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Competency and Privilege of Witnesses under Section 829 of the New York Code of Civil Procedure

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COMPETENCY AND PRIVILEGE OF WITNESSES UNDER SECTION 829 OF THE NEW YORK CODE OF CIVIL PROCEDURE.

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THESIS PRESENTED BY

PATRICK C. DALY

FOR THE DEGREE OF BACHELOR OF LAWS.

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CORNELL UNIVERSITY.

SCHOOL OF LAW.

1895.
COMPETENCY AND PRIVILEGE OF WITNESSES UNDER SECTION 829 OF THE NEW YORK CODE OF CIVIL PROCEDURE.

It is impossible to calculate the influence which interest in a given cause, or in the event of a given suit, will exercise on the mind of a given individual. On some minds a very slight interest will act sufficiently to induce perjury; on others very great interests would be powerless. It being impossible to detect the numberless ways in which parties may be, directly or indirectly, interested in a particular event, the exclusion was limited, by the common law, to the parties to the action and others having a legal interest in the event thereof. The rule excluding parties was founded on the interest which parties to a suit were supposed to have in it. Consequently, when it appeared that they had none, or that any which they ever had, had been removed, their evidence was receivable. The husbands or wives of the parties to the suit or proceeding, were also considered as incompetent. This being on the theory that husband and wife were the same person in law, and had the same affections and interests.

Various statutory changes in the United States and England have reversed this rule, and the general rule now is that interest is not a cause for the rejection of evidence, and parties to the record of a suit, or the husbands or wives of such parties, are competent witnesses in the suit; the fact of their being interested affecting only their credibility.

This result is accomplished in the State of New York by section 828 of the Code of Civil Procedure which provides that
a person shall not be excluded or excused from being a witness, by reason of his or her interest in the event of an action or special proceeding; or because he or she is a party thereto; or the husband or wife of a party thereto, or of a person in whose behalf an action or special proceeding is brought, prosecuted, opposed or defended.

A husband or wife has, however, by a subsequent section been rendered incompetent upon the trial of an action, or the hearing upon the merits of a special proceeding founded upon the allegation of adultery; except to prove the marriage and disprove the allegation of adultery. They cannot, moreover, be compelled, or without the consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage. And in an action for criminal conversation the plaintiff's wife is not a competent witness for the plaintiff.

Allowing the unrestricted evidence of parties or persons interested in the event of an action or special proceeding is open to one great objection, viz., that in cases where the cause of an action arose out of a personal transaction or communication had with a person who has since died, or become insane, there is great danger of injustice being done to the estate of the deceased person of lunatic, by reason of misrepresentation, concealment or perjury, on the part of the other party to the transaction.

The legislatures of the different states have wisely guarded against such an injustice; and the testimony of a party or in-
terested witness is generally not admissible, as against the es-
tate of a deceased person or lunatic, or a person succeeding to
the interest of such deceased person or lunatic. And in England
the courts, without any express statute, hold that the testimony
of a party to personal transactions with the deceased, which ex-
onerate himself, is not sufficient, at least in equity, to sustain
a decree unless corroborated.

Hill v. Wilson LR. 8 Ch. App. 888

The New York statute in its present form (section 829 of
the Code of Civil Procedure) is perhaps the most successful
statute yet enacted upon this subject. It provides as follows;

"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 lunatic, or a person deriv-
ing his title or interest from, through or under a deceased per-
son or lunatic, by assignment or otherwise concerning a personal
transaction or communication between the witness and the deceas-
ed person or lunatic, 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 lunatic or de-
ceased person is given in evidence concerning the same transac-
tion or communication. A person shall not be deemed interested
for the purposes of this section by reason of his being a stock-
holder or officer of any banking corporation which is a party
to the action or proceeding, or interested in the event thereof."

This section was not originally enacted in its present suc-
cessful form, but is the product of numerous revisions, amendments
and alterations, which the experience of years has shown to be
most judicious and fair to all parties who may be affected by it
Section 351 of the Code of Procedure, as originally enacted, (af-
terward changed to section 398) was a sweeping provision that:

"No person offered as a witness shall be excluded by rea-
son of his interest in the event of the action." And the purpose
of the succeeding section, (afterward changed to 399), was simply
to exclude from the operation of the proceeding section "a party
to the action; "any person for whose immediate benefit it is pro-
secuted or defended," and "any assignor of a thing in action assign-
ed for the purpose of making him a witness."

In 1851 by section 399 of the Code of Procedure it was en-
acted that when an assignor of a thing in action, or contract, was
examined as a witness, on behalf of any person deriving title
through or from him, the adverse party might offer himself as a
witness to the same matter in his own behalf and shall be so re-
ceived. But that such assignor shall not be admitted to be exam-
ined in behalf of any person deriving title through or from him,
against an assignee or an executor or administrator, unless the
other party to such contract or thing in action, whom the defen-
dant or plaintiff represented as living, and his testimony could
be procured for such examination.
The section was again amended in 1857, but no important change was made in the part which relates to this subject, until 1860. In the amendment of that year the subject matter of the testimony was an important element. And it was provided that the examination should not be "in respect to any transactions had personally between the deceased person and the witness."

The amendment of 1862 provided that where the executors, administrators, heirs at law, next of kin, or assignees were examined on their own behalf, in regard to any conversation or transaction had between the deceased person and the assignor, or party respectively, then the assignor or party might be examined in regard to such conversation or transaction, but not in regard to any new matter. In 1863 a provision was added that: "If a party dies after his testimony is taken and before it is used on the trial, the other party shall be competent as to the same matter."

In 1866 the section was largely elaborated, and all persons who had a legal or equitable interest, which might be affected by the event of the action, were excluded. The examination was forbidden not only in behalf of the party, but also in behalf of any other party. And the privilege was extended to insane persons.

During the following year the court of appeals decided that the clause "in respect to any transaction had personally between the deceased person and the witness", did not exclude evidence of transactions or communications which took place in the presence of the witness between deceased and a third person, and in which the witness did not participate.
Lobdell v. Lobdell, 36 N.Y. 327

The legislature thereupon, again amended the section, and among other minor changes, omitted the words "had personally" and rendered the witness incompetent to testify to "any transaction or communication between" the witness and a person since deceased. This provision was found to be too broad, as under it the courts were obliged to exclude the testimony of a witness to letters which passed between them.

Resigne v. Mason, 58 Barb. 89

Accordingly, in 1869 the law was again amended by changing the prohibition to "any personal transaction or communication," so that it then stood as follows:

"No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person or lunatic, But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence."
The section remained in this form down to 1878 when it was practically reenacted into the present section 829 of the Code of Civil Procedure; about the only change made, being to limit the incompetency to evidence offered in behalf of the party or person testifying, or of the person claiming from, through or under him, whereas the former section rendered the witness incompetent no matter in whose behalf it was offered.

To What Courts and Proceedings Applied.

On its first enactment and down to 1857 the statute applied only to the trial of actions. In that year it was extended to embrace proceedings. In 1860 proceedings in Surrogate's Courts, and summary proceedings were specially mentioned. But since 1865 no particular special proceedings have been designated, and the application of the statute has been common to every form of action and special proceeding.

Naturally the rule is often invoked in the various proceedings in Surrogate's Courts, and has been held to apply to applications for probate, for letters of administration, to sell real estate of decedents' for payment of debts and funeral expenses; to proceedings for discovery of assets, for judicial settlement of accounts, and generally to actions and proceedings in any court in relation to decedents' estates; as upon the reference of disputed claims, or the trial of special issues concerning the due execution of a will. The section applies to justices' courts, and has been held to apply to the trial of a feigned issue out of chancery under section 823 of the code.

Parks v. Andrews, 56 Hun 391
But the simple verification of a claim against a decedents' estate by the claimant is not rendered incompetent; nor are proofs of loss made to an insurance company, as provided by its regulations. The section is also held not to apply to a proceeding against an attorney to compel him to pay over money alleged to belong to his client. The reason being that upon motion to the Court to control the action of an attorney the Court is not restricted to the same rules of evidence which govern in an action between parties.

Re Purdy v. Stewart 16 W. Dig. 284

To Whose Testimony Applied.

The section mentions parties, persons interested, and persons from through or under whom such parties or interested persons derive their interest or title by assignment or otherwise. But the mere fact that one is a party is not alone sufficient to render him incompetent. For a party to the proceeding as well as a person not a party must be interested in the event or he cannot be excluded. And it is not material whether he had or had not an interest at the time of the transaction or communication, as interest at the time of the trial alone disqualifies. It seems to be the same in an action as to whether the party appears in an individual or representative capacity.

Poucher v. Scott 33 Hun 223

But upon an application for probate the rule seems to be different. An executor even though he be the proponent, being then not considered as a party within the meaning of the section, so as to render him incompetent to prove the execution of the will.

Rugg v. Rugg, 83 N.Y. 592
Just who are, and who are not, included as persons interested, is a serious question, and one concerning which there have been many adjudications. The true test of the interest of a witness seems to be that he would either gain or lose by the direct legal operation and effect of the judgement, or that the record will be legal evidence for or against him in some other action or proceeding. It is the same interest which would exclude at common law and must be present, certain and vested, and not uncertain, remote or contingent.


But where the interest is a conditional one, the performance of the condition being in the discretion of the party, he will nevertheless be regarded as a person interested.

Matter of Burke, 5 Redf. 399.

The beneficiaries under a will would therefore be incompetent to sustain the probate, or the heirs at law and next of kin to oppose probate. An administrator would be incompetent in an action to recover a debt alleged to be due the estate; his percentage on the amount which the estate receives being considered as a sufficient interest to bar his evidence. A stockholder would likewise be incompetent in behalf of his corporation, unless it be a banking corporation; stockholders in a banking corporation being by the last amendment of the section, in 1881, especially exempted from the provisions of the statute. A woman having an inchoate right of dower depending upon the event; a lawyer whose fees depend upon the result; and a subsequent mortgagee in a foreclosure suit, have all been held incompetent un-
der this provision of the section.

It is not enough to disqualify that the witness is interested in the question involved; he must be interested in the event of the action.

Eisenlard v. Clum, 126 N. Y. 522.

And the section does not mean an interest in any event of the action, but an interest in the event as respects the party who calls him as a witness. The words "interested in the event" are to be construed to mean, and must be limited in their application, to the issue or question as to which the witness is called to testify. This being the rule well established in the common law courts on the question of competency, before the code was enacted. The language of the section in reference to excluding the testimony of assignors is so explicit that it has given rise to comparatively few adjudications. Grantors of real estate, vendors of chattels, indorsers of notes and checks, the assignor of a mortgage, and the assignor of an equity of redemption, have all been held incompetent under this provision. On the other hand a father who has surrendered to a minor child her wages in advance of their being earned, is competent in a suit brought by the child to recover her wages, against the administrator of the employer; the child not deriving its title to the wages from the father.

Shirley v. Bennett, 6 Lans. 512.

And on an accounting, a claimant to whom the executors have paid a claim, is held competent for the executors to prove his contract with the deceased, they not having derived any title or
interest from him.

In re Frazer, 92 N. Y. 240.
Thus the lien which an attorney has for his costs on his client's cause of action is not sufficient to render him incompetent. Nor is a possible right to curtesy or dower such an interest as is regarded by the statute.

Cooper v. Monroe, 28 N. Y. Supp. 222.
So the statute has reference to transfer of title or interest by assignment or otherwise: Therefore the maker of a note is competent, in an action against the personal representatives of the accommodation indorser; for the holder does not derive his interest from the accommodation indorser, within the meaning of the section.

Converse v. Cook, 31 Hun 417.
Again the interest referred to is an interest in the subject matter of the action; and the prohibition is not limited to an examination pertaining to the parts of the action assigned, but extends to the entire action. And it matters not that there are transfers mesne the proposed witness and the party or person interested. But whenever one party gives evidence of admissions by a grantor of the other party, the testimony of the grantor is admissible to rebut this evidence, even though it relates to a transaction with a deceased person through whom the witness claims title.

Cole v. Denul, 3 Hun 610.

In Whose Behalf Offered.

Prior to 1866 incompetency under the statute only extended
to evidence in behalf of parties or interested persons, but in
the amendment of that year this feature of the statue was lost
sight of, and the evidence of such parties became incompetent in
any event and remained thus down to 1878 when the present sec-
tion was enacted.

At the present time, therefore, the witness is competent
when not testifying in his own behalf or interest, or in behalf
of the party succeeding to his title or interest. Thus a re-
siduary legatee under a will may testify to transactions with
the testator, in behalf of a claimant against the estate.

Carpenter v. Soule, 88 N. Y. 251.

Or the maker of a note is competent to establish the liability
of an indorser; he being liable upon the note in any event of
the action. But where the testimony of the witness, although
directly in behalf of another, must indirectly be for his own
benefit, it will not be received. As where a subsequent mort-
gagee defendant in foreclosure attempts to testify in behalf of
his mortgagee.

Hadsall v. Scott, 26 Hun 617.

But it has been held that the maker of a note, who was a defend-
ant but had not answered, is incompetent to testify in behalf of
his surety, on the ground that he was interested in avoiding a
judgement against the surety, which would entitle the surety to
prosecute and obtain a judgement against him, which he would be
compelled to pay.

Church v. Howard, 79 N. Y. 415.

Any evidence which would be incompetent if offered in behalf of
the witness, would likewise be incompetent if offered in behalf
of a party succeeding to his title or interest.

*Against Whom the Testimony is Incompetent.*

As the section now stands, executors, administrators or survivors of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, are specially mentioned as persons in whose favor the statute is enacted. But it was not until the amendment of 1866, that the provision in favor of survivors and lunatics first appeared. And not until the amendment of 1869 was the committee of a lunatic, or insane person, specially mentioned. The present section applies in favor of an executor propounding a will for probate. For, although technically a proponent is not an executor under a will until it is admitted to probate, yet, if it is well executed as regards all legal formalities, he holds before the surrogate the position of an executor, and is protected by the section.

*Schoonmaker v. Wolford, 20 Hun 166.*

And it is held that in an action by an administrator, who has received his letters, evidence of conversations may not be introduced, tending to show that the alleged deceased is still living.

*Parham v. Moran, 4 Hun. 717.*

But the statute does not apply in favor of a creditor petitioning to sell a decedent's real estate to pay debts, as against another creditor. The creditor not being a party included under the
The provision applies in favor of the surviving partner of a firm, unless he was present at the interview between the witness and the deceased partner which is sought to be put in evidence. And it is held that the term "surviving partner" includes one who, though not technically a member of the firm, has become liable to third persons as such by reason of his acts.

One of the joint makers of a note is, however, not a survivor. He being liable to a separate action before, as well as after, the death of the maker.

The provision favoring a person deriving his title or interest from the deceased or lunatic is not confined to a person deriving such title or interest directly, but applies, even though there have been several mesne conveyances.

Pope v. Allen, 90 N. Y. 298.
It is extended to a person contesting probate;

Matter of Smith, 95 N. Y. 516.
the words "any person deriving his title or interest" being construed as any person claiming to derive title or interest. But neither a mortgagee nor his assignee are considered as deriving their title or interest from, through or under the mortgagor, so as to claim the protection of the statute.

Holcomb v. Campbell, 118 N. Y. 46.
Where the executor, administrator, survivor, committee or assignee is interested in the suit, not as such, but in his own
right, the section is not applicable. As when a wife has been induced to convey her dower interest by the fraudulent representations of her husband, she is not precluded from giving evidence of such fraudulent representations, as the grantee of the husband does not derive the interest claimed from the husband.

Witthaus v. Shack, 105 N. Y. 332.

Also, where the administrator brought an action to set aside a deed made by deceased in fraud of creditors; it was held that he was not protected as he then represented the creditors and not the deceased.

Miller v. Davis, 60 Hun 198.

Nature of Testimony Excluded.

The question as to what does and what does not constitute a personal transaction or communication within the meaning of the statute is perhaps the most perplexing one that arises in connection with this section. This is owing, principally, to the fact that the provision may be applied to almost as great a variety of cases as there are human transactions. And for that reason no fixed rules can properly be made; the most that can be done being to examine the decisions on this point and observe the tendency of the courts in the application of the statute.

The language of the statute is that the person shall not be examined "concerning a personal transaction or communication between the witness and the deceased person or lunatic". As it refers to personal transactions or communications, it does not, of course, apply to transactions of agents with the deceased or lunatic, nor to transactions or communications with agents of
the deceased; neither does it apply to transactions or communications with the deceased agent of the opposite party.

The transaction need not necessarily have been a private one, or confined to the witness and the deceased, as the policy of the statute excludes testimony of an interested witness concerning any transaction with the deceased in which the witness in any manner participated, or of any communication in his presence or hearing, if he in any way was a party thereto. Accordingly it was held that testimony was improperly received of interested witnesses as to conduct and actions of the deceased, tending to show his enfeebled and dependent condition, and as to statements made by him, although not addressed to the witness, and made in ignorance of his presence.

Holcomb v. Holcomb, 95 N. Y. 316.

And it is even held that testimony as to the appearance of testator, as indicating his incompetency to make a will, observed by an interested witness, is within the section.


The simple fact that the transaction or communication was had is not incompetent, unless that is the material fact to be proven.

Monerick v. Marvel, 90 N. Y. 656.

But the silence of the deceased, provided such silence may be construed to mean assent, comes within the section.

Oliver v. Freleigh, 36 Hun 634.

The death of one of two persons jointly interested, does not, however, render a party incompetent as against the survivor, to testify to personal transactions or communications with the
Extrinsic facts may also be testified to, as the birth of deceased, the signature of deceased, possession of papers, or seeing an entry in decedent's books at a certain time. But it has been held that a wife is incompetent to testify as to her marriage with deceased, or a creditor as to payment or nonpayment, or as to services performed for deceased.

McMurray v. McMurray, 63 Hun 183.

If the party was present but did not participate in the conversation, which took place wholly between the deceased and third parties it was formerly held that he would not be incompetent to testify thereto, as it was not a personal transaction or communication.

Badger v. Badger, 83 N. Y. 546.

But at the present time there seems to be an inclination to hold that an interested witness is incompetent to testify to any conversation on the part of the deceased, whether it was addressed to him, or to third persons, and in which he took no part.


At any rate it is certain that if he took any part in the interview he cannot testify as to it, even though he omit the matters in which he participated. This would also apply in a case in which, although he had been silent, his silence was equivalent to assent. Where the parties taking part in the interview with the deceased are jointly interested with the party who attempts to give evidence of the interview, they will not be regarded as
third persons, and evidence of the interview would therefore be inadmissible. All testimony, whether negative or affirmative, is equally affected by the statute. Thus proof that no personal transaction took place is equally inadmissible with evidence that one did take place. But it is held that after evidence has been given by a third person who claims to have been present, concerning a personal transaction or communication between a decedent and a party or interested person, the latter, in his own behalf may give evidence, the nature and substance of which is, in effect, a statement that there was no interview at the time and place testified to by the third person, but he may not deny that the transaction or communication took place as testified to by the third person. Thus he may show that he was in a different place at the time mentioned, or that the testator was at a different place at such time, or that the witness was not present at the interview as to which he has testified.

Pinney v. Orth, 88 N. Y. 447.
And it is held that after the transaction or communication has been proved by other testimony it is competent for the witness to state that he believed and relied upon the representations of the deceased as detailed in the prior testimony.

Hard v. Ashley, 117 N. Y. 606.

It was formerly held that books of account could not be given in evidence, unless it was shown by disinterested testimony that the party kept correct books, but this rule is changed and the present holding seems to be that the books of a party can be proved against a deceased person, as they do not constitute a personal transaction or communication.
Young v. Luce, 21 N. Y. Supp. 225.

When such Testimony Becomes Competent.

The provision of the section in this regard enacts that exception must be made "where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication." The testimony must therefore have been offered in behalf of the party claiming under the deceased person or lunatic. And a party cannot, by examining his adversary as to a transaction with a deceased person, claim that the evidence thus elicited is given by the adversary in his own behalf, and that therefore he may contradict him.

Corning v. Walker, 28 Hun 435; 100 N. Y. 547.

The fact that the executor etc., has testified to one transaction does not render a party competent to testify to any other transaction, as the purpose of the exception is solely to prevent any inequality and not to give any advantage to either. In other words, the testimony of a party is competent where it tends to repel a presumption arising from the facts testified to by the executor.

Martin v. Hillen, 142 N. Y. 140.

But proof of declarations by a deceased by competent third persons does not open the door for the admission of what would otherwise be plainly incompetent.

Lyon v. Ricker, 141 N. Y. 225.

Where testimony of the deceased plaintiff given upon a
former trial is read in behalf of his representative at the second trial, the defendant may contradict, correct or supplant the same as to all that took place at the interview in question.

Potts v. Mayer, 86 N. Y. 302.

But the testimony of a decedent in another action brought upon another cause of action, will not render evidence competent within this exception.

Objections.

In regard to the mode of entering an objection it should be borne in mind that the objection must be specific and not in general. Thus where a witness is objected to under the section before any testimony has been taken, the objection will not be considered, even though in the course of the examination incompetent testimony is subsequently admitted. The courts holding that the specific testimony must be objected to.

Sanford v. Ellithorp, 95 N. Y. 48.

The objection being once properly made to the testimony, as incompetent under the section, it is sufficient, and it is not necessary to renew the objection and exception each time similar testimony is offered by the same witness, or others standing in the same relation to the deceased.

Schoonmaker v. Woolferd, 20 Hun 166.

Even though the objection be not made at the time the evidence is offered, the incompetent evidence may be afterward stricken out in the discretion of the court, if the omission can be shown to have been from mistake or inadvertence.

And in making the objection, it is sufficient to object to the testimony on the ground that it relates to a personal transaction with the deceased by an interested witness, without referring to the section of the Code.

Sanford v. Ellithorp, 95 N. Y. 48.

But where the defendant objected to evidence, as "hearsay and incompetent", but not as inadmissible under section 829, it was held that the objection was not sufficiently specific to apprise the court and plaintiffs that it was directed to the statutory incompetency of the witnesses, and was therefore not available.


If the original question does not necessarily show the incompetency of the testimony, the defendant has the right to cross-examine the witness in regard to the answer, without waiving his objection, and when from such examination the testimony appears incompetent under this section, it should be stricken out on motion. But ordinarily the objection must be raised when the testimony is offered. Where incompetent evidence is erroneously received by the court, after being properly excepted to, it can only be disregarded on appeal when it can be seen that it did no harm.


Conclusion.

The policy of this statute, as will have been observed, rests upon different grounds from the common law rule excluding the evidence of interested witnesses. The examination being prohibited in the special cases mentioned, not simply on account
of interest, but mainly upon the ground of the enforced silence of the other party to the transaction. The law considering it just and proper that where death or insanity has closed the mouth or clouded the reason of one of the parties, the other party who would thereby be permitted to testify uncontradicted to transactions, which obviously the deceased or lunatic could contradict or explain, should not be permitted to prove such transactions against the representatives of the deceased, or lunatic. To prevent evasion the restriction was not limited to an interested witness, called in his own behalf, but extends to all cases where it is sought to examine the witness in behalf of a party or person interested in the event, who derives title to the subject matter of the action by assignment or otherwise from the witness. To prevent injustice it confines the prohibition to evidence in behalf or interest of the witness, and only to personal transactions or communications. And to prevent unequal application, it does not apply against one side when the other side has gone into the subject of the interview. Considering these facts we are convinced that the New York statute is a model of its kind, and has been eminently successful.

Patrick C. Kelly
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