant is inadmissible. Ellis v Filon, 33 N.Y.S. 138, 85 Hun 485 (1895).

It was not sufficient to produce error under CPA § 347 that the fact testified to might corroborate in some degree the evidence given which involves a transaction between witness and deceased, if the fact itself was an independent one. Tomlinson v Seifert, 2 N.Y. St. 283.

47. Scope of prohibition

The simple proof of the fact that a conversation was had with a deceased person, without proof of the conversation itself, is not obnoxious to the objection, unless the mere fact of a conversation is the material thing to be proved. Hier v Grant, 47 N.Y. 278, 47 N.Y. (N.Y.S.) 278, 1872 N.Y. LEXIS 16 (N.Y. 1872).

CPA § 347 prohibited the survivor from testifying that any particular communication or transaction did or did not take place between him and the deceased, but there the prohibition ended. It did not preclude him from testifying to extraneous facts or circumstances, which tended to show that a witness, who testified to such transaction or communication, testified falsely, or that it was impossible that his statement could be true, as, for instance, that the survivor was at the time absent from the country when the transaction was stated to have occurred. Accordingly, held, where a witness had testified in behalf of an administrator plaintiff, to a transaction between the defendant and the intestate in his presence, that the defendant might testify that the witness was not present at any transaction between him and the intestate; and also that the interview between them did not take place in the room where the witness testified it did, but in another room. Pinney v Orth, 88 N.Y. 447, 88 N.Y. (N.Y.S.) 447, 1882 N.Y. LEXIS 125 (N.Y. 1882), limited, In re Kelly's Estate, 238 N.Y. 71, 143 N.E. 795, 238 N.Y. (N.Y.S.) 71, 1924 N.Y. LEXIS 650 (N.Y. 1924).

The provision prohibiting a party from testifying in his own behalf against an executor does not necessarily exclude evidence which tends only to negative or affirm the transaction or communication. Lewis v Merritt, 98 N.Y. 206, 98 N.Y. (N.Y.S.) 206, 1885 N.Y. LEXIS 597 (N.Y. 1885).

CPA § 347 not only prohibited direct testimony of the survivor that a personal transaction did or did not take place, but also prohibited his testifying to what, on its face, might seem an independent fact; when it appeared by other evidence that it had its origin or directly resulted from a personal transaction, he might not testify to subsidiary facts which originated or proceeded from such transaction. Clift v Moses, 112 N.Y. 426, 20 N.E. 392, 112 N.Y. (N.Y.S.) 426, 1889 N.Y. LEXIS 838 (N.Y. 1889).

The purpose of CPA § 347 was not only to exclude direct testimony of conversations and transactions but all facts so closely related as to warrant reasonable inference of such transactions therefrom. Kings County Trust Co. v Hyams, 242 N.Y. 405, 152 N.E. 129, 242 N.Y. (N.Y.S.) 405, 1926 N.Y. LEXIS 998 (N.Y. 1926).

It is not incompetent for an interested party to state the names of persons present in a room at a certain time, even though one of the parties named is since deceased. Kissinger v Quirin, 206 A.D. 126, 200 N.Y.S. 599, 1923 N.Y. App. Div. LEXIS 7157 (N.Y. App. Div. 1923).

“Facts” as used in CPA § 347 denoted act, thing done. Rost v Kessler, 267 A.D. 686, 49 N.Y.S.2d 97, 1944 N.Y. App. Div. LEXIS 4807 (N.Y. App. Div. 1944).

The inhibition of CPA § 347 was not confined to communications with the deceased person where no other persons were present, but applied equally to such communications in the presence of others. Ludwig v Goldenberg, 128 N.Y.S. 1132, 71 Misc. 119, 1911 N.Y. Misc. LEXIS 179 (N.Y. App. Term 1911).

Testimony by alleged surviving spouse that neither he nor decedent had ever instituted a matrimonial action against each other, is not barred as testimony of a transaction with deceased. In re Estate of Lancaster, 30 Misc. 2d 7, 209 N.Y.S.2d 395, 1960 N.Y. Misc. LEXIS 2369 (N.Y. Sur. Ct. 1960).

Collateral testimony relating to facts not dependent upon the evidence of the deceased party, but having a tendency to maintain the defense of the party from whom the evidence is proposed to be derived, was not included within CPA § 347. Guibert v Saunders, 10 N.Y. St. 43.

A party may testify to an extrinsic fact which tends to negative a personal transaction with deceased, but no statement of the subject matter can be embraced in the question. McKenna v Bolger, 1 N.Y.S. 651, 49 Hun 259, 1888 N.Y. Misc. LEXIS 1496 (N.Y. App. Term 1888), aff'd, 117 N.Y. 651, 22 N.E. 1132, 117 N.Y. (N.Y.S.) 651, 1889 N.Y. LEXIS 1525 (N.Y. 1889).

The rule is the same whether the object be to prove an affirmative or a negative. The interested party cannot testify that an alleged conversation took place or an interview concerning the agreement or transaction did not take place any more than he can testify concerning the transaction or conversation. Walsh v McArdle, 29 N.Y.S. 169, 78 Hun 411 (1894).

CPA § 347 applied to exclude evidence that established a cause of action or an affirmative defense. Jerry Vogel Music Co. v Forster Music Publisher, Inc., 147 F.2d 614, 1945 U.S. App. LEXIS 4486 (2d Cir. N.Y.), cert. denied, 325 U.S. 880, 65 S. Ct. 1573, 89 L. Ed. 1996, 1945 U.S. LEXIS 2786 (U.S. 1945).

48. Mental attitude or physical condition; physical acts and circumstances

Testimony of plaintiff that he went with the alleged trustee when she withdrew money and when she received the deed and paid money is not incompetent. Hutton v Smith, 175 N.Y. 375, 67 N.E. 633, 175 N.Y. (N.Y.S.) 375, 1903 N.Y. LEXIS 989 (N.Y. 1903).

Evidence of defendant as to state of her husband’s health just before his death should have been permitted as not prohibited by CPA § 347. Kings County Trust Co. v Hyams, 242 N.Y. 405, 152 N.E. 129, 242 N.Y. (N.Y.S.) 405, 1926 N.Y. LEXIS 998 (N.Y. 1926).

A party even if he may be interested in an action may testify as to the fact that he saw the deceased come out of a certain hotel on a certain day. Cowan v Davenport, 30 A.D. 130, 51 N.Y.S. 478, 1898 N.Y. App. Div. LEXIS 1259 (N.Y. App. Div. 1898).

In an action to set aside the probate of a will which disinherited the testator's children on the ground that in making such will the testator was controlled by an insane delusion, the children are incompetent to testify to their father's wild and excited actions and speech and the widow is also incompetent to testify that she executed a mortgage which resulted in a separation agreement between herself and her husband. Holland v Holland, 98 A.D. 366, 90 N.Y.S. 208, 1904 N.Y. App. Div. LEXIS 3564 (N.Y. App. Div. 1904).

In an action for the death of a guest in an automobile which was owned and being driven by the defendant, wherein the defendant claimed that the accident which caused the decedent's death was due to the negligence of the driver of another automobile, held that defendant was competent to testify as to the acts of the other driver and his own in the emergency confronting him, and as to the physical conditions present. McCarthy v Woolston, 210 A.D. 152, 205 N.Y.S. 507, 1924 N.Y. App. Div. LEXIS 6676 (N.Y. App. Div. 1924).

A mental attitude cannot be established as a fact by proving as a basis for it a personal transaction or communication with deceased. O'Marr v McLean, 228 A.D. 19, 238 N.Y.S. 443, 1930 N.Y. App. Div. LEXIS 12088 (N.Y. App. Div. 1930).

In an action for death of plaintiff's intestate while riding as guest in car driven by defendant, it was reversible error to admit testimony by defendant as to intoxication of plaintiff's intestate. Trombly v Deso, 235 A.D. 15, 256 N.Y.S. 225, 1932 N.Y. App. Div. LEXIS 7869 (N.Y. App. Div. 1932).

In action by administratrix for death of decedent, defendant was competent to testify that decedent was driving car at time of accident. Rost v Kessler, 267 A.D. 686, 49 N.Y.S.2d 97, 1944 N.Y. App. Div. LEXIS 4807 (N.Y. App. Div. 1944).

Where intention is material, a witness may testify to his intention in doing a certain act, though the act itself is a part of a transaction with decedent; so held where witness was seeking to impress a lien for permanent improvements made on land under the mistaken belief that he was owner. O'Marr v McLean, 235 N.Y.S. 428, 134 Misc. 143, 1929 N.Y. Misc. LEXIS 870 (N.Y. Sup. Ct. 1929), rev'd, 228 A.D. 19, 238 N.Y.S. 443, 1930 N.Y. App. Div. LEXIS 12088 (N.Y. App. Div. 1930).

Oral statements by intestate immediately after fall on sidewalk to policeman and later to doctor at hospital that “she slipped on banana and fell,” and admission sheet of hospital and accident report of police department, were admitted as not violative of CPA § 347. Fischer v New York, 138 N.Y.S.2d 754, 207 Misc. 528, 1955 N.Y. Misc. LEXIS 2678 (N.Y. Sup. Ct. 1955).

Witnesses could testify that they saw deceased at a certain place on a certain day. In re Brown, 14 N.Y.S. 122, 59 Hun 628, 1891 N.Y. Misc. LEXIS 1881 (N.Y. Sup. Ct. 1891).

In action on note against executor of deceased maker, the fact that plaintiff has seen the note is not a personal transaction. Redfield v Still, 10 N.Y. St. 366.

In action against executor of deceased married woman upon a bond executed by her and her husband, defendant pleaded alteration to bond after the execution, so as to charge her separate estate. Plaintiff testified that he saw bond in his attorney’s hands before its execution, and that it contained the clause in question. Held, that the evidence was inadmissible. Pease v Barnett, 30 Hun 525 (N.Y.).

Where plaintiff sued upon a quantum meruit to recover for services rendered deceased, held, that she could not testify that after a paralytic stroke deceased was very feeble, or that a customary attendant was absent for a considerable period. Campbell v Hubbard, 38 Hun 306 (N.Y.).

When evidence of seeing deed in deceased person’s possession not evidence of a personal transaction. Blaesi v Blaesi, 42 Hun 159, 3 N.Y. St. 431 (N.Y.).

An interested party cannot testify as to appearance of testator as indicating his incompetency to make a will. In re McArthur's Will, 12 N.Y.S. 822, 59 Hun 619, 1891 N.Y. Misc. LEXIS 877 (N.Y. Sup. Ct. 1891).

An interested party not competent to testify to physical condition of testator during last year of his life, where questions call for facts learned while he and deceased were associated in business. Scott v Scott, 13 N.Y. St. 202.

49. Conversation and declaration

Declarations of makers or indorsers of note. Held, not to affect holder, made after he became owner. City Bank of Brooklyn v McChesney, 20 N.Y. 240, 20 N.Y. (N.Y.S.) 240, 1859 N.Y. LEXIS 186 (N.Y. 1859).

In an action by a grantee of mortgaged premises to have the mortgage canceled, one, through whom plaintiff derived title, was incompetent to testify as to declarations made by the mortgagor at the time deceased. Foote v Beecher, 78 N.Y. 155, 78 N.Y. (N.Y.S.) 155, 1879 N.Y. LEXIS 891 (N.Y. 1879).

When the mere fact that a party had a conversation with a deceased person to whom the opposite party stood in the relation specified in CPA § 347 was a material question, it was not competent for such party to testify that he had the conversation. Maverick v Marvel, 90 N.Y. 656, 90 N.Y. (N.Y.S.) 656, 1882 N.Y. LEXIS 463 (N.Y. 1882).

Proof of declarations of deceased grantor, made in possession of real estate in reference to his title thereto and against his interest, by third persons, did not open the door for the admission of what would otherwise be plainly incompetent evidence under CPA § 347. Lyon v Ricker, 141 N.Y. 225, 36 N.E. 189, 141 N.Y. (N.Y.S.) 225, 1894 N.Y. LEXIS 1122 (N.Y. 1894).

Evidence of an admission by defendant as to an agreement made by him with a deceased person is not incompetent. Hirsh v Auer, 146 N.Y. 13, 40 N.E. 397, 146 N.Y. (N.Y.S.) 13, 1895 N.Y. LEXIS 631 (N.Y. 1895).

In an action brought by heirs at law of a deceased person to set aside as fraudulent a deed executed by the deceased to one of the defendants, in which certain other heirs at law who refused to join as plaintiffs were made defendants, it was not incompetent under CPA § 347 for one of the heirs who was a co-defendant to testify as to statements made by the deceased to him. Baxter v Baxter, 13 A.D. 65, 43 N.Y.S. 94, 1897 N.Y. App. Div. LEXIS 23 (N.Y. App. Div. 1897).

Proof of the intestate's declarations of her intent to give her property to the donee held competent and her declarations as to the contents of a package were competent as part of the res gestae. In re Swade, 65 A.D. 592, 72 N.Y.S. 1030, 1901 N.Y. App. Div. LEXIS 2202 (N.Y. App. Div. 1901).

Testimony as to whether or not an interested adverse party had had a conversation with the defendant's testator, is incompetent. Healy v Malcolm, 99 A.D. 370, 91 N.Y.S. 207, 1904 N.Y. App. Div. LEXIS 3081 (N.Y. App. Div. 1904).

CPA § 347 held to render incompetent the testimony of a physician, seeking recovery from a decedent's estate for professional services alleged to have been rendered decedent in testifying in his behalf in proceedings to determine decedent's sanity, respecting conferences alleged to have been held between plaintiff and decedent preliminary to such testimony in the lunacy proceedings, as well as conferences with decedent's attorney relative to the same subject. Manson v Wright, 205 A.D. 294, 199 N.Y.S. 459, 1923 N.Y. App. Div. LEXIS 5006 (N.Y. App. Div. 1923).

The fact that the plaintiff was also present during a conversation between the defendant and plaintiff's deceased partner did not affect the intent of CPA § 347 so as to justify the admission of the defendant's testimony respecting such conversation. Herschman v Fischer, 206 A.D. 629,

199 N.Y.S. 45, 1923 N.Y. App. Div. LEXIS 7594 (N.Y. App. Div.), modified, 206 A.D. 679, 199 N.Y.S. 927, 1923 N.Y. App. Div. LEXIS 8073 (N.Y. App. Div. 1923), modified, 206 A.D. 670, 199 N.Y.S. 927, 1923 N.Y. App. Div. LEXIS 7977 (N.Y. App. Div. 1923).

CPA § 347 applied notwithstanding that the party against whom the testimony was offered was present at the interview and could contradict the version of the survivor. Thus, plaintiffs, claiming an interest in proceeds of a bank account through their deceased mother, held disqualified to testify concerning declarations by the decedent relative thereto, although made in the presence of the defendant. Higgins v Lynch, 206 A.D. 773, 201 N.Y.S. 10, 1923 N.Y. App. Div. LEXIS 9057 (N.Y. App. Div. 1923).

Testimony by plaintiff, that her son was present at the time she and defendant's decedent were making the contract for services on which she seeks recovery, was inadmissible in view of her son testifying to the details of that conversation. Walize v Morton, 219 A.D. 632, 220 N.Y.S. 788, 1927 N.Y. App. Div. LEXIS 10989 (N.Y. App. Div. 1927).

In an action for wrongful death, to establish decedent's contributory negligence, it was error to permit defendant to testify, over objection, to the silence of decedent concerning the fatal accident; door to such testimony not having been opened by plaintiff. Lakin v Wright, 230 A.D. 330, 243 N.Y.S. 597, 1930 N.Y. App. Div. LEXIS 8609 (N.Y. App. Div. 1930).

Witness may testify to conversations had in presence of decedent but in which he did not take part. In re Ryder's Will, 279 A.D. 1131, 112 N.Y.S.2d 601 (N.Y. App. Div. 1952).

A deposition taken during the lifetime of a testator on interrogatories and cross-interrogatories is not inadmissible. Roland v Pinckney, 29 N.Y.S. 1102, 8 Misc. 458, 1894 N.Y. Misc. LEXIS 495 (N.Y. Super. Ct. 1894).

In an action against the maker of a note, evidence of statements made to him by an intermediate transferee, since deceased, tending to establish a defense of payment, is

inadmissible. German-American Bank v Slade, 36 N.Y.S. 983, 15 Misc. 287, 1895 N.Y. Misc. LEXIS 1105 (N.Y. Super. Ct. 1895).

CPA § 347 rendered incompetent the testimony of parties to an action involving the validity of an alleged trust agreement, assailed in their interest as invalid because not executed in accordance with the laws of Mexico, as to alleged conversations with the deceased settler tending to show that at the time of the execution of the instrument he was domiciled in that country. Equitable Trust Co. v Pratt, 193 N.Y.S. 152, 117 Misc. 708, 1922 N.Y. Misc. LEXIS 1067 (N.Y. Sup. Ct. 1922), aff'd, 206 A.D. 689, 199 N.Y.S. 921, 1923 N.Y. App. Div. LEXIS 8134 (N.Y. App. Div. 1923).

Aside from CPA § 347 the admissions of a person now deceased were unreliable and were to be carefully scrutinized before acceptance as proof of a contract giving his property in return for home and care, of which there was no other proof. McCallum v Pickens, 213 N.Y.S. 119, 126 Misc. 436, 1925 N.Y. Misc. LEXIS 1176 (N.Y. Sup. Ct. 1925), aff'd, 217 A.D. 714, 215 N.Y.S. 882, 1926 N.Y. App. Div. LEXIS 8031 (N.Y. App. Div. 1926).

CPA § 347 sought to protect the interests of those who were not present at a transaction and could never know the whole truth. Bronx County Trust Co. v O'Connor, 230 N.Y.S. 226, 132 Misc. 294, 1928 N.Y. Misc. LEXIS 962 (N.Y. Sup. Ct. 1928), rev'd, 226 A.D. 126, 234 N.Y.S. 414, 1929 N.Y. App. Div. LEXIS 8666 (N.Y. App. Div. 1929).

Oral statements by intestate immediately after fall on sidewalk to policeman and later to doctor at hospital that “she slipped on banana and fell,” and admission sheet of hospital and accident report of police department, were admitted as not violative of CPA § 347. Fischer v New York, 138 N.Y.S.2d 754, 207 Misc. 528, 1955 N.Y. Misc. LEXIS 2678 (N.Y. Sup. Ct. 1955).

Where in an action to enforce specific performance of a parol agreement to convey lands, the supporting evidence was furnished chiefly by the mother and husband of plaintiff, and consisted largely of declarations of deceased father of plaintiff who was one of the parties to the agreement, and both witnesses were interested in the event of the action. Held, incompetent.

Devinney v Corey, 5 N.Y.S. 289, 52 Hun 612, 1889 N.Y. Misc. LEXIS 2940 (N.Y. Sup. Ct. 1889), aff'd, 127 N.Y. 655, 28 N.E. 254, 127 N.Y. (N.Y.S.) 655, 1891 N.Y. LEXIS 1845 (N.Y. 1891).

A party was not prohibited by CPA § 347 from testifying to declarations of a deceased person from whom neither party acquired title to or interest in the property in controversy. Bump v Pratt, 32 N.Y.S. 538, 84 Hun 201 (1895).

Hearsay evidence is admissible in the case of declarations and entries against their interest made by persons since deceased. Swan v Morgan, 34 N.Y.S. 829, 88 Hun 378 (1895).

50. Transaction between decedent and third person

A witness may testify to transactions between decedent and third parties in presence of witness. Lobdell v Lobdell, 36 N.Y. 327, 36 N.Y. (N.Y.S.) 327, 4 Abb. Pr. (n.s.) 56, 1867 N.Y. Misc. LEXIS 110 (N.Y. 1867).

CPA § 347 did not preclude a party from testifying to statements made by a deceased person to a third party, although witness participated in the conversation, so long as his testimony was limited to what was not personal between him and deceased; although the third person was counsel for deceased. Cary v White, 59 N.Y. 336, 59 N.Y. (N.Y.S.) 336, 1874 N.Y. LEXIS 425 (N.Y. 1874).

A party may testify to a conversation between the deceased and a third person in his hearing, and to a transaction between himself and the agent of the deceased. Hildebrant v Crawford, 65 N.Y. 107, 65 N.Y. (N.Y.S.) 107, 1875 N.Y. LEXIS 327 (N.Y. 1875).

If it was connected with anything that passed between him and the deceased he cannot testify. Brague v Lord, 67 N.Y. 495, 67 N.Y. (N.Y.S.) 495, 1876 N.Y. LEXIS 424 (N.Y. 1876).

In one part of a conversation between a person since deceased and a third person at which plaintiff was present, the former made a remark which alluded to the latter and at the same time turned his head toward the latter. Held, that plaintiff could not as against executors of deceased

testify to the remark. Brague v Lord, 67 N.Y. 495, 67 N.Y. (N.Y.S.) 495, 1876 N.Y. LEXIS 424 (N.Y. 1876).

A party may testify to a conversation between the decedent and another person in which he took no part, even though he was mentioned in it. Simmons v Havens, 101 N.Y. 427, 5 N.E. 73, 101 N.Y. (N.Y.S.) 427, 1886 N.Y. LEXIS 650 (N.Y. 1886).

In an action on an account against an estate for work, labor and goods sold, plaintiff was permitted to testify in his own behalf as to what was said by him on an occasion of an attempted settlement of the claim, the defendants being present. Held, incompetent. Davis v Gallagher, 124 N.Y. 487, 26 N.E. 1045, 124 N.Y. (N.Y.S.) 487, 1891 N.Y. LEXIS 1388 (N.Y. 1891).

As to whether a party excluded from testifying to a conversation with a person, since deceased, may testify to a conversation between decedent and a third person. Devlin v Greenwich Sav. Bank, 125 N.Y. 756, 26 N.E. 744, 125 N.Y. (N.Y.S.) 756, 1891 N.Y. LEXIS 1585 (N.Y. 1891).

Husband of deceased daughter, through whom he claimed title, could not testify to a personal transaction between decedent and daughter in his presence. Griswold v Hart, 205 N.Y. 384, 98 N.E. 918, 205 N.Y. (N.Y.S.) 384, 1912 N.Y. LEXIS 1230 (N.Y. 1912).

Party interested in event could not testify to conversation, though she did not take part in it. Brown v Crossman, 206 N.Y. 471, 100 N.E. 42, 206 N.Y. (N.Y.S.) 471, 1912 N.Y. LEXIS 993 (N.Y. 1912).

A party to an action cannot testify to a conversation between his predecessor in title and his adversary's predecessor in title when both are dead even where he did not take any part in the conversation. Stillwell v Boyer, 21 A.D. 231, 47 N.Y.S. 666, 1897 N.Y. App. Div. LEXIS 1997 (N.Y. App. Div. 1897).

A defendant in an action may testify as to a conversation between plaintiff and decedent from whom defendant claimed title to real estate, in which conversation defendant took no part. When plaintiff may not testify as to whether conversations between decedent and plaintiff, related by

others, were true. Burns v Mullin, 42 A.D. 116, 58 N.Y.S. 933, 1899 N.Y. App. Div. LEXIS 1650 (N.Y. App. Div. 1899).

In an action by a judgment creditor against devisees, the plaintiff cannot testify as to a conversation had in his presence between the deceased and his son. Burnham v Burnham, 46 A.D. 513, 62 N.Y.S. 120, 1900 N.Y. App. Div. LEXIS 7 (N.Y. App. Div. 1900), aff'd, 165 N.Y. 659, 59 N.E. 1119, 165 N.Y. (N.Y.S.) 659, 1901 N.Y. LEXIS 1513 (N.Y. 1901).

In an action against the heirs of the plaintiff's aunt to establish an equitable lien upon real estate, purchased by the aunt and held by her in trust for the plaintiff, the plaintiff's testimony as to the conversation which took place between his aunt and his uncle in relation to the money, and to the withdrawal of the money from the bank and the subsequent payment thereof to the grantor of the premises in question, is not incompetent. Hutton v Smith, 74 A.D. 284, 77 N.Y.S. 523, 1902 N.Y. App. Div. LEXIS 1831 (N.Y. App. Div. 1902), aff'd, 175 N.Y. 375, 67 N.E. 633, 175 N.Y. (N.Y.S.) 375, 1903 N.Y. LEXIS 989 (N.Y. 1903).

A person attempting to charge an administrator with moneys alleged to have been loaned him by the decedent is not prohibited from testifying to a conversation between the administrator and the decedent, during which the former asked the latter if she kept an account of the money which she had loaned him, to which the decedent replied in the affirmative, where it does not appear that the witness took any part in the conversation by word or deed. In re Andrews, 97 A.D. 429, 89 N.Y.S. 965, 1904 N.Y. App. Div. LEXIS 2639 (N.Y. App. Div. 1904).

Evidence of witnesses that they heard a conversation between a decedent and another in which they took no part is admissible. In re Brown, 14 N.Y.S. 122, 59 Hun 628, 1891 N.Y. Misc. LEXIS 1881 (N.Y. Sup. Ct. 1891).

The party plaintiff, being interested in the event of an action brought against the executors of a deceased person, is not a competent witness in his own behalf, in respect to acts and statements of the deceased which took place in his presence and hearing between the deceased and a third person. Price v Price, 33 Hun 69 (N.Y.).

In probate or other cases when a will, other instrument or acts is contested on the ground of undue influence, restraint, mental incapacity, fraud, a person who is interested in the event of an action or proceeding is disqualified to testify as to any transaction or communication which occurred in his presence or hearing, although it was not with or addressed to such person, or one in which he participated. Upon other issues, an interested witness may be permitted to testify to a conversation or transaction between a decedent and a third party in the presence of the witness, provided he was not referred to by the parties to such conversation, and did not participate in it by word, sign or act, but if there was any such reference or participation, although slight, the witness is incompetent. Eighmie v Taylor, 23 N.Y.S. 248, 68 Hun 573 (1893).

Conversation of a decedent with a third person in the presence of a person interested cannot be given in evidence by the person interested. Ditmars v Sackett, 36 N.Y.S. 690, 92 Hun 381 (1895).

51. Transaction with deceased personal representative

Where it was alleged that a conveyance by a deceased executrix was obtained by undue influence, testimony of the grantee as to transactions with deceased was competent. In re Fitzpatrick's Will, 252 N.Y. 121, 169 N.E. 110, 252 N.Y. (N.Y.S.) 121, 1929 N.Y. LEXIS 534 (N.Y. 1929).

After the death of the widow of a decedent, also his administratrix, the decedent’s son was incompetent to testify in his own behalf against her administrator as to personal transactions with her. In re Meyers' Estate, 223 N.Y.S. 701, 129 Misc. 760, 1927 N.Y. Misc. LEXIS 1019 (N.Y. Sur. Ct. 1927).

52. Evidence given on a former trial before death

Where a witness has testified on his own behalf as to personal transactions with the plaintiff, and after such testimony the plaintiff dies, and the plaintiff's administrator is substituted, the testimony is not incompetent, as the competency depended entirely on the facts at the time the testimony was given. Collins v McGuire, 76 A.D. 443, 78 N.Y.S. 527, 1902 N.Y. App. Div. LEXIS 2578 (N.Y. App. Div. 1902).

Testimony of a witness on a former trial does not involve a communication between him and the decedent or make the testimony incompetent. Stirling v Kelley, 77 A.D. 621, 79 N.Y.S. 250, 1902 N.Y. App. Div. LEXIS 2916 (N.Y. App. Div. 1902).

The fact that a person had testified as to personal transactions with a decedent under the provisions of former Code Civ Proc § 2709, did permit such person to testify under CPA § 347 as to the subject of the prior testimony. Killian v Heinzerling, 114 A.D. 410, 99 N.Y.S. 1036, 1906 N.Y. App. Div. LEXIS 2116 (N.Y. App. Div. 1906).

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 death bed, 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).

Where parties to an action have been examined before trial, and subsequently defendant dies and representative is substituted, plaintiff's deposition may be read, although relating to personal transactions had 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).

When testimony of plaintiff given on a former trial may be read, though one of the defendants has become insane and the action is continued against his committee. Morehouse v Morehouse, 41 Hun 146, 3 N.Y. St. 790 (N.Y.).

53. Bills and notes

In an action by personal representatives of a deceased person upon a promissory note against maker and indorser, neither of the defendants can be called as a witness in favor of the other, as to personal transactions with the deceased, although they have put in separate answers. Alexander v Dutcher, 70 N.Y. 385, 70 N.Y. (N.Y.S.) 385, 1877 N.Y. LEXIS 628 (N.Y. 1877).

In an action by an indorsee of a promissory note for the makers' accommodation, to recover the amount paid by him from the defendants, to whom it was transferred in violation of the terms of the indorsement, where one of the makers had died, held, that the defendants were not assignees within CPA § 347. Comstock v Hier, 73 N.Y. 269, 73 N.Y. (N.Y.S.) 269, 1878 N.Y. LEXIS 611 (N.Y. 1878).

In an action by the administrator of the payee, against the maker and surety on a promissory note, where the surety alone defends, the maker is an interested party, and cannot testify as to personal transactions between himself and the intestate, as he is interested in preventing a judgment against his surety. And where he was permitted so to testify, held, that the error was not cured by the plaintiff afterwards testifying as to the same facts. And where the surety, being called in his own behalf, was asked if he had any interest in the note or received any benefit from it, held, that the testimony was incompetent. Church v Howard, 79 N.Y. 415, 79 N.Y. (N.Y.S.) 415, 1880 N.Y. LEXIS 12 (N.Y. 1880).

In an action to recover a loan, plaintiff claimed that the loan was made by check given to him by defendant's intestate. Defendant alleged check to have been given on business of a corporation of which defendant was president, and plaintiff treasurer. Held, that the general denial in the answer authorized defendant to show the facts in respect to the transaction. Koehler v Adler, 91 N.Y. 657, 91 N.Y. (N.Y.S.) 657, 1883 N.Y. LEXIS 88 (N.Y. 1883).

A second indorser, who has taken up and paid a promissory note in action against the first indorser to recover the amount thereof, is not precluded by the death of the maker from

testifying in his own behalf as to the circumstances of the indorsement. Kelly v Burroughs, 102 N.Y. 93, 6 N.E. 109, 102 N.Y. (N.Y.S.) 93, 1 N.Y. St. 161, 1886 N.Y. LEXIS 805 (N.Y. 1886).

An indorser, not a party, and who has not been charged on a note, in suit against the maker, is competent to prove declarations of the deceased owner to the defendant, showing it paid. Nearpass v Tilman, 104 N.Y. 506, 10 N.E. 894, 104 N.Y. (N.Y.S.) 506, 5 N.Y. St. 745, 1887 N.Y. LEXIS 615 (N.Y. 1887).

Upon a reference under CPA § 347 of a disputed claim by an executor against estate of deceased person, founded upon a promissory note, the defense was the statute of limitations. Plaintiff and two other witnesses, who were entitled under the will to a third of what was collected, testified under objection that the indorsement of payments of interest on the note were made by plaintiff during lifetime of plaintiff's testator. Held, incompetent. Mills v Davis, 113 N.Y. 243, 21 N.E. 68, 113 N.Y. (N.Y.S.) 243, 1889 N.Y. LEXIS 941 (N.Y. 1889).

In an action on a joint and several note, plaintiff and one of the makers died. Held, that although the other maker might testify to personal transactions between himself and the makers of the note showing that he signed it, yet as his evidence showed a joint liability of deceased maker and a duty of contribution by the latter it was incompetent. Wilcox v Corwin, 117 N.Y. 500, 23 N.E. 165, 117 N.Y. (N.Y.S.) 500, 1889 N.Y. LEXIS 1458 (N.Y. 1889).

When the issue is that a note was indorsed at the request of the deceased person for a special purpose and was afterwards wrongfully diverted by such deceased person, the party so indorsing cannot testify as to the personal request of the deceased; and the court may sustain an objection to such testimony when it appears, by the question, to call for a personal transaction. Sallade v Gerlach, 132 N.Y. 548, 30 N.E. 372, 132 N.Y. (N.Y.S.) 548, 1892 N.Y. LEXIS 1237 (N.Y. 1892).

Although a note executed by a deceased person may be read in evidence by his representative yet the living party to the instrument cannot testify as to what was said and done when it was

executed. In re Callister's Estate, 153 N.Y. 294, 47 N.E. 268, 153 N.Y. (N.Y.S.) 294, 1897 N.Y. LEXIS 702 (N.Y. 1897).

Where maker of note had plaintiff indorse it and delivered it to one since deceased, and decedent indorsed the note and transferred it to another who obtained judgment against plaintiff, which judgment decedent paid and took an assignment of, in an action by plaintiff to restrain enforcement of a judgment on the ground that plaintiff was an accommodation indorser for decedent, the maker of the note was not “interested in the event” and was a competent witness. Franklin v Kidd, 219 N.Y. 409, 114 N.E. 839, 219 N.Y. (N.Y.S.) 409, 1916 N.Y. LEXIS 841 (N.Y. 1916).

Assignee of mortgage in action against subsequent assignee could not testify that there was an agreement with his assignor, since deceased, that blank assignment should be of no effect until postdated check was paid. Levy v Louvre Realty Co., 222 N.Y. 14, 118 N.E. 207, 222 N.Y. (N.Y.S.) 14, 1917 N.Y. LEXIS 808 (N.Y. 1917).

Testimony of estate claimant that checks of decedent, offered by executor to prove payment of decedent’s note held by claimant, were given for purpose other than payment of note, was incompetent. In re Seigle's Estate, 289 N.Y. 300, 45 N.E.2d 809, 289 N.Y. (N.Y.S.) 300, 1942 N.Y. LEXIS 947 (N.Y. 1942).

Where a claim consisting of a note is presented against an estate, the person in whose favor the note is drawn cannot testify as to the execution of the note; viz., that the name of the witness subscribed was her signature, or that it was subscribed at the request of the executor who signed the note by making his mark. Weeks v Washburn, 23 A.D. 151, 48 N.Y.S. 908, 1897 N.Y. App. Div. LEXIS 2582 (N.Y. App. Div. 1897).

An action brought by a father to recover a legacy left him by his son, the latter’s executors set up as a counterclaim the father’s liability on a note which he had endorsed and which was owned by the estate, the plaintiff endeavored to establish by the testimony of the maker that the note was not delivered as a binding obligation upon the indorser, held, that the maker was a

competent witness to testify to personal transactions of the deceased in an action founded upon the contract of indorsement. Crampton v Foster, 29 A.D. 215, 51 N.Y.S. 883, 1898 N.Y. App. Div. LEXIS 1029 (N.Y. App. Div. 1898).

Where three parties had made a joint and several promissory note and an action was brought in which the defense was interposed that the note was delivered to one of the makers by defendants' testator, who was also one of the makers of the note and that the first maker diverted the note by delivering it to the plaintiff, said maker may testify that he delivered the note to the payee on the advice of the defendants' testator and that whatever he did was done with the said testator's approval and consent. Benjamin v Ver Nooy, 36 A.D. 581, 55 N.Y.S. 796, 1899 N.Y. App. Div. LEXIS 103 (N.Y. App. Div. 1899), modified, 168 N.Y. 578, 61 N.E. 971, 168 N.Y. (N.Y.S.) 578, 10 N.Y. Ann. Cas. 333, 1901 N.Y. LEXIS 909 (N.Y. 1901).

As indorser personally liable on a note and thus liable to guarantors, who were compelled to pay, could, in an action by the representative of a deceased guarantor against the other guarantors to compel distribution, testify as to personal transactions with the decedent; he was not an interested party within the meaning of CPA § 347. Spier v McNaught, 121 A.D. 330, 105 N.Y.S. 1060, 1907 N.Y. App. Div. LEXIS 1767 (N.Y. App. Div. 1907).

In action by administrator against bank alleged to have wrongfully paid a check drawn by intestate, beneficiaries of the check could testify to personal transactions with intestate. Glennan v Rochester Trust & Safe Deposit Co., 152 A.D. 316, 136 N.Y.S. 747, 1912 N.Y. App. Div. LEXIS 8532 (N.Y. App. Div. 1912), aff'd, 209 N.Y. 12, 102 N.E. 537, 209 N.Y. (N.Y.S.) 12, 1913 N.Y. LEXIS 794 (N.Y. 1913).

A daughter whose share of an estate has been surcharged with a loan from her father, evidenced by notes, may not testify, as to whether her father destroyed the notes or as to what he said at the time. She may testify as to acts relating to notes after her father's death. In re Abwender's Estate, 241 A.D. 566, 272 N.Y.S. 569, 1934 N.Y. App. Div. LEXIS 8308 (N.Y. App. Div. 1934).

In an action by an administrator on a promissory note payable to the plaintiff's intestate and admittedly bearing the signature of the defendant, it was reversible error to permit the defendant to testify as to personal transactions with the plaintiff's intestate. Greenman v Butler, 258 A.D. 311, 16 N.Y.S.2d 297, 1939 N.Y. App. Div. LEXIS 6430 (N.Y. App. Div. 1939).

In discovery proceeding by administrator to determine whether proceeds of bank check endorsed by decedent coadministrator and his wife, in order named, belonged to estate, coadministrator was incompetent to testify that, following telephone conversation with decedent, he visited decedent who endorsed check and delivered it to coadministrator who endorsed it and delivered it to his wife. Petition of Jennings, 286 A.D. 256, 143 N.Y.S.2d 383, 1955 N.Y. App. Div. LEXIS 4023 (N.Y. App. Div. 1955), aff'd, 1 N.Y.2d 762, 152 N.Y.S.2d 305, 135 N.E.2d 56, 1956 N.Y. LEXIS 929 (N.Y. 1956).

Where the payee of a note dies before the action brought by his indorsee for value before maturity, and the answer denies that the plaintiff is a bona fide holder for value without notice of the defendant's equities, the defendant cannot testify as a witness as to conversations between himself and the deceased payee in reference to the note. McMillan v Stern, 28 N.Y.S. 596, 8 Misc. 82, 1894 N.Y. Misc. LEXIS 392 (N.Y. City Ct. 1894).

A widow and heir at law are entitled to show that their intestate was merely an accommodation maker; upon that question an administrator may testify although he is an endorser of the note. In re Georgi, 47 N.Y.S. 1061, 21 Misc. 419, 1897 N.Y. Misc. LEXIS 610 (N.Y. Sur. Ct. 1897).

In view of CPA § 347 a claimant against an estate whose demand rested in part upon promissory notes of the decedent payable to him could not testify, in aid of his claim, to the delivery of the notes to him by the decedent. In re Bougher's Will, 197 N.Y.S. 239, 119 Misc. 476, 1922 N.Y. Misc. LEXIS 1620 (N.Y. Sur. Ct. 1922).

Where the payee of a note indorsed same to plaintiff, and defendant, wife of the deceased maker, gave indorsee her check, payable to the payee, in payment of the note and then stopped its payment, in an action on the check by indorsee of the note, the payee could testify as to

payments upon the note by the maker sufficient to remove the bar of the statute of limitations. Partyka v Zawadzki, 228 N.Y.S. 494, 131 Misc. 854, 1928 N.Y. Misc. LEXIS 824 (N.Y. Sup. Ct. 1928).

Where administrator calls claimant to testify that text of deceased's checks was in claimant's handwriting, he did not open door to testimony by claimant as to circumstances under which he procured checks in question. In re Walker's Estate, 32 N.Y.S.2d 595, 177 Misc. 991, 1941 N.Y. Misc. LEXIS 2564 (N.Y. Sur. Ct. 1941).

In final settlement of executor's accounts, testator's note, antedating will, to executor, had to be satisfactorily established by extraneous proof under CPA § 347. In re Chichester's Will, 55 N.Y.S.2d 544, 185 Misc. 5, 1945 N.Y. Misc. LEXIS 1879 (N.Y. Sur. Ct. 1945).

Payee and holder of checks drawn by decedent could not testify as to consideration therefor in estate proceeding. In re De Montale's Estate, 107 N.Y.S.2d 146, 199 Misc. 711, 1950 N.Y. Misc. LEXIS 2564 (N.Y. Sur. Ct. 1950).

In an action against executor on note made by testator where note is barred unless interest was paid as indorsed, plaintiff is incompetent to testify to indorsement. Redfield v Stett, 4 N.Y. St. 864.

One to whom note is pledged by payee is a competent witness, after redemption of note, in payee's action on note against maker's representatives. Wilson v Law, 7 N.Y. St. 672.

One of two makers of a joint and several note having died, the other is not incompetent to testify to personal transactions with deceased. Sprague v Swift, 28 Hun 49 (N.Y.).

Where a note was indorsed by the payee for the maker's accommodation, the holder did not derive title within CPA § 347, so that, in an action against indorser's executor, maker was not disqualified from testifying to admission of testator tending to charge him. Converse v Cook, 31 Hun 417 (N.Y.).

The alleged maker of a promissory note not disqualified, in an action by an indorsee from testifying that the name signed to the note is not his signature, although the payee is dead. Saratoga County Bank v Leach, 37 Hun 336 (N.Y.).

A plaintiff may testify that certain notes in suit were in his possession prior to the death of the maker and were in her possession at the death of the maker. Mortimer v Chambers, 17 N.Y.S. 874, 63 Hun 335, 1892 N.Y. Misc. LEXIS 559 (N.Y. App. Term 1892).

54. Books of account

A person, seeking to re-establish that he rendered services to decedent, cannot testify that his books of account are correct as such books constitute a personal transaction between himself and the decedent. Wright v Hicks, 61 A.D. 489, 70 N.Y.S. 675, 1901 N.Y. App. Div. LEXIS 971 (N.Y. App. Div. 1901).

Testimony that entries in a book are in a decedent’s handwriting does not relate to a personal transaction between the decedent and the witness. Goetting v Weber, 71 A.D. 503, 75 N.Y.S. 890, 1902 N.Y. App. Div. LEXIS 993 (N.Y. App. Div. 1902).

Wife of claimant who was suing for balance due for services was competent to identify account book, though most entries were made by claimant. In re Schaff's Estate, 274 A.D. 1020, 85 N.Y.S.2d 147, 1948 N.Y. App. Div. LEXIS 4497 (N.Y. App. Div. 1948).

Where the correctness of claimant’s books of account has been established by the testimony of third persons, the books are competent evidence in establishing a claim against the estate of a decedent, although the entires were made by the claimant himself. In re Runions, 130 N.Y.S. 1039, 71 Misc. 641, 1911 N.Y. Misc. LEXIS 302 (N.Y. Sur. Ct. 1911).

Plaintiff in action for services rendered decedent could testify as to identity of decedent’s books of accounts, that he kept no clerk, and that his custom was to make entries therein in the usual course of business, but he could not testify as to his having an account with the decedent in his

books and that it was a true transcript of the transactions between him and decedent. Bellows v Bender, 149 N.Y.S. 548, 87 Misc. 187, 1914 N.Y. Misc. LEXIS 836 (N.Y. App. Term 1914).

A shopkeeper cannot testify as to delivery of articles to decedent against whose estate he seeks to establish a claim for the price, or that the items charged to decedent on his books were correct. In re Clodgo's Estate, 227 N.Y.S. 690, 131 Misc. 490, 1928 N.Y. Misc. LEXIS 771 (N.Y. Sur. Ct. 1928).

A claim against an estate for moneys loaned to the decedent in varying sums during a period of about eighteen months may not be established from a book of account kept by the claimant. In re De Simone's Estate, 270 N.Y.S. 618, 151 Misc. 87, 1934 N.Y. Misc. LEXIS 1195 (N.Y. Sur. Ct. 1934).

The receipt in evidence of a book of account containing an itemized statement of services rendered to a decedent, the authenticity of which book was supported solely by the testimony of the plaintiff herself, was improper under CPA § 347 and constituted reversible error. Eby v Grieves, 275 N.Y.S. 90, 153 Misc. 428, 1934 N.Y. Misc. LEXIS 1759 (N.Y. App. Term 1934).

Record kept by claimant of services rendered to decedent, based solely on testimony of claimant, was inadmissible. In re Mulderig, 91 N.Y.S.2d 895, 196 Misc. 527, 1949 N.Y. Misc. LEXIS 2736 (N.Y. Sur. Ct. 1949).

Where claim was made against estate for work done on real property owned by decedent, ledger entries made in the regular course of business from daily work sheets submitted by plaintiff’s foreman were admissible under CPA § 374-a (Rule 4518 herein) and the work done and reasonableness of the amounts claimed were properly established by testimony of claimant’s foreman. In re Estate of Phillips, 10 Misc. 2d 714, 173 N.Y.S.2d 632, 1958 N.Y. Misc. LEXIS 3429 (N.Y. Sur. Ct. 1958).

Where a claimant against an estate was subject to the bar of CPA § 347, he might establish his claim by office records and through testimony of the decedent’s bookkeeper. In re Estate of

Fuller, 12 Misc. 2d 640, 172 N.Y.S.2d 505, 1958 N.Y. Misc. LEXIS 3866 (N.Y. Sur. Ct. 1958), app. dismissed, 182 N.Y.S.2d 348 (N.Y. App. Div. 1959), modified, 10 A.D.2d 938, 201 N.Y.S.2d 116, 1960 N.Y. App. Div. LEXIS 9674 (N.Y. App. Div. 1st Dep't 1960).

Account books, if otherwise admissible, were not within CPA § 347. Young v Luce, 21 N.Y.S. 225, 66 Hun 631 (N.Y. Sup. Ct. 1892).

A claimant against the estate of W was allowed to show that figures showing the price and numbers of certain cords of wood in suit were entered in a book of W by his son at his direction, and that they agreed with figures in claimant's books; the book of W was admitted as evidence for claimant. Held, error. Herrington v Winn, 14 N.Y.S. 612, 60 Hun 235, 1891 N.Y. Misc. LEXIS 2424 (N.Y. Sup. Ct. 1891).

Physicians' books were incompetent under CPA § 347 to establish rendering of services to deceased. Davis v Seaman, 19 N.Y.S. 260, 64 Hun 572 (1892).

55. Contracts

Where, after the death of the alleged father in an action by a child to enforce an oral contract, it appears that the promise of the mother to the father, in consideration of his promise to pay the child alone furnished the consideration, the sole interest of the child is derived from the mother and she is disqualified to testify to the alleged agreement. Rosseau v Rouss, 180 N.Y. 116, 72 N.E. 916, 180 N.Y. (N.Y.S.) 116, 1904 N.Y. LEXIS 1303 (N.Y. 1904), reh'g denied, 180 N.Y. 538, 72 N.E. 1150, 180 N.Y. (N.Y.S.) 538, 1905 N.Y. LEXIS 1125 (N.Y. 1905).

Plaintiff, suing as promisee of a contract but asking performance for the benefit of another, held "interested in the event" within the meaning of CPA § 347 because of a possible liability for costs. Croker v New York Trust Co., 245 N.Y. 17, 156 N.E. 81, 245 N.Y. (N.Y.S.) 17, 1927 N.Y. LEXIS 583 (N.Y. 1927).

A plaintiff claiming rights under an alleged contract as against a decedent's estate is incompetent to testify to conversations with the decedent for the purpose of establishing the contract. Lally v Cronen, 247 N.Y. 58, 159 N.E. 723, 247 N.Y. (N.Y.S.) 58, 1928 N.Y. LEXIS 1040 (N.Y. 1928).

A party may testify that a decedent was on a certain day at a place at which an agreement is alleged to have been made by him in the witness' favor. Hamlin v Stevens, 59 A.D. 522, 69 N.Y.S. 255, 1901 N.Y. App. Div. LEXIS 430 (N.Y. App. Div. 1901).

Evidence was not incompetent under CPA § 347 when it did not purport to ask the result of a personal transaction between a defendant and the plaintiff's intestate, but only denied a contract with a witness who testified that he was a party to the contract under the same conditions as the intestate. Lefevre v Silo, 112 A.D. 464, 98 N.Y.S. 321, 1906 N.Y. App. Div. LEXIS 707 (N.Y. App. Div. 1906).

In an action against executors by the son of their decedent to impress a trust upon certain real estate which was to be deeded to plaintiff by the decedent in his lifetime on payment to him by plaintiff of a certain amount, held that plaintiff's attempts to show what certain payments made by him to his father were for were properly excluded on defendants' objections. Warner v Warner, 199 A.D. 159, 191 N.Y.S. 612, 1921 N.Y. App. Div. LEXIS 6629 (N.Y. App. Div. 1921).

In an action by an administratrix to recover the reasonable value of premises conveyed by plaintiff's intestate by bargain and sale deed reciting as consideration "one dollar and other good and valuable considerations," whereon defendant had admittedly paid but one dollar although the reasonable value of the property was $3,600, defendant was precluded by this section from testifying that the consideration for the deed was love and affection. Moller v Paulivico, 212 A.D. 394, 208 N.Y.S. 737, 1925 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div.), rev'd, 241 N.Y. 193, 149 N.E. 829, 241 N.Y. (N.Y.S.) 193, 1925 N.Y. LEXIS 539 (N.Y. 1925).

Claimant's testimony as to his conversations with respondent's testator was not competent to establish a claim against testator's estate based on an alleged agreement by the testator to

leave his estate to claimant's intestate or his children. In re Howe's Estate, 260 A.D. 555, 23 N.Y.S.2d 139, 1940 N.Y. App. Div. LEXIS 4652 (N.Y. App. Div. 1940), app. dismissed, 285 N.Y. 611, 33 N.E.2d 545, 285 N.Y. (N.Y.S.) 611, 1941 N.Y. LEXIS 1627 (N.Y. 1941).

Lessee could not testify as to when he first saw indorsement of renewal on lease in absence of landlord, since deceased, where purpose was to fix date of transaction with deceased. Wald v Weilhamer, 144 N.Y.S. 929, 82 Misc. 455, 1913 N.Y. Misc. LEXIS 1068 (N.Y. County Ct. 1913).

Claimant seeking to establish a claim against estate of a deceased person is incompetent to testify as to a payment made by decedent taking the claim out of the statute of limitations. In re Clodgo's Estate, 227 N.Y.S. 690, 131 Misc. 490, 1928 N.Y. Misc. LEXIS 771 (N.Y. Sur. Ct. 1928).

One who has made default in paying to plaintiff the first instalment due for work under a contract is not incompetent to testify to an agreement made between defendant's testator and the plaintiff to pay the latter for completing the work. George H. Kitchen & Co. v Taylor, 14 N.Y. St. 398.

56. Deeds

On a claim for damages arising upon the appropriation by the state of land of plaintiff's intestate, defendant was called as a witness in his own behalf; on cross-examination he was asked what the consideration expressed in a deed from the deceased to him was; he answered, "$6,000 imaginary consideration." His counsel then asked him to state the real consideration; this was objected to as calling for a transaction with the deceased and excluded. Held, no error. Ballou v Ballou, 78 N.Y. 325, 78 N.Y. (N.Y.S.) 325, 1879 N.Y. LEXIS 915 (N.Y. 1879).

In an action brought to set aside a deed executed by a decedent upon the ground of undue influence when the grantee has testified that she was present and heard the conversation between her grantor and the tenant in regard to the lands described in the deed, she is precluded from giving any testimony in regard to the transaction as to the deed for the purpose of explaining the lease. Burdick v Burdick, 180 N.Y. 261, 73 N.E. 23, 180 N.Y. (N.Y.S.) 261,

1905 N.Y. LEXIS 1075 (N.Y.), reh'g denied, 181 N.Y. 531, 73 N.E. 1120, 181 N.Y. (N.Y.S.) 531, 1905 N.Y. LEXIS 816 (N.Y. 1905).

In an action to set aside a deed as fraudulent and void as to plaintiff, where it appears that the money applied to the discharge of liens and incumbrances upon the premises was obtained by a fraudulent grantor from the plaintiff's decedent, the fraudulent grantor is incompetent to testify on behalf of the other defendants, who claimed through her as to the instructions given her by the decedent in reference to the use to be made of the money. Hall v Bond, 68 A.D. 293, 74 N.Y.S. 5, 1902 N.Y. App. Div. LEXIS 107 (N.Y. App. Div. 1902).

In an action brought by a judgment creditor of a grantor of real property against the grantor and heirs and the executrix of the grantee to have the deed of conveyance set aside, on the ground of fraud, the grantor is incompetent to testify to conversations which took place between him and the deceased grantee. Roberts v Mack, 98 A.D. 485, 90 N.Y.S. 526, 1904 N.Y. App. Div. LEXIS 3582 (N.Y. App. Div. 1904).

In action for reformation of deed given by plaintiff's intestate, court properly excluded conversation between defendant and intestate not testified to by plaintiff's witnesses and not occurring at time contract was made. Knobloch v Kracke, 151 A.D. 19, 135 N.Y.S. 381, 1912 N.Y. App. Div. LEXIS 7684 (N.Y. App. Div. 1912).

Whether a certain deed was in decedent's desk does not involve a personal transaction, so as to question whether a party ever acknowledged a certain deed. Blaesi v Blaesi, 15 N.Y. St. 672.

57. Delivery of property

In an action for money had and received by the defendant's intestate, where the defense was, that the money was placed in the hands of the intestate to defraud the plaintiff's creditors, the plaintiff, as a witness in his own behalf, was asked if he put any property in the hands of the defendant's intestate with intent to defraud his creditors. Held, that he could not answer. The placing of property was a personal transaction, and the intent with which it was done

accompanied and characterized the transaction and was an element thereof. There is the same reason for excluding the living party from testifying as to the intent with which a personal transaction with a deceased party was performed, as for excluding him as a witness to any other part of the transaction. Tooley v Bacon, 70 N.Y. 34, 70 N.Y. (N.Y.S.) 34, 1877 N.Y. LEXIS 582 (N.Y. 1877); see Hard v Ashley, 117 N.Y. 606, 23 N.E. 177, 117 N.Y. (N.Y.S.) 606, 1890 N.Y. LEXIS 951 (N.Y. 1890).

Where the holder of a promissory note parts with the possession thereof to the maker, it was a personal transaction within the meaning of CPA § 347. Van Gelder v Van Gelder, 81 N.Y. 625, 81 N.Y. (N.Y.S.) 625, 1880 N.Y. LEXIS 287 (N.Y. 1880).

In action against executor to recover value of bonds delivered to his testator for safe keeping, plaintiff is a competent witness to testify to the exact number of bonds then owned by her. Price v Brown, 112 N.Y. 677, 20 N.E. 381, 112 N.Y. (N.Y.S.) 677, 1889 N.Y. LEXIS 907 (N.Y. 1889).

A deceased grantor had given a deed of premises to plaintiff and later destroyed that and gave a second deed to defendant; in an action of ejectment defendant denied ever having seen the first deed and plaintiff testified under objections to conversations with defendant in which she exhibited the deeds; held, no error, for the statute does not forbid evidence of extraneous facts and circumstances from which a delivery of the deed might be inferred. Lawyer v White, 198 N.Y. 318, 91 N.E. 840, 198 N.Y. (N.Y.S.) 318, 1910 N.Y. LEXIS 802 (N.Y.), reh'g denied, 198 N.Y. 628, 92 N.E. 1089, 198 N.Y. (N.Y.S.) 628, 1910 N.Y. LEXIS 1028 (N.Y. 1910).

In an action by an administrator to recovery moneys paid upon a contract for the sale of a farm, which moneys passed into defendant’s possession, it was shown that the decedent executed and delivered a deed to the defendant, but that such deed was found in the private box of the decedent, evidence by the defendant that he placed the deed in decedent’s private box is inadmissible. Parker v Parsons, 79 A.D. 310, 79 N.Y.S. 688, 1903 N.Y. App. Div. LEXIS 260 (N.Y. App. Div. 1903).

Upon the hearing of a claim against a decedent's estate on a note alleged to have been delivered by the intestate to the claimant, he cannot testify that the note was in his safe on the day of the death of the decedent. In re Blair, 99 A.D. 81, 91 N.Y.S. 378, 1904 N.Y. App. Div. LEXIS 3018 (N.Y. App. Div. 1904).

Action of plaintiff in placing cedar box and its contents in decedent's trunk to which he had no key, constituted personal transaction with decedent. Gurski v Sapowitch, 276 A.D. 821, 93 N.Y.S.2d 159, 1949 N.Y. App. Div. LEXIS 3443 (N.Y. App. Div. 1949).

Evidence that certain chattels in controversy were delivered at deceased's establishment is incompetent. Hay v Muller, 28 N.Y.S. 57, 7 Misc. 670, 1894 N.Y. Misc. LEXIS 286 (N.Y.C.P. 1894).

Claimant could not testify that he drew certain money from a bank and put it in an envelope and gave it to a third person who testified that he delivered it to decedent. In re Ennever, 189 N.Y.S. 177, 116 Misc. 32, 1921 N.Y. Misc. LEXIS 1553 (N.Y. Sur. Ct. 1921).

In action to discover stock certificate purportedly belonging to deceased testator, testimony by the party in interest to establish "delivery" was in fact a transaction with the testator and, hence, inadmissible within the meaning of CPA § 347. In re Brown's Estate, 7 Misc. 2d 798, 167 N.Y.S.2d 8, 1957 N.Y. Misc. LEXIS 2639 (N.Y. Sur. Ct. 1957).

The delivery to plaintiff by her agent of a box in which he kept plaintiff's securities, of which she then made a list, and from which she was able to state their amount (the question at issue) and the return of the box by her to decedent, is a "personal transaction" with the agent and inadmissible. Doolittle v Stone, 8 N.Y.S. 605, 55 Hun 604, 1889 N.Y. Misc. LEXIS 2328 (N.Y. Sup. Ct. 1889), aff'd, 136 N.Y. 613, 32 N.E. 639, 136 N.Y. (N.Y.S.) 613, 1892 N.Y. LEXIS 1752 (N.Y. 1892).

Certain personal property inclosed in a box was handed by plaintiff to an intermediary to deliver it to defendant's testator. Held that proof by plaintiff of the specific articles in said box tending to

establish delivery was incompetent. GREGORY v FICHTNER, 14 N.Y.S. 891, 27 Abb. N. Cas. 86, 1891 N.Y. Misc. LEXIS 3342 (N.Y.C.P. 1891), limited, Hay v Muller, 28 N.Y.S. 57, 7 Misc. 670, 1894 N.Y. Misc. LEXIS 286 (N.Y.C.P. 1894).

Defendant's testimony as to conversations with deceased, upon which defendant predicated his claim of oral sale to him of all of decedent's business properties, was inadmissible. Bata v Chase Safe Deposit Co., 99 N.Y.S.2d 535, 1950 N.Y. Misc. LEXIS 1977 (N.Y. Sup. Ct. 1950), aff'd, 279 A.D. 182, 108 N.Y.S.2d 659, 1951 N.Y. App. Div. LEXIS 2894 (N.Y. App. Div. 1951).

When a party cannot testify as to the address of a package sent by express to a person since deceased. Stuart v Patterson, 37 Hun 113 (N.Y. 1885).

Evidence by a witness that she had the custody of a deed executed by deceased both before and after its acknowledgment and down to the trial. Held, in an action involving the delivery of the deed, to be admissible. Viall v Leavens, 39 Hun 291 (N.Y.).

58. Demand or notice

Where executors bring an action to recover rent due their decedent they may introduce entries made in said decedent's books charging the rent against the defendant, who cannot testify that the decedent never demanded rent. Russell v Russell, 47 A.D. 144, 62 N.Y.S. 108, 1900 N.Y. App. Div. LEXIS 61 (N.Y. App. Div. 1900).

In an action by brokers against the executrix of the husband to recover damages for his alleged breach of implied warranty, it is improper to receive the testimony of one of the plaintiffs, that he notified the deceased husband over the telephone that a purchaser had been found. Bloodgood v Short, 98 N.Y.S. 775, 50 Misc. 286, 1906 N.Y. Misc. LEXIS 63 (N.Y. App. Term 1906).

In action to recover balance due upon a land contract, brought by administrators of vendor against administrator of purchaser, testimony of defendant that after death of purchaser vendor

made no claim against the estate for anything due on the contract, is inadmissible. Parks v Andrews, 10 N.Y.S. 344, 56 Hun 391, 1890 N.Y. Misc. LEXIS 2107 (N.Y. Sup. Ct. 1890).

On a reference of a disputed claim against an estate for damages incurred in defending title to land, plaintiff's evidence that he prepared notices to grantor to defend the action and took them to the house of deceased grantor and came away without having them in his possession, is incompetent. Finton v Egelston, 16 N.Y.S. 721, 61 Hun 246, 1891 N.Y. Misc. LEXIS 2207 (N.Y. Sup. Ct. 1891).

Where a plaintiff is interested in the proceeds of the sale of a vessel by the deceased, who had agreed to notify plaintiff of the sale, such plaintiff cannot testify that the first he learned from any source of the sale of the vessel was seven years after the death of such deceased; as it is an attempt to prove by indirection the failure of the deceased to notify the plaintiff. Hall v Roberts, 18 N.Y.S. 480, 63 Hun 473 (1892).

59. Gifts

When in action for conversion against bailees who set up title in executors of third person, plaintiff incompetent to prove gift of property to her by deceased. Mullins v Chickering, 110 N.Y. 513, 18 N.E. 377, 110 N.Y. (N.Y.S.) 513, 18 N.Y. St. 606, 1888 N.Y. LEXIS 906 (N.Y. 1888); see Hildick v Williams, 3 N.Y.S. 817, 1888 N.Y. Misc. LEXIS 958 (N.Y. City Ct. 1888).

When in action for conversion against bailees who set up title in executors of third person, plaintiff incompetent to prove gift of the property to her by deceased. Mullins v Chickering, 110 N.Y. 513, 18 N.E. 377, 110 N.Y. (N.Y.S.) 513, 18 N.Y. St. 606, 1888 N.Y. LEXIS 906 (N.Y. 1888).

One M. received from her mother, since deceased, a certain sum of money in trust for plaintiff, and without knowledge of the latter gave it to defendant, who received it with knowledge of the circumstances, and refused to pay it over to plaintiff, claiming that it belonged to him and had been handed him by the mother. Held, that defendant was incompetent to testify to transactions

between himself and the mother. Mason v Prendergast, 120 N.Y. 536, 24 N.E. 806, 120 N.Y. (N.Y.S.) 536, 1890 N.Y. LEXIS 1290 (N.Y. 1890).

One claiming title to railroad stock by gift from a deceased person is prohibited from testifying that for a certain period during decedent's lifetime and at his residence the certificates of stock were in her possession. Richardson v Emmett, 170 N.Y. 412, 63 N.E. 440, 170 N.Y. (N.Y.S.) 412, 1902 N.Y. LEXIS 1073 (N.Y. 1902).

A witness who claims that the intestate gave her a tin box containing the bank book during her last illness, cannot testify that this bank book was the only one in such tin box. O'Connor v Ogdensburgh Bank, 51 A.D. 70, 64 N.Y.S. 501, 1900 N.Y. App. Div. LEXIS 1130 (N.Y. App. Div. 1900).

Where a party sues for the conversion of a watch claimed to have been given to the plaintiff's son, now deceased, the plaintiff cannot testify to a conversation held with the deceased as to the watch even though the defendant, the deceased's wife, was present and heard the conversation. Byerer v Smith, 55 A.D. 405, 66 N.Y.S. 968, 1900 N.Y. App. Div. LEXIS 2628 (N.Y. App. Div. 1900).

An administrator could not testify that certain property claimed to be part of the estate was a gift inter vivos to him by decedent. In re Atkinson's Adm'r, 192 A.D. 426, 182 N.Y.S. 780, 1920 N.Y. App. Div. LEXIS 7491 (N.Y. App. Div. 1920).

In a discovery proceeding testimony of one of decedent's executors, corroborating the testimony of the appellants as to the gift is not incompetent upon the ground that he had some interest in the matter as an executor. His interest is not present, certain and vested and he is not disqualified. In re Berardini's Will, 238 A.D. 433, 264 N.Y.S. 479, 1933 N.Y. App. Div. LEXIS 9517 (N.Y. App. Div. 1933), aff'd, 263 N.Y. 627, 189 N.E. 730, 263 N.Y. (N.Y.S.) 627, 1934 N.Y. LEXIS 1327 (N.Y. 1934).

In an action to determine the ownership of certain shares of stock the plaintiff was competent to testify to the transactions and communications with the deceased in reference to the stock and the alleged gift. Lowery v Central Hudson Gas & Electric Co., 242 A.D. 799, 274 N.Y.S. 746, 1934 N.Y. App. Div. LEXIS 7541 (N.Y. App. Div. 1934).

Where joint mortgagees, father, son and stepmother, died and sister of stepmother, claiming through gift, has personal interest in event and may not be examined as witness in her own behalf as to personal transaction with deceased, as against a survivor. In re Conklin's Estate, 259 A.D. 432, 20 N.Y.S.2d 59, 1940 N.Y. App. Div. LEXIS 6165 (N.Y. App. Div. 1940).

In action to recover $9,000 alleged to have been withheld by the defendant, a sister of the plaintiff’s intestate, from a package containing $17,000 in bills, left with the defendant by the intestate a few days prior to his death, testimony by the defendant as to a conversation with her deceased brother concerning a gift of the money to her was inadmissible under CPA § 347. Armstrong v Duffy, 261 A.D. 41, 25 N.Y.S.2d 162, 1941 N.Y. App. Div. LEXIS 7242 (N.Y. App. Div.), reh'g denied, 261 A.D. 1035, 27 N.Y.S.2d 457, 1941 N.Y. App. Div. LEXIS 8616 (N.Y. App. Div. 1941).

CPA § 347 did not forbid certain brothers and sisters interested in the event, from testifying, on the final accounting of the executor of the mother as administratrix of the son, as to the action of a deceased brother in joining in a gift to the mother of the personal property of the son who died unmarried and intestate. In re Sproule's Estate, 87 N.Y.S. 432, 42 Misc. 448, 1904 N.Y. Misc. LEXIS 22 (N.Y. Sur. Ct. 1904).

Where it is sought to charge an executor upon the settlement of his accounts with the value of certain property taken by a third person claiming the property as a gift from the testatrix, such person is competent to testify for the executor. In re Herrington's Estate, 132 N.Y.S. 486, 73 Misc. 182, 1911 N.Y. Misc. LEXIS 495 (N.Y. Sur. Ct. 1911).

In proving a gift causa mortis, as against the estate of the alleged donor, the wife of the donee is a competent but interested witness, and her uncorroborated testimony is insufficient. In re

Buoninfante's Estate, 212 N.Y.S. 265, 125 Misc. 907, 1925 N.Y. Misc. LEXIS 1105 (N.Y. Sur. Ct. 1925).

Under section 206 of the Surrogate's Court Act, if a petitioner in a discovery proceeding did not call the respondent as a witness concerning transaction with the decedent, CPA § 347 applied and the respondent was barred from testifying that property in her possession was a gift from decedent. In re Davis' Estate, 220 N.Y.S. 204, 128 Misc. 622, 1927 N.Y. Misc. LEXIS 816 (N.Y. Sur. Ct. 1927), aff'd, 222 A.D. 846, 226 N.Y.S. 797, 1928 N.Y. App. Div. LEXIS 8630 (N.Y. App. Div. 1928).

Claimant in discovery proceeding by administratrix was incompetent to testify that money in claimant's possession was gift from decedent mother. In re Bates' Estate, 21 N.Y.S.2d 306, 1939 N.Y. Misc. LEXIS 2794 (N.Y. Sur. Ct. 1939), aff'd, 259 A.D. 968, 20 N.Y.S.2d 1012 (N.Y. App. Div. 1940).

Where donor of stock certificates is dead, donee is incompetent to testify that donor made gift thereof to him. In re Sussman's Estate, 125 N.Y.S.2d 584, 1953 N.Y. Misc. LEXIS 2347 (N.Y. Sur. Ct. 1953), aff'd, 283 A.D. 1051, 131 N.Y.S.2d 880, 1954 N.Y. App. Div. LEXIS 6271 (N.Y. App. Div. 1954).

A widow from whom executor claims property in her hands, cannot prove that her husband gave her the property a few days before his death. Tilton v Ormsby, 10 Hun 7 (N.Y.), aff'd, 70 N.Y. 609, 70 N.Y. (N.Y.S.) 609, 1877 N.Y. LEXIS 677 (N.Y. 1877).

In replevin against one claiming title as administratrix, testimony given by plaintiff that the property was given to her by defendant's intestate is incompetent. Crane v Crane, 43 Hun 309, 5 N.Y. St. 423 (N.Y.).

60. Handwriting

Testimony by plaintiff in her own behalf as to having possession of a deed and that the signature was in writing of her deceased grantor, without stating from whom she received the deed, held, not to involve a personal transaction between her and deceased grantor. Simmons v Havens, 101 N.Y. 427, 5 N.E. 73, 101 N.Y. (N.Y.S.) 427, 1886 N.Y. LEXIS 650 (N.Y. 1886).

In an action to recover upon promissory notes, in which the defense was forgery, and there is independent evidence of delivery, evidence by the plaintiff that the signatures to the notes were those of the testatrix does not involve a personal transaction between the plaintiff and the testatrix and is not inadmissible. Hoag v Wright, 174 N.Y. 36, 66 N.E. 579, 174 N.Y. (N.Y.S.) 36, 1903 N.Y. LEXIS 1301 (N.Y. 1903).

In an action on a note, even though the administrator and grandson of the intestate testified that they were acquainted with the handwriting of the intestate, yet this does not permit the payee named in the note to testify that he saw the intestate sign the note and subsequently deliver the same to him. Hobart v Verrault, 74 A.D. 444, 77 N.Y.S. 483, 1902 N.Y. App. Div. LEXIS 1865 (N.Y. App. Div. 1902).

In an action against executors on a note, evidence by the plaintiff that the note was in her possession at the time of the testator's death was properly excluded under CPA § 347, and she could not testify that she had seen the decedent write his name in order to qualify herself to express an opinion that the note was in his handwriting; even though such interested witness might have had sufficient knowledge to testify as to the decedent's handwriting derived from sources other than personal transactions with him, the theory was not available upon appeal if not presented to the trial court. Wilber v Gillespie, 127 A.D. 604, 112 N.Y.S. 20, 1908 N.Y. App. Div. LEXIS 4063 (N.Y. App. Div. 1908).

In an action against a devisee to recover plaintiff's share of profits, according to agreements between plaintiff and testator of certain lands purchased in testator's name and by him devised to defendant, plaintiff is not incompetent to testify that a certain letter was in testator's handwriting, that he found it in his desk, that it was in an envelope directed to him in testator's

handwriting. Wing v Bliss, 8 N.Y.S. 500, 55 Hun 603, 1889 N.Y. Misc. LEXIS 2310 (N.Y. Sup. Ct. 1889), aff'd, 138 N.Y. 643, 34 N.E. 513, 138 N.Y. (N.Y.S.) 643, 1893 N.Y. LEXIS 931 (N.Y. 1893).

61. Instruments in writing

Nor can defendant testify as to the consideration in action on bond by administrator of obligee. Van Alstyne v Van Alstyne, 28 N.Y. 375, 28 N.Y. (N.Y.S.) 375, 1863 N.Y. LEXIS 80 (N.Y. 1863).

Assignor of corporate stock could not testify that deceased's signature was upon certificates before his death, in action by assignee suing on theory of gift to his assignor. Fuller v New York C. & H. R. R. Co., 160 A.D. 864, 146 N.Y.S. 345, 1914 N.Y. App. Div. LEXIS 5310 (N.Y. App. Div. 1914), aff'd, 213 N.Y. 689, 107 N.E. 1078, 213 N.Y. (N.Y.S.) 689, 1915 N.Y. LEXIS 1496 (N.Y. 1915).

Where no instrument is produced, subscribing witness is incompetent. In re Courtney's Estate, 71 N.Y.S.2d 430, 1947 N.Y. Misc. LEXIS 2569 (N.Y. Sur. Ct. 1947).

An agreement in writing between original plaintiff and defendant's decedent contained mutual covenants on part of deceased and for an account. In action against his administrator the original plaintiff is incompetent to testify as to execution and delivery of the instrument. Chaffee v Goddard, 42 Hun 147, 3 N.Y. St. 386 (N.Y.).

The assignor of a disputed claim against the estate of a deceased person may be asked as a witness for claimant if she knew whether her husband at any time had a written acknowledgment of any indebtedness to him from deceased. Bloss v Morrison, 47 Hun 218, 14 N.Y. St. 379 (N.Y.).

62. Letters

Letter of decedent to his wife, offered in evidence by executor to show her failure to accept offer of reconciliation, removed her incompetency to testify. In re Boesenberg's Estate, 265 A.D. 484, 39 N.Y.S.2d 418, 1943 N.Y. App. Div. LEXIS 6329 (N.Y. App. Div. 1943).

Where testator's widow had acted as his amanuensis, letter written to contestant at his dictation admissible. 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).

Letters between a deceased party and one claiming under him as to claim which was the subject of litigation is improper. Van Vechten v Van Vechten, 20 N.Y.S. 140, 65 Hun 215 (1892).

63. Lost Instruments

Testimony of an interested witness as to the execution of a deed (which was lost) by the decedent to a third person, who conveyed to the witness, is incompetent. Dolan v Leary, 69 A.D. 459, 74 N.Y.S. 981, 1902 N.Y. App. Div. LEXIS 464 (N.Y. App. Div. 1902), aff'd, 174 N.Y. 540, 66 N.E. 1107, 174 N.Y. (N.Y.S.) 540, 1903 N.Y. LEXIS 1421 (N.Y. 1903).

Devisee and wife in will destroyed after testator's death could testify that they saw the will. Strong v Gambier, 155 A.D. 294, 140 N.Y.S. 410, 1913 N.Y. App. Div. LEXIS 5107 (N.Y. App. Div. 2d Dep't 1913), aff'd in part, modified, 155 A.D. 294, 141 N.Y.S. 421, 1913 N.Y. App. Div. LEXIS 5813 (N.Y. App. Div. 2d Dep't 1913), aff'd, 215 N.Y. 690, 109 N.E. 1093, 215 N.Y. (N.Y.S.) 690, 1915 N.Y. LEXIS 1125 (N.Y. 1915).

In action to establish lost or destroyed will, beneficiary named in will is incompetent to testify that deceased had shown her will to him and that it contained bequest to him. Hollender v Wallace, 180 A.D. 393, 167 N.Y.S. 824, 1917 N.Y. App. Div. LEXIS 8189 (N.Y. App. Div. 1917), aff'd, 227 N.Y. 614, 125 N.E. 919, 227 N.Y. (N.Y.S.) 614, 1919 N.Y. LEXIS 779 (N.Y. 1919).

64. Sales

In action for goods sold and delivered and issue is whether they were sold to decedent or to his son, plaintiff seller is incompetent to testify to personal transaction with decedent. Marlborough Mfg. & Supply Co. v Bocchino, 1 A.D.2d 751, 147 N.Y.S.2d 229, 1955 N.Y. App. Div. LEXIS 3788 (N.Y. App. Div. 3d Dep't 1955).

The vendor of goods is incompetent to testify as a witness, in an action to recover the purchase price from the executors of vendee, as to whether or not the goods were paid for. Brayman v Stephens, 29 N.Y.S. 526, 79 Hun 28 (1894).

65. Savings or other bank account

In an action brought by one daughter against the executors of her father to recover a passbook representing deposits made in trust for such daughter, another daughter may testify to conversations had with the father in substance that he was depositing money in the savings bank for the daughter who was plaintiff in the action. Meislahn v Meislahn, 56 A.D. 566, 67 N.Y.S. 480, 1900 N.Y. App. Div. LEXIS 2893 (N.Y. App. Div. 1900).

In an action by the widow of a former beneficiary against the estate of a depositor, evidence that she or her husband knew of the deposit is inadmissible, being immaterial unless the fact had been communicated by the depositor, and she was incompetent to testify to personal transactions with the deceased. In re United States Trust Co., 117 A.D. 178, 102 N.Y.S. 271, 1907 N.Y. App. Div. LEXIS 216 (N.Y. App. Div.), aff'd, 189 N.Y. 500, 81 N.E. 1177, 189 N.Y. (N.Y.S.) 500, 1907 N.Y. LEXIS 967 (N.Y. 1907).

In an action by the administrator of a husband against the administrator of the wife to recover a bank deposit, evidence of a statement made by the husband to his daughter that the money should belong to her at his death, but not made in the presence of his wife, is not competent. Moore v Fingar, 131 A.D. 399, 115 N.Y.S. 1035, 1909 N.Y. App. Div. LEXIS 827 (N.Y. App. Div. 1909).

In an action brought by the husband of deceased depositor, in which he sought to establish that the bank deposit consisted of funds wrongfully taken by his wife from the receipts of his business, he was incompetent, under CPA § 347 to testify as to the time when he first discovered that his wife had the deposit. Magdeburg v Dry Dock Sav. Inst., 147 A.D. 652, 132 N.Y.S. 655, 1911 N.Y. App. Div. LEXIS 2939 (N.Y. App. Div. 1911), app. dismissed, 205 N.Y. 544, 98 N.E. 1099, 205 N.Y. (N.Y.S.) 544, 1912 N.Y. LEXIS 1273 (N.Y. 1912).

The husband of one for whom a decedent had made a savings bank deposit as a trust was not so interested in the event of the suit in the meaning of CPA § 347 as to make him incompetent to testify as to conversations of the decedent in his wife's presence concerning the bank books. In re Brazil's Will, 219 A.D. 594, 220 N.Y.S. 331, 1927 N.Y. App. Div. LEXIS 10979 (N.Y. App. Div. 1927).

In an action based on fraud for the recovery of moneys claimed to have been turned over by the plaintiff to the defendant administratrix's decedent, so far as savings bank account items were concerned a witness was not disqualified by CPA § 347 to testify to conversations with the deceased respecting such moneys. Palmer v Kneibert, 258 A.D. 810, 15 N.Y.S.2d 999, 1939 N.Y. App. Div. LEXIS 7051 (N.Y. App. Div. 1939).

Where an administrator of a depositor sues a savings bank for the depositor's balance of account, and the bank answers that it has paid it to a third party as donee causa mortis of the depositor, the bank has a right to the testimony of the donee regarding the gift and its exclusion is erroneous. Podmore v Seamen's Bank for Sav., 71 N.Y.S. 1026, 35 Misc. 379, 1901 N.Y. Misc. LEXIS 409 (N.Y. City Ct. 1901).

Grandson was incompetent to testify to circumstances of trip with testatrix to New Jersey, where she opened savings account in her name in trust for him, and to conversation with her about deposit in proceeding under SCA § 206-a. In re Weinstein's Estate, 28 N.Y.S.2d 137, 176 Misc. 592, 1941 N.Y. Misc. LEXIS 1854 (N.Y. Sur. Ct. 1941).

In discovery proceeding by administrator relative to money deposited by respondent “for” decedent, respondent was incompetent to testify and assert status as trustee only. In re Burke's Estate, 30 N.Y.S.2d 427, 177 Misc. 303, 1941 N.Y. Misc. LEXIS 2285 (N.Y. Sur. Ct. 1941).

In action to restrain withdrawal of funds from defendant bank transferred by plaintiff’s deceased father to joint bank account of himself and individual defendant, plaintiff’s moving affidavit for temporary injunction was competent under CPA § 347, as facts alleged therein were such that they were presumably within plaintiff’s own knowledge or could have been learned, upon information and belief, from persons other than defendant. Tiedemann v Tiedemann, 1 Misc. 2d 1074, 149 N.Y.S.2d 306, 1956 N.Y. Misc. LEXIS 2164 (N.Y. Sup. Ct. 1956).

Testimony of a niece’s husband as to a decedent’s oral gift to his niece of a bank account even if not barred by CPA § 347, was incredible without any physical delivery. In re Miller's Estate, 8 Misc. 2d 1059, 168 N.Y.S.2d 777, 1957 N.Y. Misc. LEXIS 2232 (N.Y. Sur. Ct. 1957).

Savings account: in action by beneficiary of savings bank account to recover it, defendant co-beneficiary is incompetent to testify to discussions with settlor. Garlick v Garlick, 53 N.Y.S.2d 321, 1945 N.Y. Misc. LEXIS 1502 (N.Y. Sup. Ct. 1945).

To rebut claim that uncle gave two bank accounts to nephew as recent fabrication, witness for nephew was incompetent to testify that nephew told him during uncle’s lifetime about such gift. In re McCredy's Estate, 72 N.Y.S.2d 219, 1947 N.Y. Misc. LEXIS 2727 (N.Y. Sur. Ct. 1947), aff'd, 274 A.D. 363, 83 N.Y.S.2d 806, 1948 N.Y. App. Div. LEXIS 3082 (N.Y. App. Div. 1948).

66. Services

Where the testimony concerning the valuation of the services relates to personal transactions with decedent it is incompetent. Brague v Lord, 67 N.Y. 495, 67 N.Y. (N.Y.S.) 495, 1876 N.Y. LEXIS 424 (N.Y. 1876); In re Simpson's Estate, 5 N.Y.S. 863, 53 Hun 629, 1889 N.Y. Misc. LEXIS 2653 (N.Y. Sup. Ct. 1889).

In a suit by attorney to recover for services rendered to defendant's testator, his employment was disputed. Held, that advice given as to subject-matter of his employment was a personal communication and excluded. Brague v Lord, 67 N.Y. 495, 67 N.Y. (N.Y.S.) 495, 1876 N.Y. LEXIS 424 (N.Y. 1876).

In an action for services against a decedent, plaintiff is incompetent to testify whether he has been paid, as a negative answer thereto negatives a personal transaction with deceased. Lerche v Brasher, 104 N.Y. 157, 10 N.E. 58, 104 N.Y. (N.Y.S.) 157, 4 N.Y. St. 335, 1887 N.Y. LEXIS 578 (N.Y. 1887).

On an appraisal under the transfer tax act, a legatee may testify as to the conversation with deceased showing that legacy was made for services rendered. In re Gould's Estate, 19 A.D. 352, 46 N.Y.S. 506, 1897 N.Y. App. Div. LEXIS 1428 (N.Y. App. Div. 1897), modified, 156 N.Y. 423, 51 N.E. 287, 156 N.Y. (N.Y.S.) 423, 1898 N.Y. LEXIS 715 (N.Y. 1898).

A claimant for alleged services to a decedent cannot testify to a conversation between herself and the decedent when she claims that some money was paid to her on account of such services. Niskern v Haydock, 23 A.D. 175, 48 N.Y.S. 895, 1897 N.Y. App. Div. LEXIS 2586 (N.Y. App. Div. 1897).

Upon a hearing of a disputed claim, the plaintiff cannot testify that she harnessed her team and drove to decedent's residence and then to cemetery, where the claim is for services in driving decedent and for materials furnished. Mitchell v Hollands, 72 A.D. 224, 76 N.Y.S. 120, 1902 N.Y. App. Div. LEXIS 1222 (N.Y. App. Div. 1902).

When a night watchman may testify that he performed services as such before death of defendant's testator. Shedrick v Young, 72 A.D. 278, 76 N.Y.S. 56, 1902 N.Y. App. Div. LEXIS 1234 (N.Y. App. Div. 1902).

In an action by a client against the executrix of his deceased attorney to determine the validity of a lien for services, testimony of the plaintiff as to whether he knew of any lien which had been

given to anyone on the fund in suit is incompetent as it invokes a personal transaction with the deceased attorney. Boyd v Daily, 85 A.D. 581, 83 N.Y.S. 539, 1903 N.Y. App. Div. LEXIS 2151 (N.Y. App. Div.), aff'd, 176 N.Y. 613, 68 N.E. 1114, 176 N.Y. (N.Y.S.) 613, 1903 N.Y. LEXIS 947 (N.Y. 1903).

CPA § 347 forbid not only direct testimony of personal transactions with a decedent, but also every attempt by indirection to prove the same thing; thus, when plaintiffs suing on a quantum meruit to recover for services in preparing plans for a house for the decedent were allowed over objection to testify to frequent interviews with the decedent respecting the plans while they were being prepared, and to a number of consultations and interviews when the plans were discussed, it was reversible error. Little v Johnson, 117 A.D. 500, 102 N.Y.S. 754, 1907 N.Y. App. Div. LEXIS 288 (N.Y. App. Div. 1907).

Action to recover for services rendered to decedent; promise made by deceased to plaintiff not competent evidence. Wernet v Karutz, 140 A.D. 114, 124 N.Y.S. 1041, 1910 N.Y. App. Div. LEXIS 2873 (N.Y. App. Div. 1910).

In action by physician to recover for services performed for decedent, he was not a competent witness to testify that he attended the decedent professionally. Kennedy v Mulligan, 173 A.D. 859, 160 N.Y.S. 105, 1916 N.Y. App. Div. LEXIS 7608 (N.Y. App. Div. 1916).

In an action to recover on a contract of employment, the plaintiff cannot testify as to any personal transactions with his alleged employer, the incompetent person. Bartlett v Sanford, 244 A.D. 722, 278 N.Y.S. 578, 1935 N.Y. App. Div. LEXIS 6100 (N.Y. App. Div. 1935).

Broker, suing seller of realty for commissions, may testify to his negotiation with customer buyer to show that broker was procuring cause of sale. Pomerantz v Sussman, 279 A.D. 1019, 111 N.Y.S.2d 911, 1952 N.Y. App. Div. LEXIS 5665 (N.Y. App. Div. 2d Dep't 1952).

In action to impress equitable lien upon realty of surviving joint tenant for amount of reasonable value of improvements made and paid for by plaintiffs, they were not competent, suing not as

executors of deceased joint tenant but in their personal capacity, to testify that decedent agreed, in consideration of their caring for him for life, that they would become sole owners of all his property. Vulovich v Baich, 286 A.D. 403, 143 N.Y.S.2d 247, 1955 N.Y. App. Div. LEXIS 4053 (N.Y. App. Div. 1955), aff'd, 1 N.Y.2d 735, 152 N.Y.S.2d 281, 135 N.E.2d 40, 1956 N.Y. LEXIS 964 (N.Y. 1956).

In physician's action for services rendered to a decedent, physician is incompetent to testify as to visits made, the treatment given, or the value of his services. Sklaire v Estate of Turner, 12 A.D.2d 386, 212 N.Y.S.2d 389, 1961 N.Y. App. Div. LEXIS 11925 (N.Y. App. Div. 3d Dep't 1961).

In an action by a dentist to recover for services rendered by him to the defendants' testator, the provisions of CPA § 347 were not applicable to the plaintiff, so far as he testified solely to the work which he did for the testator while the testator himself was not present. Howe v Regensburg, 132 N.Y.S. 837, 75 Misc. 132, 1912 N.Y. Misc. LEXIS 627 (N.Y. App. Term 1912).

One performing services necessarily involving personal contact and transactions with decedent could not testify as to the value thereof. In re Fingar, 168 N.Y.S. 361, 101 Misc. 516, 1917 N.Y. Misc. LEXIS 802 (N.Y. Sur. Ct. 1917).

In a creditor's action by the widow of the deceased, an insolvent debtor, to set aside a fraudulent conveyance made by said debtor to the defendant, his daughter, the plaintiff's testimony as to her employment and compensation therefrom, the reasonable value of her board and lodging, her expenses for medical and dental treatment and for necessary wearing apparel, was not incompetent under CPA § 347. Kuhlbarsch v Sauter, 10 N.Y.S.2d 996, 170 Misc. 955, 1939 N.Y. Misc. LEXIS 1672 (N.Y. Sup. Ct.), aff'd, 257 A.D. 1038, 13 N.Y.S.2d 844, 1939 N.Y. App. Div. LEXIS 8988 (N.Y. App. Div. 1939).

Where a son made a claim against the father's estate for services, evidence of what he did apart from personal transactions with deceased is admissible. In re Merchant's Estate, 6 N.Y.S. 875, 53 Hun 638, 1889 N.Y. Misc. LEXIS 824 (N.Y. Sup. Ct. 1889).

Plaintiff suing for medical services cannot testify as to personal transactions with deceased. Titus v Spencer, 145 N.Y.S. 40 (N.Y. App. Term 1913).

Claimant against estate cannot testify as to value of services rendered decedent. Titus v Spencer, 147 N.Y.S. 343 (N.Y. App. Term 1914).

Daughter was incompetent to testify as to arrangements made by her with her deceased father as to compensation for services. In re Harter's Estate, 148 N.Y.S. 766 (N.Y. Sur. Ct. 1914).

Chauffeur is incompetent to testify as to services as chauffeur for decedent. In re Lettner's Estate, 112 N.Y.S.2d 540, 1952 N.Y. Misc. LEXIS 2670 (N.Y. Sur. Ct. 1952).

Employee of person interested in event is not disqualified as witness. In re Olson's Estate, 119 N.Y.S.2d 207, 1952 N.Y. Misc. LEXIS 2240 (N.Y. Sur. Ct. 1952).

In accounting proceeding by administrator, statute of frauds did not prevent proof of alleged quasi contract by intestate to pay for services rendered in his lifetime, if prohibition of CPA § 347 could be overcome. In re Post's Estate, 145 N.Y.S.2d 297, 1955 N.Y. Misc. LEXIS 3329 (N.Y. Sur. Ct. 1955).

In an action by an attorney against an administrator for services rendered decedent, plaintiff cannot, after proof of general employment, testify to the services he performed and the value thereof. Lerche v Brasher, 37 Hun 385 (N.Y.), rev'd, 104 N.Y. 157, 10 N.E. 58, 104 N.Y. (N.Y.S.) 157, 4 N.Y. St. 335, 1887 N.Y. LEXIS 578 (N.Y. 1887).

A party may testify to the value of services performed by him in pursuance of a contract between himself and a deceased intestate, in action to recover same against personal representatives of the latter. Burrows v Butler, 38 Hun 157 (N.Y.).

In an action brought by an infant for services rendered a deceased person, the infant cannot testify that she attended the deceased, did errands for her, and performed other menial services. Taylor v Welsh, 36 N.Y.S. 952, 92 Hun 272 (1895).

D. Testimony Made Competent

67. Generally

Testimony otherwise competent should not be rejected because it cannot be contradicted as the contradictory evidence would be inadmissible. In re Burbank, 104 A.D. 312, 93 N.Y.S. 866, 1905 N.Y. App. Div. LEXIS 1764 (N.Y. App. Div. 1905), aff'd, 185 N.Y. 559, 77 N.E. 1183, 185 N.Y. (N.Y.S.) 559, 1906 N.Y. LEXIS 977 (N.Y. 1906).

In an action for dower brought by the alleged common-law wife of the decedent, testimony by the defendant executor to conversations had with the deceased on a number of occasions touching the status of the plaintiff in the decedent's household, the general purport of which was to the effect that the plaintiff was merely his housekeeper, held not to open the door to testimony by plaintiff to prove an alleged marriage ceremony or agreement between herself and the decedent, and that they lived together as man and wife thereafter, such testimony not relating to the same "transaction" as that testified to by the executor within the meaning of CPA § 347. Lockwood v Lockwood, 201 A.D. 657, 195 N.Y.S. 652, 1922 N.Y. App. Div. LEXIS 6384 (N.Y. App. Div. 1922), aff'd, 236 N.Y. 504, 142 N.E. 260, 236 N.Y. (N.Y.S.) 504, 1923 N.Y. LEXIS 913 (N.Y. 1923).

Opening door to certain extent will not let down bars to admission of all other testimony. In re White's Will, 280 A.D. 454, 114 N.Y.S.2d 431, 1952 N.Y. App. Div. LEXIS 3503 (N.Y. App. Div. 1952).

Testimony may be received of personal transaction between decedent and person sought to be charged, where such testimony tends to qualify or explain evidence theretofore received forming part of whole transaction. In re Muller's Estate, 49 N.Y.S.2d 767, 183 Misc. 957, 1944 N.Y. Misc. LEXIS 2198 (N.Y. Sur. Ct. 1944).

In an executor's accounting proceeding, where question involved was whether executor was negligent in failing to prosecute claim arising under provisions of an ambiguous stock

agreement, corporate resolutions were not rendered incompetent by CPA § 347, since such corporation resolutions did not involve the examination of a witness. In re Schwarzkopf's Will, 6 Misc. 2d 566, 160 N.Y.S.2d 669, 1957 N.Y. Misc. LEXIS 3416 (N.Y. Sur. Ct. 1957).

A party is a competent witness when she is not examined in her own behalf and is not interested in the subject upon which she testifies. Kelsey v Cooley, 11 N.Y.S. 745, 58 Hun 601, 1890 N.Y. Misc. LEXIS 2342 (N.Y. Sup. Ct. 1890).

Door was not sufficiently opened to remove incompetency. In re Heimann's Estate, 69 N.Y.S.2d 578, 1947 N.Y. Misc. LEXIS 2270 (N.Y. Sur. Ct. 1947), aff'd, 273 A.D. 1013, 79 N.Y.S.2d 886 (N.Y. App. Div. 1948).

Waiver of right to burial in cemetery plot removed witness' disqualification to testify under CPA § 347. In re Keegan's Will, 114 N.Y.S.2d 217, 1952 N.Y. Misc. LEXIS 2873 (N.Y. Sur. Ct. 1952).

68. Release of interest

Where a witness, disqualified by reason of interest in the event of the action, releases her interest to a coplaintiff or codefendant, the effect of which is to vest in another party to the action, the title of interest which such witness had, does not render the testimony of such witness competent where it is proposed to use it in behalf of the successor in interest. O'Brien v Weiler, 140 N.Y. 281, 35 N.E. 587, 140 N.Y. (N.Y.S.) 281, 1893 N.Y. LEXIS 1145 (N.Y. 1893).

Transfer of stock, even during trial and after witness first testifies and is ruled to be incompetent, qualifies him to testify to personal transaction with decedent. Friedrich v Martin, 294 N.Y. 588, 63 N.E.2d 586, 294 N.Y. (N.Y.S.) 588, 1945 N.Y. LEXIS 755 (N.Y. 1945).

In a probate proceeding the testimony of a legatee who had duly released and discharged the decedent's estate from payment of legacy or devise under the will was competent. In re Lawler's Will, 253 A.D. 120, 1 N.Y.S.2d 305, 1937 N.Y. App. Div. LEXIS 5120 (N.Y. App. Div. 1937).

Where witness renounced all claims against estate, she was not interested person under CPA § 347 and so was competent to testify to conversations with decedent in will contest. In re Norminton's Will, 261 A.D. 1105, 27 N.Y.S.2d 110, 1941 N.Y. App. Div. LEXIS 8983 (N.Y. App. Div. 1941).

Releasing distributee may not testify against executor propounding will for probate in favor of other distributees whose interest was proportionately enlarged by such release. In re Aievoli's Will, 272 A.D. 544, 74 N.Y.S.2d 29, 1947 N.Y. App. Div. LEXIS 3336 (N.Y. App. Div. 1947).

Where a testator’s son has filed in court a release of his interest in the estate he is competent to testify in proceedings contesting the will. In re Williams' Will, 201 N.Y.S. 205, 121 Misc. 243, 1923 N.Y. Misc. LEXIS 1233 (N.Y. Sur. Ct. 1923).

A legatee under a will is a competent witness in a proceeding to construe the residuary clause of the will where she has released all rights under said clause. In re Milliette's Estate, 206 N.Y.S. 342, 123 Misc. 745, 1924 N.Y. Misc. LEXIS 1207 (N.Y. Sur. Ct. 1924).

In a proceeding to construe residuary clause of a will a legatee who has released all her rights under said clause is not a person from, through, or under whom an interested party derives title, by reason of the fact that by her release she thereby increases the share of each residuary legatee. In re Milliette's Estate, 206 N.Y.S. 342, 123 Misc. 745, 1924 N.Y. Misc. LEXIS 1207 (N.Y. Sur. Ct. 1924).

An executor who renounced legacies under the will thereby avoided the effect of CPA § 347 and qualified as a witness in the probate contest of the will. In re Southmayd's Estate, 207 N.Y.S. 558, 124 Misc. 647, 1925 N.Y. Misc. LEXIS 620 (N.Y. Sur. Ct. 1925), aff'd, 216 A.D. 746, 214 N.Y.S. 922 (N.Y. App. Div. 1926).

Renunciation makes legatee competent. In re Kuehnel's Will, 52 N.Y.S.2d 617, 1944 N.Y. Misc. LEXIS 2763 (N.Y. Sur. Ct. 1944), aff'd, 269 A.D. 820, 56 N.Y.S.2d 205, 1945 N.Y. App. Div. LEXIS 4022 (N.Y. App. Div. 1945).

A release of the interests of a proposed witness in the estate in question which names no release and is not shown to have been delivered to anyone, is insufficient to qualify him to testify as to a personal transaction with the decedent. In re Forkington's Will, 29 N.Y.S. 433, 79 Hun 128 (1894).

69. Evidence against interest

Evidence of an admission by defendant to an agreement made by him with the deceased person is not incompetent. Hirsh v Auer, 146 N.Y. 13, 40 N.E. 397, 146 N.Y. (N.Y.S.) 13, 1895 N.Y. LEXIS 631 (N.Y. 1895).

A widow was not incompetent to testify, under CPA § 347, where she was not called to testify on her own behalf, but on behalf of the contestants of her husband’s will, whose interests were opposed to hers. In re Hayden's Will, 261 A.D. 103, 24 N.Y.S.2d 608, 1941 N.Y. App. Div. LEXIS 7262 (N.Y. App. Div. 1941).

In action to establish secret trust in property bequeathed to two sons, one of the sons was a competent witness to testify against his interest to personal transaction with deceased. Golland v Golland, 147 N.Y.S. 263, 84 Misc. 299, 1914 N.Y. Misc. LEXIS 910 (N.Y. Sup. Ct. 1914).

A party may testify to conversations between herself and decedent, where her testimony is against her own interest. Davis v Gallagher, 9 N.Y.S. 11, 55 Hun 593, 1890 N.Y. Misc. LEXIS 6 (N.Y. Sup. Ct. 1890), rev'd, 124 N.Y. 487, 26 N.E. 1045, 124 N.Y. (N.Y.S.) 487, 1891 N.Y. LEXIS 1388 (N.Y. 1891).

70. Waiver by committee

The committee of an incompetent might, with the consent of the court, waive the provisions of CPA § 347. 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).

Committee of an incompetent might waive the privilege of CPA § 347 by cross-examining the witness as to transactions with the incompetent or by testifying himself as to such matters. Payne v Chatham & Phenix Nat'l Bank & Trust Co., 229 N.Y.S. 563, 132 Misc. 531, 1928 N.Y. Misc. LEXIS 905 (N.Y. Mun. Ct. 1928).

71. Waiver only at hearing on merits

Prohibition contained in CPA § 347 could only be waived at a trial or hearing upon the merits. A hearing under § 263 of the Surrogate's Court Act was not upon the merits. In re Van Volkenburgh's Adm'x, 254 N.Y. 139, 172 N.E. 269, 254 N.Y. (N.Y.S.) 139, 1930 N.Y. LEXIS 1017 (N.Y. 1930).

Affidavit, signed by executor, on motion for summary judgment, did not operate to waive benefits of CPA § 347, since waiver could occur only on trial or on hearing on merits. Weiss v Uchitelle, 46 N.Y.S.2d 289, 180 Misc. 942, 1943 N.Y. Misc. LEXIS 2768 (N.Y. Sup. Ct. 1943).

In inquisitorial stage of discovery proceeding, CPA § 347 did not apply. In re Schulman's Estate, 72 N.Y.S.2d 239, 189 Misc. 672, 1947 N.Y. Misc. LEXIS 2731 (N.Y. Sur. Ct.), app. dismissed, 75 N.Y.S.2d 517 (N.Y. App. Div. 1947).

Where donee testified in pretrial examination as to alleged gifts, she did not "open the door" so as to give her counsel the right to question her by direct examination as to personal transactions with the deceased. In re Gray's Estate, 7 Misc. 2d 112, 165 N.Y.S.2d 602, 1957 N.Y. Misc. LEXIS 2646 (N.Y. Sur. Ct. 1957).

In proceeding to determine ownership of mortgage executed by wife and husband, claimed by daughter as executrix of deceased mother, claimant, by testifying that mother paid purchase price of realty conveyed by father and mother and that mortgage in question was taken back, waived provisions of CPA § 347. Hinman v Couse, 30 N.Y.S.2d 388, 1941 N.Y. Misc. LEXIS 2276 (N.Y. County Ct. 1941).

Answer, raising issue as to petitioning executrix' title as to items sought to be recovered, constituted commencement of trial on merits. In re Garland's Will, 97 N.Y.S.2d 442, 1950 N.Y. Misc. LEXIS 1654 (N.Y. Sur. Ct. 1950).

72. Introducing testimony of personal representative

In a discovery proceeding, evidence of a son as to the details of the gift was not incompetent under CPA § 347, where his lips were opened on petitioner's direct examination. In re Berardini's Will, 238 A.D. 433, 264 N.Y.S. 479, 1933 N.Y. App. Div. LEXIS 9517 (N.Y. App. Div. 1933), aff'd, 263 N.Y. 627, 189 N.E. 730, 263 N.Y. (N.Y.S.) 627, 1934 N.Y. LEXIS 1327 (N.Y. 1934).

Checks of decedent drawn to claimant's order and indorsed by him, introduced in evidence by executor to show payment of decedent's note to claimant, held not to open door to permit claimant to testify to purposes for which checks were given. In re Seigle's Estate, 264 A.D. 76, 34 N.Y.S.2d 489, 1942 N.Y. App. Div. LEXIS 4068 (N.Y. App. Div.), rev'd, 289 N.Y. 300, 45 N.E.2d 809, 289 N.Y. (N.Y.S.) 300, 1942 N.Y. LEXIS 947 (N.Y. 1942).

In an action by a husband as administrator of his wife's estate for damages for her death, alleged to have been due to the negligence of a dentist in extracting teeth whereby one of them lodged in her lung, wherein the administrator was permitted to testify that up to the date of the alleged negligent act the decedent was apparently well, that on the evening of that date she was in apparent distress and so continued until her death a few weeks later from the cause above stated, it was error to exclude the testimony of the dentist in respect of conversations between the decedent and himself on the date of the extraction, notwithstanding CPA § 347. Minns v Crossman, 193 N.Y.S. 714, 118 Misc. 70, 1922 N.Y. Misc. LEXIS 1153 (N.Y. Sup. Ct. 1922).

An executor may waive the prohibition by testifying himself as to a transaction with a deceased person, or by cross-examining a witness. In re McArdle's Estate, 250 N.Y.S. 276, 140 Misc. 257, 1931 N.Y. Misc. LEXIS 1330 (N.Y. Sur. Ct. 1931).

Where administrator testified to isolated portions of examination before trial supporting claim by estate against corporation CPA § 347 was not available to prevent disclosure of the entire transactions. In re Fisch's Estate, 264 N.Y.S. 260, 147 Misc. 552, 1933 N.Y. Misc. LEXIS 1135 (N.Y. Sur. Ct. 1933).

The introduction of evidence by the corporate accounting coadministrator as to business transactions the decedent had with the claimant and the detailed cross-examination of the claimant, opened the door for the claimant to testify as to his transactions with the decedent. In re Van Muffling's Estate, 277 N.Y.S. 584, 154 Misc. 300, 1935 N.Y. Misc. LEXIS 985 (N.Y. Sur. Ct. 1935).

The fact that the parties were dead and the action maintained by their representatives did not render the evidence incompetent under CPA § 347. Hurlburt v Hurlburt, 2 N.Y.S. 317, 50 Hun 600, 1888 N.Y. Misc. LEXIS 156 (N.Y. Sup. Ct. 1888), aff'd, 128 N.Y. 420, 28 N.E. 651, 128 N.Y. (N.Y.S.) 420, 1891 N.Y. LEXIS 995 (N.Y. 1891).

73. Testimony elicited by protected party

Testimony of defendant as to the receipt of a check from deceased, though under CPA § 347 incompetent on direct examination, should have been admitted on redirect after plaintiff brought out full details on cross-examination. Kings County Trust Co. v Hyams, 242 N.Y. 405, 152 N.E. 129, 242 N.Y. (N.Y.S.) 405, 1926 N.Y. LEXIS 998 (N.Y. 1926).

Full details of a writing by a surviving spouse, stating a transaction with deceased and offered in evidence by plaintiff, should have been allowed to be given by defendant on redirect examination. Kings County Trust Co. v Hyams, 242 N.Y. 405, 152 N.E. 129, 242 N.Y. (N.Y.S.) 405, 1926 N.Y. LEXIS 998 (N.Y. 1926).

Where a party was examined by an administrator or other representative of a deceased person as to any transactions with the decedent, the inhibition contained in CPA § 347 was no longer effective and such party was thereafter permitted to testify as to such transactions but such

waiver could not be based merely upon an examination in a discovery proceeding. De Laurent v Townsend, 243 N.Y. 130, 152 N.E. 699, 243 N.Y. (N.Y.S.) 130, 1926 N.Y. LEXIS 733 (N.Y. 1926).

In a proceeding under §§ 205, 206, of Surrogate's Court Act, to discover property withheld from executor, the respondent could not testify as to transactions with decedent in the attempt to establish a gift inter vivos of certain property, where petitioner had not interrogated the respondent as to personal transactions with the decedent. In re Glasgow's Estate, 209 A.D. 884, 205 N.Y.S. 559, 1924 N.Y. App. Div. LEXIS 9590 (N.Y. App. Div. 1924).

Where brothers of decedent testified on his behalf as to personal transactions with him, door was opened for evidence on behalf of respondent, in discovery proceeding by administrator. In re Riley's Estate, 261 A.D. 690, 27 N.Y.S.2d 176, 1941 N.Y. App. Div. LEXIS 7408 (N.Y. App. Div. 1941).

CPA § 347 was not intended to abrogate the rule of evidence that where a party calls a witness and examines him, the other party may call out the whole of the communication or transaction which was the subject of the first examination. In re Glasgow's Estate, 201 N.Y.S. 541, 121 Misc. 613, 1923 N.Y. Misc. LEXIS 1289 (N.Y. Sur. Ct. 1923), modified, 209 A.D. 884, 205 N.Y.S. 559, 1924 N.Y. App. Div. LEXIS 9590 (N.Y. App. Div. 1924).

A petitioner, who in seeking to show that property in the possession of a respondent belongs to the estate he represents, calls her as witness and examines her as to transactions with the decedent, thereby permits her to testify that such property was given her by the decedent. In re Davis' Estate, 220 N.Y.S. 204, 128 Misc. 622, 1927 N.Y. Misc. LEXIS 816 (N.Y. Sur. Ct. 1927), aff'd, 222 A.D. 846, 226 N.Y.S. 797, 1928 N.Y. App. Div. LEXIS 8630 (N.Y. App. Div. 1928).

One who was conducting an examination of the representative of an estate before trial in an accounting proceeding, might retain the advantages provided in CPA § 347, but if he inquired as to personal transactions with the deceased, he waived that advantage and the door was open to further testimony by the witness on his own behalf as to such transactions. In re Van

Valkenburgh's Estate, 221 N.Y.S. 309, 128 Misc. 819, 1927 N.Y. Misc. LEXIS 720 (N.Y. Sur. Ct. 1927), aff'd, 226 A.D. 10, 233 N.Y.S. 457, 1929 N.Y. App. Div. LEXIS 8635 (N.Y. App. Div. 1929).

Prohibition of CPA § 347 was lifted by examination of witness by adverse party. In re Schlossman's Adm'x, 242 N.Y.S. 417, 136 Misc. 893, 1930 N.Y. Misc. LEXIS 1314 (N.Y. Sur. Ct. 1930).

Testimony concerning a conversation between decedent and his wife, in regard to the acceptance of a broker's suggestions as to a gift to the wife, was not violative of CPA § 347 where testimony had already been given by a member of the broker's firm detailing the correspondence between the decedent and the representative of the broker with regard to the gift. In re Frothingham's Will, 291 N.Y.S. 656, 161 Misc. 317, 1936 N.Y. Misc. LEXIS 1517 (N.Y. Sur. Ct. 1936).

Where objectants read at trial portion of testimony given by accounting administratrix of decedent on her examination by objectants before trial, she was competent to explain or qualify transaction in question. In re Nettle's Estate, 91 N.Y.S.2d 255, 1949 N.Y. Misc. LEXIS 2574 (N.Y. Sur. Ct. 1949), aff'd, 276 A.D. 929, 94 N.Y.S.2d 704, 1950 N.Y. App. Div. LEXIS 5165 (N.Y. App. Div. 1950).

In action against a decedent's estate for I. O. U.'s, the survivor is precluded from testifying as to personal transactions with decedent unless the door is opened by his examination by the other party. In re Gilligan's Estate, 157 N.Y.S.2d 740 (N.Y. Sur. Ct. 1956).

Proof of claim on note by bankrupt to his deceased brother constituted examination of claimants on their own behalf so as to make competent bankrupt to testify to transactions with deceased. In re Falk, 83 F. Supp. 817, 1949 U.S. Dist. LEXIS 2938 (D.N.Y. 1949), aff'd, 180 F.2d 562, 1950 U.S. App. LEXIS 2454 (2d Cir. N.Y. 1950).

74. Testimony in witnesses' own behalf or interest

The prohibition of testimony under CPA § 347 could only rest successfully on the circumstance that the witness had a financial interest in the event of the litigation which will be supported and forwarded by the testimony which he proposes to give, so that if permitted to give it he would be testifying in his own behalf or interest. Harrington v Schiller, 231 N.Y. 278, 132 N.E. 89, 231 N.Y. (N.Y.S.) 278, 1921 N.Y. LEXIS 636 (N.Y.), reh'g denied, 231 N.Y. 646, 132 N.E. 923, 231 N.Y. (N.Y.S.) 646, 1921 N.Y. LEXIS 817 (N.Y. 1921).

In an action against executors of a deceased mortgagor to foreclose mortgage, testimony of the surviving executor of the mortgagee as to admissions of the mortgagor, given by him upon a former trial when mortgagor was present, held admissible, as was also the evidence at said former trial of his coexecutor, then deceased to the same effect. Staley v Nellis, 231 N.Y. 521, 132 N.E. 872, 231 N.Y. (N.Y.S.) 521, 1921 N.Y. LEXIS 674 (N.Y. 1921).

To escape the disqualification imposed on one from, through or under whom a party or interested person derived his title, it is not necessary that the proposed witness should be injured by the testimony which she offers; it is only necessary that she should not be benefited thereby. Harrington v Schiller, 231 N.Y. 646, 132 N.E. 923, 231 N.Y. (N.Y.S.) 646, 1921 N.Y. LEXIS 817 (N.Y. 1921).

CPA § 347 had no application where the witness was examined in behalf of the adverse party and not as a witness in his own behalf or interest. In re Anna's Estate, 248 N.Y. 421, 162 N.E. 473, 248 N.Y. (N.Y.S.) 421, 1928 N.Y. LEXIS 1282 (N.Y. 1928).

In action against executor, where executor contended that sale involved was to a witness for plaintiff and not to decedent, such witness, though vitally interested in the question in controversy, could testify as to transactions with deceased, since he would not gain or lose by the direct legal operation and effect of a judgment. West End Brewing Co. v Utica Trust & Deposit Co., 175 A.D. 477, 162 N.Y.S. 537, 1916 N.Y. App. Div. LEXIS 9032 (N.Y. App. Div. 1916).

The test of whether one is testifying “in his own behalf or interest” is not merely whether he may gain or lose by the direct effect of the judgment, but whether the judgment will be legal evidence for or against him in some other action. Kerwood v Hall, 201 A.D. 89, 193 N.Y.S. 811, 1922 N.Y. App. Div. LEXIS 6259 (N.Y. App. Div. 1922).

In an action by an executrix to recover from the defendant corporation the cost of erecting a building, under an alleged agreement by defendant to pay therefor, testimony of an agent of defendant who was not a stockholder thereof, respecting conversations with the plaintiff’s testator touching the agreement between the parties, was not incompetent under CPA § 347. Conley v Powell Corp., 212 A.D. 324, 208 N.Y.S. 596, 1925 N.Y. App. Div. LEXIS 9462 (N.Y. App. Div. 1925).

In a will contest CPA § 347 disqualified a person interested in sustaining the will, from testifying when called by proponent, but not when called by contestants. In re Radley's Will, 228 A.D. 119, 239 N.Y.S. 44, 1930 N.Y. App. Div. LEXIS 12116 (N.Y. App. Div. 1930).

A son of the decedent, who was also a legatee and a devisee under a proposed will, was not incompetent to testify against the will, under CPA § 347, since his testimony was against his own interest, and since in the event the will failed of probate the contestants would share in the distribution of the estate, not as assignees of the witness, but as heirs of the decedent. In re Klein's Will, 193 N.Y.S. 755, 118 Misc. 423, 1922 N.Y. Misc. LEXIS 1157 (N.Y. Sur. Ct. 1922).

Sister of alleged widow of decedent may testify to facts to prove common-law marriage. In re Cooke's Estate, 85 N.Y.S.2d 104, 195 Misc. 468, 1949 N.Y. Misc. LEXIS 1660 (N.Y. Sur. Ct. 1949).

Against incompetent; term “lunatic” includes one committed as incompetent to state mental institution, and “committee of lunatic” necessarily includes special guardian appointed by court to protect interests of incompetent. In re Musczak's Estate, 92 N.Y.S.2d 97, 196 Misc. 364, 1949 N.Y. Misc. LEXIS 2767 (N.Y. Sur. Ct. 1949).

CPA § 347 precluded interested witness from testifying not only to positive of transaction or communication but also to negative thereof. In re Erdmann's Estate, 98 N.Y.S.2d 111, 198 Misc. 1087, 1950 N.Y. Misc. LEXIS 1745 (N.Y. Sur. Ct. 1950).

Sister of testatrix and sole distributee was competent to testify that testatrix meant that gift of latter's property, which would pass to witness if gift failed, should go to particular charity. In re Comfort's Will, 116 N.Y.S.2d 851, 203 Misc. 669, 1952 N.Y. Misc. LEXIS 1967 (N.Y. Sur. Ct. 1952).

Fact that executor-trustee would be entitled to statutory commissions as compensation for his services as fiduciary does not disqualify him as witness in will contest. In re Bitterman's Estate, 118 N.Y.S.2d 859, 203 Misc. 796, 1952 N.Y. Misc. LEXIS 2223 (N.Y. Sur. Ct. 1952), aff'd, 281 A.D. 1024, 122 N.Y.S.2d 622, 1953 N.Y. App. Div. LEXIS 4176 (N.Y. App. Div. 1953).

Alleged widow is incompetent to testify on application by son of first wife of decedent, that she is lawful second wife and widow. In re Rappoport's Estate, 129 N.Y.S.2d 472, 205 Misc. 661, 1954 N.Y. Misc. LEXIS 3166 (N.Y. Sur. Ct. 1954).

In hearing on claim for caring for decedent during last illness, claimant is incompetent. In re Taylor's Estate, 129 N.Y.S.2d 159, 205 Misc. 872, 1954 N.Y. Misc. LEXIS 2367 (N.Y. Sur. Ct. 1954).

Defendant called as witness by plaintiff was testifying not in her own interest but against it and, therefore, her testimony was admissible. Masone v Ferino, 32 Misc. 2d 15, 221 N.Y.S.2d 472, 1961 N.Y. Misc. LEXIS 2023 (N.Y. City Ct. 1961).

Where witness, although not party to action, by his testimony as to transaction with deceased may bring about a judgment which will be evidence of a fact in another action against himself, he is interested in the event of the action in which he testifies. Jacobellis v Wilson, 43 N.Y.S.2d 231, 1943 N.Y. Misc. LEXIS 2168 (N.Y. App. Term 1943).

Where witness was testifying entirely contrary to his own financial interest, he was competent. In re Lyons' Will, 75 N.Y.S.2d 237, 1947 N.Y. Misc. LEXIS 3392 (N.Y. Sur. Ct. 1947).

Claimant against estate cannot contradict any evidence tending to show claim of title derived by him from decedent. In re Cohen's Will, 90 N.Y.S.2d 776, 1949 N.Y. Misc. LEXIS 2488 (N.Y. Sur. Ct. 1949).

Where witness was examined in behalf of adverse party and not as witness in his own behalf or interest, CPA § 347 did not apply. Colaci v Pagano, 130 N.Y.S.2d 801, 1954 N.Y. Misc. LEXIS 2092 (N.Y. Sup. Ct. 1954).

75. Parties protected

Where a member of an alleged law partnership of three persons received and retained, as executor of one of them, a check made payable to the alleged partnership, depositing it in his name as executor after indorsing it in the name of the firm and in his own name as executor, in an action against him individually for conversion of the check, brought by the third member of the alleged partnership under a claim that the check was in payment of services rendered by another partnership, consisting of the decedent and such third member only, it was error to exclude testimony of the plaintiff respecting alleged conversations between decedent and himself touching the alleged separate partnership nature of the services in payment of which the check was given, in view of CPA § 347, since the effect of such testimony, if given force, would have been to increase rather than diminish the interest of the deceased partner’s estate in the fund in suit. Gratwick v Smith, 202 A.D. 600, 195 N.Y.S. 568, 1922 N.Y. App. Div. LEXIS 4943 (N.Y. App. Div. 1922).

In an action against a physician for malpractice in failing to remove a portion of the placenta or afterbirth, which was subsequently removed by another physician who had since died, held that a conversation between the defendant and the other physician at the time of the operation by the latter was not incompetent, as CPA § 347 was designed for the protection of a deceased

person's estate, and not for the protection of a witness. Heartwell v Berliner, 211 A.D. 760, 207 N.Y.S. 737, 1925 N.Y. App. Div. LEXIS 10693 (N.Y. App. Div. 1925).

After a joint defendant, agent of his codefendant, has died and no revival has been had against his estate, the remaining defendant cannot object to evidence being offered of oral conversations with the deceased defendant. Melkon v H. B. Kirk & Co., 220 A.D. 180, 220 N.Y.S. 551, 1927 N.Y. App. Div. LEXIS 9259 (N.Y. App. Div. 1927).

Evidence proffered on behalf of the administrator should not have been excluded. Stevens v Stevens, 225 A.D. 892, 233 N.Y.S. 902, 1929 N.Y. App. Div. LEXIS 12628 (N.Y. App. Div. 1929).

In an action by the receiver of a bank to recover an assessment against the stock of a deceased owner, it was prejudicial error to exclude, under CPA § 347, the testimony of the defendant as to an oral agreement claimed to have been entered into by her with the decedent prior to their marriage, and which provided for the transfer to her of the property which later comprised the decedent's estate. The plaintiff was not "a person deriving his title or interest from, through or under a deceased person . . . by assignment or otherwise," within the meaning of CPA § 347. Brayton v Dager, 249 A.D. 94, 291 N.Y.S. 67, 1936 N.Y. App. Div. LEXIS 5040 (N.Y. App. Div. 1936).

CPA § 347 did not bar evidence of conversations with agent of corporation, although such agent was dead at time of trial. Carmen v Shore Cleaners & Dyers, Inc., 270 A.D. 945, 62 N.Y.S.2d 362, 1946 N.Y. App. Div. LEXIS 4813 (N.Y. App. Div. 1946).

The testimony of a witness against the administratrix of an estate as to transactions with his father, the decedent, during the latter's lifetime, is incompetent. In re Meyers' Estate, 223 N.Y.S. 701, 129 Misc. 760, 1927 N.Y. Misc. LEXIS 1019 (N.Y. Sur. Ct. 1927).

CPA § 347 was for the benefit of the committee, since a witness could not testify in his own behalf against him, but the committee might prove his own case by an interested witness. Payne

v Chatham & Phenix Nat'l Bank & Trust Co., 229 N.Y.S. 563, 132 Misc. 531, 1928 N.Y. Misc. LEXIS 905 (N.Y. Mun. Ct. 1928).

Lunatic, like decedent, is protected against presentation of evidence which he cannot refute. In re Harkavy's Estate, 56 N.Y.S.2d 700, 184 Misc. 742, 1945 N.Y. Misc. LEXIS 2091 (N.Y. Sur. Ct. 1945).

Where defendant claimed under “deed” which was an obvious nullity, appearing on its face to have been executed fifteen years after grantor’s death, defendant did not fall within any protected category and could not raise CPA § 347 as a bar to plaintiff’s testimony as to grantor’s delivery of another deed to plaintiff. Diers v Heckelman, 16 Misc. 2d 872, 181 N.Y.S.2d 722, 1958 N.Y. Misc. LEXIS 2241 (N.Y. Sup. Ct. 1958), aff'd, 12 A.D.2d 952, 212 N.Y.S.2d 1010, 1961 N.Y. App. Div. LEXIS 12746 (N.Y. App. Div. 2d Dep't 1961).

Conversations between officials of bank-mortgagee and decedent mortgagor pertaining to banking transactions were exempted from the prohibitions of CPA § 347. Domestic Finance Corp. v Tinney Cadillac Corp., 23 Misc. 2d 153, 197 N.Y.S.2d 693, 1960 N.Y. Misc. LEXIS 3485 (N.Y. City Ct. 1960).

Mother held incompetent to testify as to an alleged oral agreement between herself and her two daughters to execute mutual wills bequeathing to the survivors their respective interests in the estate of the husband and father, in an action between the mother, as administratrix of the husband’s estate, and the administrator of one of the daughters. Blaine v Richardson, 193 N.Y.S. 612, 1922 N.Y. Misc. LEXIS 1142 (N.Y. Sup. Ct. 1922).

76. Agent of party interested

One is not a party, nor interested in the result of an action, so as to be prevented from testifying therein, merely because he has acted as the agent of the wife of one of the parties. Whitman v Foley, 125 N.Y. 651, 26 N.E. 725, 125 N.Y. (N.Y.S.) 651, 1891 N.Y. LEXIS 1526 (N.Y. 1891).

CPA § 347 did not preclude the husband or agent of an interested party from testifying in regard to personal transactions with a deceased party in an action against the legal representative of the decedent. Savercool v Wilsey, 5 A.D. 562, 39 N.Y.S. 413, 1896 N.Y. App. Div. LEXIS 1782 (N.Y. App. Div. 1896).

In an action for conversion against certain stockbrokers to whom a messenger of plaintiff's testatrix had wrongfully delivered stock belonging to said testatrix, the conversations of such messenger with the testatrix were held to be inadmissible under this section, as such messenger was an interested party under CPA § 347. Hall v Wagner, 111 A.D. 70, 97 N.Y.S. 570, 1906 N.Y. App. Div. LEXIS 102 (N.Y. App. Div. 1906).

In an action for specific performance of an alleged contract for the conveyance of real property, continued, after the death of the defendant, against his sole heir at law, the broker through whom the contract was negotiated was not precluded from testifying respecting conversations with the deceased concerning certain interlineations in the contract. Frank v Witlin, 201 A.D. 709, 194 N.Y.S. 795, 1922 N.Y. App. Div. LEXIS 6396 (N.Y. App. Div. 1922).

The husband of the holder of a note, purporting to have been indorsed by a deceased person, who managed his wife's business under a power of attorney as if it were his own, his wife paying no attention to it and knowing no more about it than if she had no interest in it, the title being in the name of the wife simply to enable the husband who had failed to evade payment of his creditors, was incompetent under CPA § 347 to testify to the circumstances attending the alleged indorsement of the note in a proceeding for the sale of the decedent's real estate for the payment of his debts, including such note. In re Neufeld, 100 N.Y.S. 444, 50 Misc. 215, 1906 N.Y. Misc. LEXIS 47 (N.Y. Sur. Ct. 1906).

A mother, who on behalf of her child entered into a contract with the decedent by which the decedent was to adopt the child and leave his property to the child, is not disqualified to testify as a witness in behalf of her child as to the transactions with the decedent whereby the contract of adoption was made. Godine v Kidd, 19 N.Y.S. 335, 64 Hun 585 (1892).

On the hearing of a claim against a decedent's estate, the agent of the decedent who had charge of the transaction out of which the claim arose, and who is not a party to or interested in the proceeding, is not incompetent to testify, in behalf of the claimant, to conversations between himself and decedent. Ketchum v Holden, 34 N.Y.S. 870, 88 Hun 482 (1895).

77. Attorney for party in interest

It is improper for the court over the objection of the defendant to permit an attorney to testify to professional transactions and communications with the deceased. Downey v Owen, 98 A.D. 411, 90 N.Y.S. 280, 1904 N.Y. App. Div. LEXIS 3572 (N.Y. App. Div. 1904).

Attorney was not barred from testifying to advice he had given testator's widow relating to her rights in testator's estate, where testator had not participated in the conversations. In re French's Will, 8 A.D.2d 660, 185 N.Y.S.2d 132, 1959 N.Y. App. Div. LEXIS 9033 (N.Y. App. Div. 3d Dep't 1959).

An attorney who brought proceeding on claimant's behalf and who had no definite agreement of compensation with his client but expected to charge her more if he should be successful than if he should be unsuccessful was not "a person interested in the event" within the meaning of CPA § 347. In re Kislyk's Estate, 1 N.Y.S.2d 386, 164 Misc. 287, 1937 N.Y. Misc. LEXIS 1101 (N.Y. Sur. Ct. 1937).

Where objector sought to surcharge executor with interest for failing to invest funds in interest-bearing securities, attorney of record for executor was competent to testify to conversations with deceased coexecutrix and residuary legatee. In re Annunziato's Estate, 108 N.Y.S.2d 101, 201 Misc. 971, 1951 N.Y. Misc. LEXIS 2471 (N.Y. Sur. Ct. 1951).

CPA § 347 did not bar attorney for defendant-vendor from testifying as to conversations had with deceased officer of defendant-vendee, since the attorney was not a party or person interested in the event. Gabbe v Kleban Drug Corp., 6 Misc. 2d 457, 161 N.Y.S.2d 245, 1957 N.Y. Misc. LEXIS 3303 (N.Y. Sup. Ct. 1957).

Where in an action of interpleader the issue was whether a mortgage executed to J and assigned to H, the trustees of whose will are defendants, was assigned absolutely or for the benefit of the wife of J. A witness for plaintiff who acted as counsel for J in the execution and assignment of the mortgage was allowed to testify that H told him that J wanted him, H, to take an assignment of the mortgage for M. Held, no error. Brennan v Hall, 14 N.Y.S. 864, 60 Hun 583, 1891 N.Y. Misc. LEXIS 2535 (N.Y. Sup. Ct. 1891), aff'd, 131 N.Y. 160, 29 N.E. 1009, 131 N.Y. (N.Y.S.) 160, 1892 N.Y. LEXIS 1008 (N.Y. 1892).

An attorney who issued execution and superintended the levy is not disqualified as a witness in an action brought by the assignee of a mortgagee, who held a chattel mortgage on the property levied on, against the attorney’s client. Payne v Kerr, 21 N.Y.S. 880, 66 Hun 636 (N.Y. Sup. Ct. 1893).

Attorney for incompetent party may not make affidavit on prohibited matters. In re Hittleman's Will, 112 N.Y.S.2d 796, 1952 N.Y. Misc. LEXIS 2693 (N.Y. Sur. Ct. 1952).

Lien for costs does not render an attorney an incompetent witness. 27 Hun 331.

78. Officers of corporation

The interest of a witness, if any, by reason of his having been the secretary and treasurer of the corporation before it ceased business, was too remote, to make him interested in the event within the meaning of CPA § 347. Talbot v Laubheim, 188 N.Y. 421, 81 N.E. 163, 188 N.Y. (N.Y.S.) 421, 1907 N.Y. LEXIS 1144 (N.Y. 1907).

In an action brought by a corporation to recover for work done under a contract for manufacturing machines, it is competent for the president of the defendant to testify as to a conversation with one of plaintiff’s assignors, since deceased, which conversation led up to the contract and in which said assignor stated that the machine was built in a certain way. Garvin Mach. Co. v Hammond Typewriter Co., 12 A.D. 294, 42 N.Y.S. 564, 1896 N.Y. App. Div. LEXIS

3302 (N.Y. App. Div. 1896), aff'd, 159 N.Y. 539, 53 N.E. 1125, 159 N.Y. (N.Y.S.) 539, 1899 N.Y. LEXIS 1060 (N.Y. 1899).

Secretary and director of corporation who was not a stockholder was competent to testify to a transaction with deceased in an action against corporation. Griggs v Renault Selling Branch, Inc., 179 A.D. 845, 167 N.Y.S. 355, 1917 N.Y. App. Div. LEXIS 9388 (N.Y. App. Div. 1917).

Testimony of an officer or employee of a corporation trustee was not inadmissible as testimony of corporation. Farmers' Loan & Trust Co. v Wagstaff, 194 A.D. 757, 185 N.Y.S. 812, 1921 N.Y. App. Div. LEXIS 9354 (N.Y. App. Div. 1921).

CPA § 347 had no application to personal transactions with deceased officers or agents of corporations. Flaherty v Herring-Hall-Marvin Safe Co., 49 N.Y.S. 174, 22 Misc. 329, 1898 N.Y. Misc. LEXIS 29 (N.Y. App. Term 1898).

CPA § 347 did not bar evidence of conversations had with an officer or agent of a corporation even though such officer or agent was dead at the time of the trial. Gabbe v Kleban Drug Corp., 6 Misc. 2d 457, 161 N.Y.S.2d 245, 1957 N.Y. Misc. LEXIS 3303 (N.Y. Sup. Ct. 1957).

79. —Officers of religious corporation

Testimony of officers or trustees of religious or charitable corporations who serve without pay or reward is not incompetent. In re O'Rourke, 34 N.Y.S. 45, 12 Misc. 248, 1895 N.Y. Misc. LEXIS 382 (N.Y. Sur. Ct. 1895).

Officers or trustees of a religious corporation serving without pay were competent to testify as to gift by deceased of property to the congregation. In re Kladneve's Estate, 234 N.Y.S. 246, 133 Misc. 766, 1929 N.Y. Misc. LEXIS 767 (N.Y. Sur. Ct. 1929), aff'd, 228 A.D. 772, 239 N.Y.S. 851, 1930 N.Y. App. Div. LEXIS 13082 (N.Y. App. Div. 1930).

In action by a church to recover on an oral promise of decedent to contribute to plaintiff’s expenses, including the pastor’s salary, any interest of the latter in the outcome of the litigation

did not disqualify him from testifying. Washington Heights Methodist Episcopal Church v Comfort, 246 N.Y.S. 450, 138 Misc. 236, 1930 N.Y. Misc. LEXIS 1682 (N.Y. Mun. Ct. 1930).

80. Testimony in favor of estate on their own behalf by representative and survivor

CPA § 347 disqualified an executor in giving evidence, as to a personal transaction with deceased, in favor of the personal representatives of such deceased. McLaughlin v Webster, 141 N.Y. 76, 35 N.E. 1081, 141 N.Y. (N.Y.S.) 76, 1894 N.Y. LEXIS 1100 (N.Y. 1894).

Where an executor has been permitted without objection to testify that he had been operating in lands for his father, the testator, testimony given by him to the effect that when he made the purchase for his father the deeds were taken in the names of other members of the family, is not incompetent. In re Woodward, 69 A.D. 286, 74 N.Y.S. 755, 1902 N.Y. App. Div. LEXIS 422 (N.Y. App. Div. 1902).

The evidence of an executor as to declarations made by his testator, by which he seeks to justify himself in an extravagant expenditure for a monument, is incompetent, and its admission constitutes reversible error; the executor’s verification of a claim for such monument is incompetent as evidence. Smith v Mingey, 72 A.D. 103, 76 N.Y.S. 194, 1902 N.Y. App. Div. LEXIS 1199 (N.Y. App. Div.), aff'd, 172 N.Y. 650, 65 N.E. 1122, 172 N.Y. (N.Y.S.) 650, 1902 N.Y. LEXIS 796 (N.Y. 1902).

In an action against an executor to recover an interest in real estate, evidence of such executor as to conversations with the testatrix’s husband, then deceased, as to whether he accepted the terms of the will are not competent. Farrar v Farmers' Loan & Trust Co., 85 A.D. 478, 83 N.Y.S. 218, 1903 N.Y. App. Div. LEXIS 2132 (N.Y. App. Div. 1903).

In action by administratrix to recover property for the estate of her husband, she could testify that decedent declared in defendant’s presence that the property belonged to him. Moller v Paulovico, 190 A.D. 1, 179 N.Y.S. 223, 1919 N.Y. App. Div. LEXIS 4055 (N.Y. App. Div. 1919).

In action by administratrix to recover property, she was entitled to testify in behalf of the estate that the property belonged to the estate. Moller v Paulovico, 190 A.D. 1, 179 N.Y.S. 223, 1919 N.Y. App. Div. LEXIS 4055 (N.Y. App. Div. 1919).

In an action by an administrator to recover the amount of an alleged loan made by his intestate, the testimony of the plaintiff as to a conversation between the decedent and the defendant at which he was present is competent to prove the fact of the loan. Wakefield v Wakefield, 93 N.Y.S. 554, 47 Misc. 87, 1905 N.Y. Misc. LEXIS 173 (N.Y. App. Term 1905).

Testimony given in a special proceeding in behalf of administrators who are parties, as to conversations had with the intestate are not incompetent, and this though the witness was as administrator a party to the proceeding. Re Babcock, 12 N.Y. St. 841.

One who is an executor and legatee is not disqualified from testifying in behalf of the executors, in an action against them, as to personal transactions with the decedent. Cady v Brennan, 31 N.Y.S. 190, 82 Hun 262 (1894).

81. Effect of introduction of evidence by or on behalf of adverse party

The surety on a nonresident executor’s bond is interested and incompetent to testify against the legatees, on an accounting in behalf of the executor, as to personal transactions with the deceased, and the legatees do not waive the right to object, by calling him as their witness as to other matters. Miller v Montgomery, 78 N.Y. 282, 78 N.Y. (N.Y.S.) 282, 1879 N.Y. LEXIS 908 (N.Y. 1879); see Barton v Scramling, 31 Hun 467 (N.Y.).

Where a party is called as a witness, by the adverse party, and examined as to a transaction with a deceased person respecting which he could not have testified in his own behalf, he is entitled on cross-examination to explain his testimony, and to state the whole transaction. Merritt v Campbell, 79 N.Y. 625, 79 N.Y. (N.Y.S.) 625, 1880 N.Y. LEXIS 41 (N.Y. 1880).

The object of CPA § 347 was to so carefully balance rights that a survivor should not take advantage of a deceased person and the personal representative should not take advantage of a survivor; where, in proceedings to settle the accounts of an executor, a residuary legatee, claiming that the executor had failed to recover moneys obtained by parties from the testatrix by undue influence and fraud, partially examined such party as to personal transactions with the deceased, and it being decided that the surrogate had no jurisdiction, and the proceeding having been suspended and such legatee having induced the executor to bring an action to recover the amount, in which action he introduced in evidence the statement of defendant made in the former proceeding, he thereby waived his privilege in this action and the defendant could testify as to the whole of any transactions which she was examined upon in the proceeding. Cole v Sweet, 187 N.Y. 488, 80 N.E. 355, 187 N.Y. (N.Y.S.) 488, 1907 N.Y. LEXIS 801 (N.Y. 1907).

An administratrix plaintiff in an action for goods sold against defendant whom she called to testify that he purchased such goods, waived her objection under CPA § 347, by calling defendant and he may then testify that he paid for such goods. Mahoney v Jones, 35 A.D. 84, 54 N.Y.S. 488, 1898 N.Y. App. Div. LEXIS 2507 (N.Y. App. Div. 1898).

Where a party called the adverse party and examined him as to a personal transaction with a deceased person, in reference to which he was precluded from testifying in his own behalf under CPA § 347, the witness was entitled to state the whole transaction or conversation, and thereby explain or qualify the testimony called out by the other party. In re Cozine, 104 A.D. 182, 93 N.Y.S. 557, 1905 N.Y. App. Div. LEXIS 1741 (N.Y. App. Div. 1905), modified, 113 A.D. 22, 98 N.Y.S. 1041, 1906 N.Y. App. Div. LEXIS 1360 (N.Y. App. Div. 1906).

Cross-examination of witness upon testimony as to transaction with deceased person was not a waiver of benefit of CPA § 347. Fuller v New York C. & H. R. R. Co., 160 A.D. 864, 146 N.Y.S. 345, 1914 N.Y. App. Div. LEXIS 5310 (N.Y. App. Div. 1914), aff'd, 213 N.Y. 689, 107 N.E. 1078, 213 N.Y. (N.Y.S.) 689, 1915 N.Y. LEXIS 1496 (N.Y. 1915).

On judicial settlement of administrator's account, where administrator was called by contestant first and was sworn in to testify as to transaction with decedent, his testimony was competent. In re Lese, 176 A.D. 744, 163 N.Y.S. 1014, 1917 N.Y. App. Div. LEXIS 5256 (N.Y. App. Div. 1917).

When the contestants of an account examine an executor as to personal transactions with the testator and establish such executor's personal liability on the note in question, the executor is not disqualified to testify as a witness concerning the entire transaction in order to relieve himself of such liability. In re Beach's Estate, 22 N.Y.S. 1079, 1 Misc. 27, 1892 N.Y. Misc. LEXIS 13 (N.Y. Sur. Ct. 1892).

Where a special guardian for infant legatees, seeking to surcharge the accounts of the executor by the amount of a bank deposit, cross-examines the executor as to the transaction of the gift, the executor is entitled to prove the whole transaction and conversation had by him with the testator. In re Rose, 71 N.Y.S. 172, 35 Misc. 21, 1901 N.Y. Misc. LEXIS 274 (N.Y. Sur. Ct. 1901), aff'd, 75 A.D. 615, 77 N.Y.S. 1139, 1902 N.Y. App. Div. LEXIS 2273 (N.Y. App. Div. 1902).

Where the surviving executor of the estate of the testator calls and examines an alleged debtor of the testator in order to show the liability and surcharge the account of the administrator of the widow, his former coexecutor, with the amount of the debt, the witness, although incompetent to testify to a personal transaction with the testator which would relieve the witness from liability, is entitled to give the whole transaction with the testator and show that he was not indebted to him. In re Woodbury's Estate, 81 N.Y.S. 503, 40 Misc. 143, 1903 N.Y. Misc. LEXIS 112 (N.Y. Sur. Ct. 1903).

Evidence by plaintiff that certain clothing and money given him by defendant's intestate was on account of wages due him, and that deceased so stated, is incompetent, even on redirect after he has been asked on cross-examination if he had not received them. Vanderveer v Vanderveer, 1 N.Y.S. 898, 49 Hun 608, 1888 N.Y. Misc. LEXIS 1640 (N.Y. Sup. Ct. 1888).

Testimony given by a witness upon reexamination as to personal transactions with a decedent is not objectionable, where he has been questioned by the counsel for the administrator on cross-examination as to the same subjects. In re McQueen's Estate, 13 N.Y.S. 663, 59 Hun 625 (N.Y. Sup. Ct. 1891).

Where portions of conversations with the decedent are drawn out in the cross-examination of a witness for the defendant in an action brought by executors, the provisions of this section are thereby waived, and the defendant may, upon his redirect examination, show the whole of such conversations. Hackstaff v Hackstaff, 31 N.Y.S. 11, 82 Hun 16 (1894).

The mere fact that a defendant was called as a witness by the plaintiff does not make him competent to testify as to a transaction with a deceased person where he is, in effect, examined in his own behalf and interest, and his evidence would necessarily operate to his own benefit. Duane v Paige, 31 N.Y.S. 310, 82 Hun 139 (1894).

E. Trial And Review

82. Generally

Notwithstanding a son of decedent was prevented by CPA § 347 from testifying, declarations of the father and surrounding circumstances sufficiently confirmed a sale of property by the father to the son. In re Brown's Will, 252 N.Y. 366, 169 N.E. 612, 252 N.Y. (N.Y.S.) 366, 1930 N.Y. LEXIS 633 (N.Y. 1930).

Although a claimant against an estate cannot testify to personal transactions with the decedent, his inability to produce competent proof does not authorize a judgment upon insufficient proof. Corless v Carlisle, 137 A.D. 611, 122 N.Y.S. 407, 1910 N.Y. App. Div. LEXIS 740 (N.Y. App. Div. 1910).

Erroneous exclusion of material testimony, ground for reversal. In re Fonda's Estate, 201 A.D. 780, 195 N.Y.S. 188, 1922 N.Y. App. Div. LEXIS 6418 (N.Y. App. Div. 1922).

The reception over proper objection of material testimony by witness who is incompetent under CPA § 347 was reversible error. Adrian v Bendert, 222 A.D. 763, 225 N.Y.S. 783, 1927 N.Y. App. Div. LEXIS 8932 (N.Y. App. Div. 1927).

The words “I shall hold that she too is interested . . .” constituted a rule that the witness is incompetent and, not being called for at the time, is reversible error. Bury v Michels, 215 N.Y.S. 794, 127 Misc. 281, 1926 N.Y. Misc. LEXIS 972 (N.Y. App. Term 1926).

Testimony within the prohibition of CPA § 347 disregarded by court on application to set aside probate of a will. In re Jackson's Estate, 236 N.Y.S. 226, 134 Misc. 750, 1928 N.Y. Misc. LEXIS 1275 (N.Y. Sur. Ct. 1928), aff'd, 227 A.D. 777, 237 N.Y.S. 754, 1929 N.Y. App. Div. LEXIS 8037 (N.Y. App. Div. 1929).

Competency of evidence received not passed upon, the issues having been proven without it. In re Ray's Will, 245 N.Y.S. 626, 138 Misc. 330, 1930 N.Y. Misc. LEXIS 1630 (N.Y. Sur. Ct. 1930).

83. Objections to evidence

Unless it distinctly appears that witness does not wish to be sworn at all unless allowed to give evidence at large, he should not be excluded. Brown v Richardson, 20 N.Y. 472, 20 N.Y. (N.Y.S.) 472, 1859 N.Y. LEXIS 216 (N.Y. 1859).

The fact that a witness is disqualified from testifying to a transaction with a deceased person is no ground for refusal to swear him, non constat, that he could not give other material testimony. Card v Card, 39 N.Y. 317, 39 N.Y. (N.Y.S.) 317, 1868 N.Y. LEXIS 157 (N.Y. 1868).

Where a general objection to testimony as incompetent was taken, and the testimony was excluded, the ruling might be sustained under CPA § 347, although the particular objection was not specified. Tooley v Bacon, 70 N.Y. 34, 70 N.Y. (N.Y.S.) 34, 1877 N.Y. LEXIS 582 (N.Y. 1877).

But where the testimony was admitted, a general objection would not enable the party to urge upon appeal, that the testimony should not have been received under CPA § 347. Stevens v Brennan, 79 N.Y. 254, 79 N.Y. (N.Y.S.) 254, 1879 N.Y. LEXIS 1019 (N.Y. 1879).

Objection to the competency of physicians who were decedent's attending physicians at the time of and prior to his death to testify as to the mental condition of the testator, must be raised at the time the witnesses are offered, and a motion to strike out the testimony after it is given on the ground that it was incompetent will be denied. Hoyt v Hoyt, 112 N.Y. 493, 20 N.E. 402, 112 N.Y. (N.Y.S.) 493, 1889 N.Y. LEXIS 844 (N.Y. 1889).

In an action brought by the son of a testatrix against the executors of the will upon promissory notes payable to the son, plaintiff was asked whether they were in his possession prior to the death of his mother, to which an objection was made that the question was incompetent, held error to overrule such objection, as the witness was incompetent under CPA § 347 and the objection did not challenge the competency of the witness, but the competency of the evidence. Hoag v Wright, 174 N.Y. 36, 66 N.E. 579, 174 N.Y. (N.Y.S.) 36, 1903 N.Y. LEXIS 1301 (N.Y. 1903).

Later the witness was asked if the signature to each was his mother's handwriting, to which an objection was interposed as to the competency of the witness, held not error to overrule the objection and admit the answer, since his answer was an opinion and not a personal transaction. Hoag v Wright, 174 N.Y. 36, 66 N.E. 579, 174 N.Y. (N.Y.S.) 36, 1903 N.Y. LEXIS 1301 (N.Y. 1903).

Where an objection is raised that the evidence of a witness is incompetent, it is necessary for the party raising the objection to establish the disqualification, where the interest of the witness in the estate was to a specific legacy and it appeared that the estate was sufficient to pay such legacy, and as it did not appear that the witness took part in a conversation, the testimony did not relate to any personal transaction or communication between her and the deceased. Farrar

v Farmers' Loan & Trust Co., 85 A.D. 367, 83 N.Y.S. 172, 1903 N.Y. App. Div. LEXIS 2116 (N.Y. App. Div. 1903).

An objection that a witness was not competent at all to testify under CPA § 347 was not available because too general; the proper way of taking an objection under CPA § 347 was, that the witness was incompetent to answer the question, because it involved a personal transaction between him and the deceased prohibited by CPA § 347; upon the trial of an action brought by a physician to recover for professional services rendered by the plaintiff to the decedent's intestate, the plaintiff was incompetent, under CPA § 347, to testify, after having looked at his account book for the purpose of refreshing his recollection, that he saw the intestate on the several hundred dates therein specified and that all the visits therein charged against the intestate were made by him, and that he delivered annual statements of the account to the intestate and that she kept them without objection. Russell v Hitchcock, 105 A.D. 315, 93 N.Y.S. 950, 1905 N.Y. App. Div. LEXIS 2065 (N.Y. App. Div. 1905).

Evidence of transactions with one deceased had to be objected to as inadmissible under CPA § 347 in order that the error may be available on appeal. Hamlin v Hamlin, 117 A.D. 493, 102 N.Y.S. 571, 1907 N.Y. App. Div. LEXIS 287 (N.Y. App. Div. 1907), rev'd, 192 N.Y. 164, 84 N.E. 805, 192 N.Y. (N.Y.S.) 164, 1908 N.Y. LEXIS 866 (N.Y. 1908).

Where in an action against an estate, tried before the court without a jury, to recover the value of certain alleged services, the plaintiff is permitted over proper objection and exception to testify to personal transactions with the deceased, the error is fatal to a judgment in his favor. Hartig v Hartig, 147 A.D. 6, 131 N.Y.S. 587, 1911 N.Y. App. Div. LEXIS 2807 (N.Y. App. Div. 1911).

Objection that witness was not competent to testify held sufficient notwithstanding failure to object to similar evidence afterwards admitted. Kennedy v Mulligan, 173 A.D. 859, 160 N.Y.S. 105, 1916 N.Y. App. Div. LEXIS 7608 (N.Y. App. Div. 1916).

Judgment affirmed on ground that the question of the competency of witness under CPA § 347 was not sufficiently raised, and the evidence supported the findings. Cross v Cross, 222 A.D. 791, 226 N.Y.S. 795, 1927 N.Y. App. Div. LEXIS 9180 (N.Y. App. Div. 1927).

Objection to introduction of deposition in evidence on the ground that the witness was incompetent to testify to the transaction between himself and decedent was sustained, although taken at his own instance. Percy v Huyck, 226 A.D. 142, 234 N.Y.S. 635, 1929 N.Y. App. Div. LEXIS 8668 (N.Y. App. Div.), modified, 252 N.Y. 168, 169 N.E. 127, 252 N.Y. (N.Y.S.) 168, 1929 N.Y. LEXIS 540 (N.Y. 1929).

Objection to testimony under CPA § 347 could not be considered on appeal where the point was not taken at the hearing before the surrogate. In re Levine's Estate, 247 A.D. 19, 286 N.Y.S. 513, 1936 N.Y. App. Div. LEXIS 8169 (N.Y. App. Div. 1936).

Specific objection is required. In re Yauch's Will, 270 A.D. 348, 59 N.Y.S.2d 642, 1946 N.Y. App. Div. LEXIS 3688 (N.Y. App. Div.), aff'd, 296 N.Y. 585, 68 N.E.2d 875, 296 N.Y. (N.Y.S.) 585, 1946 N.Y. LEXIS 1176 (N.Y. 1946).

General objection to evidence is not objection that witness is incompetent. In re Farley's Estate, 155 N.Y.S. 63, 91 Misc. 185, 1915 N.Y. Misc. LEXIS 852 (N.Y. Sur. Ct. 1915).

In discovery proceedings under Surrogate’s Court Act, § 205, no objection was raised under CPA § 347 to respondent’s testimony. In re Barry's Estate, 237 N.Y.S. 526, 135 Misc. 57, 1929 N.Y. Misc. LEXIS 958 (N.Y. Sur. Ct. 1929).

Testimony of an heir who renounced her share in estate, received without objection, was considered on review. In re Smith's Estate, 242 N.Y.S. 464, 136 Misc. 863, 1930 N.Y. Misc. LEXIS 1318 (N.Y. Sur. Ct. 1930).

When evidence of a personal transaction with decedent is admitted over objection, but only a general objection is made and the ground of its incompetency is not called to the attention of the

court, it cannot be considered on appeal. Sheil v Muir, 4 N.Y.S. 272, 51 Hun 644, 1889 N.Y. Misc. LEXIS 277 (N.Y. Sup. Ct. 1889).

An objection to the declarations of a parent as to the legitimacy of issue as hearsay did not raise the question that the evidence was incompetent under CPA § 347. Bell v Bumstead, 14 N.Y.S. 697, 60 Hun 580, 1891 N.Y. Misc. LEXIS 2461 (N.Y. Sup. Ct. 1891).

In administrator's discovery proceeding to recover items of jewelry claimed by decedent's daughter as gift, administrator's motion to strike out testimony of daughter and her husband as to conversations with decedent was denied where objection was not "addressed to statute". In re Corn's Estate, 141 N.Y.S.2d 16, 1955 N.Y. Misc. LEXIS 2460 (N.Y. Sur. Ct. 1955).

An objection to testimony as inadmissible under CPA § 347 had to call attention to the particular ground of objection. If the testimony was objected to as "incompetent and irrelevant," that did not enable the party to insist that it was not admissible under CPA § 347. Sanford v Ellithorp, 26 Hun 392 (N.Y. 1882).

Incompetency of witness must be made out by party alleging it. Steele v Ward, 30 Hun 555 (N.Y.).

An objection to evidence "as incompetent" is sufficiently specific. Boughton v Bogardus, 35 Hun 198 (N.Y.).

Upon the trial a son of the intestate entitled to a share in his estate was called by plaintiff. Defendants objected to his testimony as incompetent. Part of the testimony related to personal communications with deceased and part did not. Held objection too general to raise any question upon appeal. Riggs v American Home Missionary Soc., 35 Hun 656 (N.Y.).

On a commission to examine a party interrogatories should not be stricken out as inadmissible, when it is not certain that upon the trial objection to the evidence would be made. Wilcox v Dodge, 6 N.Y.S. 368, 53 Hun 565, 1889 N.Y. Misc. LEXIS 582 (N.Y. App. Term 1889).

An objection to questions as incompetent and immaterial was sufficient to present the question whether the evidence offered was objectionable under CPA § 347. Cross v Smith, 32 N.Y.S. 671, 85 Hun 49 (1895).

A motion to strike out evidence as incompetent under CPA § 347, made after it had been received over objection that it is incompetent and immaterial, was too late. Cross v Smith, 32 N.Y.S. 671, 85 Hun 49 (1895).

Testimony which is not essentially rebuttal is not admissible. Trounstine v Bauer, Pogue & Co., 144 F.2d 379, 1944 U.S. App. LEXIS 2844 (2d Cir. N.Y.), cert. denied, 323 U.S. 777, 65 S. Ct. 190, 89 L. Ed. 621, 1944 U.S. LEXIS 99 (U.S. 1944).

84. Waiver of objections or protection

Failure during a trial or hearing to take timely objection to the competency of witness to testify to prohibited communications will not constitute an irrevocable waiver of the right to thereafter object at that trial or hearing on that ground. In re Honigman's Will, 8 N.Y.2d 244, 203 N.Y.S.2d 859, 168 N.E.2d 676, 1960 N.Y. LEXIS 1073 (N.Y. 1960).

Where testimony incompetent under CPA § 347 had been given without objection, force and effect might be given to it, subject to such care and scrutiny as the conditions require and by no means extending it in operation. Stern v Ladew, 47 A.D. 331, 62 N.Y.S. 267, 1900 N.Y. App. Div. LEXIS 109 (N.Y. App. Div. 1900).

Where evidence, which is inadmissible, is admitted without objection, it becomes proof in the case which the court is entitled to consider. Hickok v Bunting, 67 A.D. 560, 73 N.Y.S. 967, 1902 N.Y. App. Div. LEXIS 31 (N.Y. App. Div. 1902).

In an action for personal services, where the plaintiff was allowed to testify to a conversation with plaintiff’s testator as to her employment but no exception was taken to the ruling, the judgment on that ground will not be reversed on appeal. Ralley v O'Connor, 71 A.D. 328, 75

N.Y.S. 925, 1902 N.Y. App. Div. LEXIS 957 (N.Y. App. Div. 1902), aff'd, 173 N.Y. 621, 66 N.E. 1115, 173 N.Y. (N.Y.S.) 621, 1903 N.Y. LEXIS 1250 (N.Y. 1903).

Where an executrix substituted as plaintiff in an action brought by her testatrix read in evidence a deposition made by the testatrix, taken when she was ill and unable to attend the trial, the protection of CPA § 347 was waived and defendants might testify as to parol agreement alleged in their answer and which the deposition related to a series of transactions, the way was open to defendant to give evidence as to all of them. Adenaw v Piffard, 137 A.D. 470, 121 N.Y.S. 825, 1910 N.Y. App. Div. LEXIS 708 (N.Y. App. Div. 1910), rev'd, 202 N.Y. 122, 95 N.E. 555, 202 N.Y. (N.Y.S.) 122, 1911 N.Y. LEXIS 997 (N.Y. 1911).

Will contestant may waive objection to competency of will proponent. In re Satterlee's Will, 281 A.D. 251, 119 N.Y.S.2d 309, 1953 N.Y. App. Div. LEXIS 3024 (N.Y. App. Div. 1953).

Where executor exercised his right to waive CPA § 347, opposing party could not complain of admission of testimony which would otherwise be inadmissible under CPA § 347. Walsh v Emigrant Industrial Sav. Bank, 176 N.Y.S. 418, 106 Misc. 628, 1919 N.Y. Misc. LEXIS 1057 (N.Y. Sup. Ct. 1919), aff'd, 192 A.D. 908, 182 N.Y.S. 956, 1920 N.Y. App. Div. LEXIS 7783 (N.Y. App. Div. 1920).

Incompetent evidence received without objection may be considered as part of proof. In re Dashnau's Estate, 88 N.Y.S.2d 13, 194 Misc. 156, 1948 N.Y. Misc. LEXIS 3946 (N.Y. Sur. Ct. 1948).

Failure to object to competency of testimony under CPA § 347 constituted waiver thereof. In re McDonnell's Will, 135 N.Y.S.2d 455, 1954 N.Y. Misc. LEXIS 3013 (N.Y. Sur. Ct. 1954).

If original question does not show incompetency of testimony, defendant may cross-examine witness in regard to answer without waiving his objection. Mills v Kemochan, 3 N.Y. St. 152.

An objection to the competency of a witness by reason of interest, if not taken at the trial, cannot be considered on appeal. Sacia v Decker (N.Y.C.P. Apr. 4, 1881).

Objection to competency of witness comes too late after testimony already received. Saper v Emerson-New York, Inc., 95 F. Supp. 980, 1951 U.S. Dist. LEXIS 2717 (D.N.Y. 1951).

85. Harmless error

Although the testimony of a person that an alleged trustee had a certain conversation with another in his presence in which he did not take part was incompetent under CPA § 347, yet a judgment will not be reversed on that ground where the same fact appeared by other evidence and the case was tried by the court without a jury. Hutton v Smith, 175 N.Y. 375, 67 N.E. 633, 175 N.Y. (N.Y.S.) 375, 1903 N.Y. LEXIS 989 (N.Y. 1903).

When evidence erroneously admitted under CPA § 347 was not a ground for reversal. In re King, 115 A.D. 751, 100 N.Y.S. 1089, 1906 N.Y. App. Div. LEXIS 3060 (N.Y. App. Div. 1906), aff'd, 188 N.Y. 626, 81 N.E. 1167, 188 N.Y. (N.Y.S.) 626, 1907 N.Y. LEXIS 1308 (N.Y. 1907).

In an action to recover money loaned by the plaintiff’s testator, when plaintiff fails to prove his cause of action, it is immaterial that one of the defendants was allowed to testify as to transactions with the deceased contrary to § 347. Kilmer v Quackenbush, 125 A.D. 352, 109 N.Y.S. 444, 1908 N.Y. App. Div. LEXIS 2781 (N.Y. App. Div. 1908).

Admission of incompetent evidence was harmless where matter testified to was established by other competent testimony. Wilson v Kane, 180 A.D. 77, 167 N.Y.S. 51, 1917 N.Y. App. Div. LEXIS 7999 (N.Y. App. Div. 1917).

Where the question whether the surrogate erred in receiving the testimony of witnesses over objection to their competency is raised, it cannot be intelligently determined whether the expectant was prejudiced by the ruling, if erroneous, unless there is included in the case on appeal all the material evidence. In re Goldsticker's Will, 105 N.Y.S. 931, 54 Misc. 175, 1907 N.Y. Misc. LEXIS 387 (N.Y. Sur. Ct. 1907).

In partition defendant set up a will alleged to have been executed, by which all the land was devised to him. Plaintiff was allowed to testify to a conversation which she heard between the defendant and her deceased father, relating to making a will. Held, that as the deceased had been found to be incapable of making a will, the testimony was immaterial and did not affect the result. Petrie v Petrie, 6 N.Y.S. 831, 53 Hun 638, 1889 N.Y. Misc. LEXIS 806 (N.Y. Sup. Ct. 1889), aff'd, 126 N.Y. 683, 27 N.E. 958, 126 N.Y. (N.Y.S.) 683, 1891 N.Y. LEXIS 1746 (N.Y. 1891).

86. Requisites of case on appeal

On questions as to the admissibility of evidence under CPA § 347, a case on appeal should contain little, if any, more than the specific questions, with the objections and rulings thereon, and the answers, if any, would be material. Moran v Rainbow Appliance Corp., 225 A.D. 587, 233 N.Y.S. 522, 1929 N.Y. App. Div. LEXIS 11703 (N.Y. App. Div. 1929).

Research References & Practice Aids

Cross References:

This section referred to in Rule 4517.; CLS SCPA § 2104.

Inquiry; trial and decree, CLS SCPA § 2104.

Federal Aspects:

General rule of competency of witnesses in United States Courts, USCS Court Rules, Federal Rules of Evidence, Rule 601.

Jurisprudences:

11 NY Jur 2d Brokers § 221. .

46 NY Jur 2d Domestic Relations § 797. .

58 NY Jur 2d Evidence and Witnesses §§ 376., 432. .

58A NY Jur 2d Evidence and Witnesses §§ 841., 907.– 915. .

4 Am Jur Proof of Facts 185., Deceased, Conversations and Transactions With.

Law Reviews:

Evidence symposium. 52 Cornell L.Q. 177.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4519, Personal Transaction or Communication Between Witness and Decedent or Mentally Ill Person.

1 Rohan, New York Civil Practice: EPTL ¶ 1-1.1, 1-2.19, 2-1.10, 2-1.11; 2 Rohan, New York Civil Practice: EPTL ¶ 3-2.2, 3-4.1; 4 Rohan, New York Civil Practice: EPTL ¶ 6-2.2, 6-3.9; . 6 Rohan, New York Civil Practice: EPTL ¶ 11-2.3, 11-3.1; 7 Rohan, New York Civil Practice: EPTL ¶ 13-1.4, 13-2.1.

1 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings §§ 6.08, 7.04, 13.03.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 37.04.

2 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 504.01, 505.01; 3 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 1403.06, 1404.09, 1407.07, 1408.03, 1419.05, 1420.02; 4 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 1802.06, 1803.03; 5 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶ 2102.03, 2103.10, 2103.12, 2104.06, 2104.08, 2211.07.

Matthew Bender's New York Practice Guides:

3 New York Practice Guide: Domestic Relations § 37.20.

1 New York Practice Guide: Probate and Estate Administration §§ 3.06, 11.20, 24.05; 2 New York Practice Guide: Probate and Estate Administration §§ 31.13, 40.01, 41.03.

Warren's Weed New York Real Property:

Warren's Weed: New York Real Property Ch. 36. Decedent's Real Property.

Matthew Bender's New York Evidence:

6 Bender's New York Evidence § 23A.04. Statutory Restrictions Upon the Testimony of Witnesses.

6 Bender's New York Evidence § 23A.05. Proving a Lost or Destroyed Will.

6 Bender's New York Evidence § 23A.06. Establishing Will by Proof of Handwriting.

8 Bender's New York Evidence § 29.04. Proof of marriage.

3 Bender's New York Evidence § 143.03. Statements of Person Since Deceased.

3 Bender's New York Evidence § 146.01. Introduction to Dead Man's Statute.

3 Bender's New York Evidence § 146.02. Applicability of Dead Man's Statute: Trial or Hearing Requirement.

3 Bender's New York Evidence § 146.03. Dead Man's Statute: Protected Interests.

3 Bender's New York Evidence § 146.04. Dead Man's Statute: Affected Witnesses.

3 Bender's New York Evidence § 146.05. Scope of Exclusion; Personal Transactions or Communications.

3 Bender's New York Evidence § 146.06. Waiver; Opening the Door.

3 Bender's New York Evidence § 146.07. Dead Man's Statute As Affected By Other Rules of Evidence.

3 Bender's New York Evidence § 146.08. How Objection Under CPLR 4519 Should Be Made.

3 Bender's New York Evidence § 147.01. Exception to Hearsay Rule.

3 Bender's New York Evidence § 153.12. Privity of Interest.

4 Bender's New York Evidence § 160.02. Attorney-Client Privilege.

Annotations:

Application of dead man's statute in proceeding involving account of personal representative. 2 ALR2d 349.

Dead man's statute as applicable to testimony denying transaction or communication between witness and person since deceased. 8 ALR2d 1094.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse. 10 ALR2d 1389.

Adverse interest or position as disqualification for appointment as personal representative, 18 A.L.R.2d 633.

Death of one coparty to contract or transaction, including copartner, as affecting competency of adverse party or surviving coparty to testify as against each other or as against estate of decedent. 22 ALR2d 1068.

Introduction of decedent's books of account by his personal representative as waiver of "dead man's statute." 26 ALR2d 1009.

Dead man's statute as applicable to spouse of party disqualified from testifying. 27 ALR2d 538.

Propriety of compelling witness to testify, in pretrial proceeding, as to matters which would be prohibited in trial testimony by dead man's statute. 42 ALR2d 578.

Statute excluding testimony of one person because of death of another as applied to testimony in respect of lost or destroyed instrument. 18 ALR3d 606.

Admissibility of testator's declarations on issue of revocation of will, in his possession at time of his death, by mutilation, alteration, or cancellation. 28 ALR3d 994.

Statements of declarant as sufficiently showing of consciousness of impending death to justify admission of dying declaration. 53 ALR3d 785.

Sufficiency of showing of consciousness of impending death, by circumstances other than statements of declarant, to justify admission of dying declaration. 53 ALR3d 1196.

Statutes excluding testimony of one person because of death of another as applicable to attorneys. 67 ALR3d 924.

Use of evidence excludible under dead man's statute to defeat or support summary judgment. 67 ALR3d 970.

Admissibility, as res gestae, of accusatory utterances made by homicide victim before the act. 74 ALR3d 963.

Existence of illicit or unlawful relation between testator and beneficiary as evidence of undue influence. 76 ALR3d 743.

Dead man's statutes as affected by Rule 601 of the Uniform Rules of Evidence and similar state rules. 50 ALR4th 1238.

Texts:

Jonakait, Baer, Jones, & Imwinkelried, New York Evidentiary Foundations (Michie), Ch 3 .The Competency of Witnesses.

NY Pattern Jury Instructions 3d, PJI 7:40.

2 New York Trial Guide (Matthew Bender) §§ 21.22, 22.01, 22.02, 22.13; 3 New York Trial Guide (Matthew Bender) §§ 40.60, 40.70, 50.50.

Hierarchy Notes:

NY CLS CPLR, Art. 45