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Case Notes

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CASE NOTES

HOSPITAL RECORDS IN EVIDENCE.—The admissibility in evidence of hospital reports of a patient's treatment, commonly known as hospital records or charts, has been the subject of much confusion among the courts. The conflicting opinions, and the reasons advanced in support of them, vary beyond possible reconciliation. In many instances courts of the same jurisdiction have alternately admitted, and excluded such evidence, without clearly indicating the basis for their decisions. While it seems that the weight of authority has been against the admission of such records, the objections advanced against their competency have not been altogether clear.

It is apparent, under common law principles, that such records, if admissible at all, can only be allowed under the exception to the hearsay rule, commonly designated as regular entries in the course of business. The first essential to avoid the hearsay rule is that the witness be unavailable; in other words a necessity for the introduction of this evidence must be clearly demonstrated. To illustrate, in the case of *Boss* v. *Illinois Central Railroad Company*[1] it was held that a refusal to allow the introduction of a clinical record was error, where it appeared that the nurse who had made the entries was deceased, and where the record had been properly identified. On the other hand, in the case of *Osborne* v. *Grand Trunk Railway Company,*[2] it was said, "Assuming, but not deciding, that such a record falls within the rule governing the admission of regular entries upon the principle of necessity, that rule requires that the person who made the entries 'must be unavailable as a witness,' " and the exclusion of the hospital record in the trial court was proper because the absence of the witnesses, nurses who kept the record, was not accounted for.

It is not necessary at this point to go into further detail on this essential. Since hospital records are usually the product of more than one person, this principle can be more clearly illustrated in the discussion hereafter of cases involving personal knowledge of the entrants, and "composite entries."

The second essential element in this exception to the hearsay rule, is most aptly described as "the circumstantial guarantee of trustworthiness,"[3] by which it is meant that all circumstances pertaining to the making of these records indicate the improbability of falsity and safeguard their correctness. In the case of *Adler* v. *New York Life Insurance Company,*[4] the court up-

[1] 221 Ill. App. 504 (1921).
[2] 87 Vt. 104, 88 A. 512 (1913).
[3] John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law (2d Ed.), III, secs. 1522 to 1530.
[4] 33 F. (2d) 827 (C. C. A. 8th, 1929).

held the admission of hospital reports and the office records of a physician, because they were the best available evidence and in all probability represented truly the facts which they purported to show. The court stated that there was far less reason to question the truthfulness of entries in such records than those in books of account. In the latter, possibility of personal gain might prompt dishonest entries, while in the former conscious misstatement could hardly benefit in any way the one making the record. A mistaken entry in a physician's record might result in serious consequences, since the treatment of a patient depends in a great measure upon the verity of such reports.

The trustworthiness of such record was questioned in the case of *National Life and Accident Insurance Company* v. *Cox*[5] on the ground that they were mere private memoranda, and could only be made use of to refresh the memory of the witnesses, if they had been present. Similarly, in the case of *Kemp* v. *Metropolitan Street Railway Company*,[6] a hospital record was held incompetent, because it was not kept by a public officer as part of his duties, and therefore not a public record.

In re Hock's Will[7] held to the same effect, saying that such records were not entitled to be regarded as public records. However, the court stated that it would be proper to use them to refresh the memory of a testifying physician, although he had no independent memory of the facts recorded therein.

In these decisions the courts seemed to overlook the fact that it was not essential that records or books be part of an industrial or mercantile occupation to be regular entries in the course of business, nor that they be official public records to be admissible in evidence. In many of our earlier cases, such records as a ship's log-book,[8] a notary's records,[9] a lawyer's record-book of proceedings in a cause,[10] a register of marriages or the like kept by priests,[11] none of which were public records, were admitted in evidence, as regular entries in the course of business.

In *Ribas* v. *Revere Rubber Company*,[12] one of the grounds for the rejection of a hospital record by the trial court was that it was not a public record, but merely a private memorandum, kept for the convenience and assistance of attending doctors and nurses. In reversing this decision, the supreme court of the state held that because the record was not required by law did

[5] 174 Ky. 683, 192 S. W. 636 (1917).
[6] 94 App. Div. 322, 88 N. Y. S. 1 (1904).
[7] 74 Misc. 15, 129 N. Y. S. 196 (1911).
[8] Barber v. Holmes, 3 Esp. 190, 170 Eng. Rep. 583 (1800).
[9] Sasscer v. The Farmers Bank, 4 Md. 409 (1853).
[10] Leland v. Cameron, 31 N. Y. 115 (1865).
[11] Kennedy v. Doyle, 92 Mass. 161 (1865).
[12] 37 R. I. 189, 91 A. 58 (1914).

not make it inadmissible. It was sufficient that the record was kept in the regular course of business.

The opinion of the court in the case of *Globe Indemnity Company* v. *Reinhart*[13] embodies, perhaps, the best reasons for the trustworthiness of hospital records. The court said: "So far as the hospital is concerned, there could be no more important record than the chart which indicates the diagnosis, the condition, and treatment of the patients. . . . Upon this record the physician depends in large measure to indicate and guide him in the treatment of any given case. Long experience has shown that the physician is fully warranted in depending upon the reliability and trustworthiness of such a record. It is difficult to conceive why this record should not be reliable. There is no motive for the person, whose duty it is to make the entries, to do other than record them correctly and accurately. On the other hand, there is the strongest reason why he should: First, because of the great responsibility, he knowing that the treatment of the patient depends largely upon this record, and, if it be incorrect, it may result, and probably will result, in the patient's failure to receive proper surgical or medical treatment, which failure might be followed by serious consequences or even death. Second, the entrant must realize and appreciate that his position is dependent upon the accuracy with which the record is made. Third, as was stated by Tindall, C. J., in *Poole* v. *Dicas*, 1 Bing. (N. C.) 649: 'It is easier to state what is true than what is false; the process of invention implies trouble in such a case unnecessarily incurred.' "

The final probative element of this, as of all evidence, is that the entry be based upon personal knowledge or observation. This does not necessarily mean that the entrant himself have personal knowledge of the facts recorded. A physician, for example, making observations of a patient's condition, dictates these observations to a nurse, who records them.

Among the difficult questions which arise are the following: (a) In the absence of the physician, may the record be admitted in evidence upon verification by the nurse? (b) In the absence of both the nurse and the physician can the records be admitted upon verification by the custodian of the records? (c) Where physicians, nurses, and internes each make individual entries upon their own observations, is the presence of all the entrants necessary to verify the record, or is it sufficient that the custodian or supervisor verify it?

To attempt to lay down one principle to govern all of these situations would be impossible. The attitudes of the courts, even in the same jurisdiction, vary so greatly, that it would be extremely difficult to say what result would follow in a given

[13] 152 Md. 439, 137 A. 43 (1927).

case. The rulings of the courts may be divided into four distinct classes, each of which will be reviewed.

(1) A number of courts, upon the sound consideration that it is practically impossible under present-day mercantile conditions to produce all of the individuals who reported or recorded the transactions, have assumed the liberal and practical attitude of admitting such records verified by one person who knew them to be regular entries kept in the establishment, without requiring that the original observers be produced or even accounted for.

The Minnesota case of *Lund* v. *Olson et al.*[14] is in point. In this case a hospital chart was admitted over objections that it was a self-serving declaration on the part of the plaintiff and was hearsay. One of the surgeons of the injured person identified the original record. He testified that the record contained what had transpired during the plaintiff's stay in the hospital, reports of his pulse, temperature, and matters relative to his condition and treatment; that it was kept by two nurses in charge, each making her individual entries; that the surgical notes were made by the surgical nurse as dictated by the operating surgeon and signed by him; that those making the entries were authorized to do so; and that the entire record was made according to the usual course of business in the hospital. The upper court sustained the admission of the record.

In the New Hampshire case of *St. Louis* v. *Boston and Maine Railroad,*[15] the defense counsel objected to the admission of hospital records, on the ground that records of this kind are not competent unless identified by the people who made them, or unless the absence of those persons is accounted for. The upper court held that their admission was error, because at the time of the trial the verifying witness, a former superintendent of the hospital, had not been connected with the institution for two years; because she had never had charge of the records; and because they had never been in her custody. However, the court said, "It is undeniably true that where modern business methods are employed, some modification of the old rule governing the proof of entries made in the regular course of business is demanded. . . . In most instances of records inscribed by various persons the production of one verifying witness should be sufficient . . ." The court further stated that if the records had been verified by the proper person, they would have been rendered admissible.

In *Ribas* v. *Revere Rubber Company,*[16] the defense attempted to introduce a hospital record to show that as a result of the patient's unruly behavior and disobedience to the orders of the attending physician and nurses a fractured bone failed to knit

[14] 182 Minn. 204, 234 N. W. 310, 75 A. L. R. 371 (1931).

[15] 83 N. H. 538, 145 A. 263 (1929).

[16] 37 R. I. 189, 91 A. 58 (1914).

properly. This record was kept by an interne, the recording official, and contained not only matters which came within his personal knowledge, but also matters which were reported to him by doctors and nurses connected with the case. The plaintiff objected to the admission of the records, because some of the facts recorded were not within the personal knowledge of the entrant, and because the facts reported by others to the interne were capable of proof by those persons, who might have been called as witnesses. In sustaining the admission of the record, the Rhode Island court decided that the lack of personal knowledge of the entrant was not sufficient to exclude it as evidence, and that where in the regular course of business, one person records an oral or written report made to him by another of a transaction lying in the personal knowledge of the latter, there is no objection to receiving the record verified by the former.

(2) The rulings of the courts which come within the second class admit such records where they are verified by the person who made them after it is shown that the original observer is unavailable because of death, insanity, illness or absence from the jurisdiction.

In *Globe Indemnity Company* v. *Reinhart,*[17] the defendant sought to introduce a hospital record for the purpose of showing that the injured person was delirious on a certain day. The chart nurse testified that she had, in the regular course of her duties, made the entries from reports furnished her by the attendant nurse. When it was established that the attendant nurse was out of the jurisdiction, the court admitted the record as verified by the chart nurse.

On the other hand, in the Illinois case of *Wright* v. *Upson et al.*[18] it was held to be error on the part of the trial court to admit a hospital record made by several nurses, where only one nurse verified it, and it was not shown that the others were deceased or out of the jurisdiction.

In the case of *Kimber* v. *Kimber et al.,* [19] which followed the case of *Wright* v. *Upson,* the admission of a hospital record was objected to because some of the notations on it were made by the internes and nurses, and not by the physician who testified. In sustaining the objection the court stated that since hospital records are admissible only upon the same basis as books of

[17] 152 Md. 439, 137 A. 43 (1927).

[18] 303 Ill. 120, 135 N. E. 209 (1922).

[19] 317 Ill. 561, 148 N. E. 293 (1925). It may be worthy to note the liberal attitude of the same court in the case of People v. Small et al., 319 Ill. 437, 150 N. E. 435 (1926), where the books of account of a large bank were admitted in evidence upon verification by the cashier, who had no personal knowledge of the entries, without producing the considerable number of clerks who made entries therein, and without showing that they were even unavailable as witnesses.

account, the same character of proof is required, that is, that all persons making entries must testify to their correctness.

(3) In the third class of rulings, the courts have excluded hospital records because the original observer was in no way accounted for, without declaring what excuse, if any, would be sufficient for his non-production. Some of these courts have intimated that even if he were produced, such records would be incompetent.

An excellent example of such a ruling is the case of *Baird* v. *Reilly*.[20] Here, that portion of the record in which the entries were made by the attending nurse, was excluded on the ground that she had not been called as witness. There was dictum to the effect that if she were present to testify, the record would be competent only to refresh her memory.

Similarly, in the case of *Harkness* v. *Borough of Swissvale*,[21] it was held that a hospital record, identified by the superintendent as being in the handwriting of a physician and nurse attached to the institution, was properly excluded. This court also stated that if the doctor had been present, this record could have been used only to refresh his memory. Of course, this statement was not necessary for the decision.

(4) A few courts, entirely disregarding the principle of necessity, have excluded such records where the absence of the original observer was accounted for, declining on any grounds to excuse non-production of the witness.

It was held in *Dougherty* v. *Kalbach*[22] that the admission of a hospital record without an opportunity to examine the physicians by whom the record was made was reversible error, even though these physicians were shown to be absent from the jurisdiction.

In the recent case of *Paxos* v. *Jarka Corporation*,[23] the admission of a hospital record by the trial court was held to be reversible error, in spite of the fact that the physicians and internes who made the entries were shown to be out of the jurisdiction. The court stated that there were three probative elements to be fulfilled in order to avoid the hearsay rule and that the record met the first two requirements, in that they were made contemporaneously with the events recorded, and there was no apparent motive to falsify. However, the third essential element, that of personal knowledge on the part of the entrant was not satisfied. The court stated that the testimony of a doctor as to the extent

[20] 92 F. 884, 35 C. C. A. 78 (1899).

[21] 238 Pa. 544, 86 A. 478 (1913).

See Levy v. J. L. Mott Iron Works, 143 App. Div. 7, 127 N. Y. S. 506 (1911); Job v. Grand Trunk Western Railway Company, 245 Mich. 353, 222 N. W. 723 (1929).

[22] 175 N. Y. S. 837 (1919).

[23] 314 Pa. 148, 171 A. 468 (1934).

of injuries, is primarily opinion evidence, and when in court, he is subjected to severe examination to test the accuracy, soundness and truth of his opinion. To deny the opposition the right to test the witnesses' knowledge and qualifications, the court held, was to deny it a substantial right. However, the court continued, "We do not wish to be understood as holding that in no case can hospital records be produced, but, except in extraordinary cases and then only where the three probative elements are present, such records should not be received in evidence."

In *Canadian Pacific Railway Company* v. *Quinn*,[24] a hospital chart verified by the superintendent of nurses, and another nurse who made entries thereon, was held not admissible, because it contained notations made by a nurse who was not present at the trial but who was shown to be available. This court, while recognizing the existence of the principle of necessity, showed no familiarity with its application.

In the discussion thus far, it has been attempted to cover those essentials necessary for admitting hospital records in evidence, under the principle of regular entries in the course of business. From this point, the discussion will cover such objections, based upon independent rules of evidence, as attack the substance of the records rather than the records as a whole as regular entries. Hospital records, being the testimonial assertions of the entrant or the original observer are, so far as applicable, subject to the rules of impeachment, which apply to all testimonial evidence.

In *Reed* v. *Hensel*,[25] a portion of a hospital record known as the history of the case, consisted of a statement by the injured person's daughter which read: "Plaintiff struck by automobile while crossing street. Unconscious for a time, but no subsequent return of unconsciousness. For many years has had attacks of Meniere's disease with associated severe headaches and short attacks of irrationality. Hearing in right ear has been poor. Since accident, cannot hear with either ear." This portion of the record was properly excluded on the ground that it was hearsay.

As in the previous case, it was held in *Dunn* v. *Buschmann*[26] to be reversible error to admit a hospital record, a considerable portion of which was obviously hearsay.

In the case of *Globe Indemnity* v. *Reinhart*, previously cited, the court stated that it did not wish to be understood as holding that everything in a hospital record would be proper in evidence. "The chart being presented," the court said, "if its contents

[24] 11 D. L. R. 600, Rop. Jud. Quebec 22 K. B. 428 (1913).
[25] 26 Ohio App. 79, 159 N. E. 843 (1927).
Also see The Western Electric Company v. The Industrial Commission, et al., 349 Ill. 139, 181 N. E. 638 (1932).
[26] 169 Wash. 395, 13 P. (2d) 69 (1932).

upon examination would be open to other objections, such as immateriality, irrelevancy, or that it was an expression of opinion by persons not competent to express an opinion, these objections are not precluded by what we have here said."

Statutes in certain jurisdictions make hospital records privileged communications, inadmissible in evidence. An illustration appears in the Washington case of *Toole* v. *Franklin Investment Company*.[27] In that jurisdiction a statute provides that a physician may not, without the consent of his patient, disclose any information that he might acquire in attending that person. The court held that hospital records, so far as they tended to disclose what the physician had learned through his care of the patient, were protected under that statute.

However, in the Missouri case of *Galli* v. *Wells*[28] it was held that a hospital record was admissible, since the plaintiff, having taken the stand and testified as to her physical condition, and having called her physician to testify on the same subject, waived the statutory privilege.

While it has been the purpose here to determine whether or not hospital records are admissible in evidence on common law principles, it is worthy of note that a number of jurisdictions have by statute made such records admissible. A statute which deserves universal sanction is that of Massachusetts. A pertinent part of that statute reads, "Records kept by hospitals under section seventy of chapter one hundred and eleven shall be admissible as evidence in the courts of the commonwealth so far as such records relate to the treatment and medical history of such cases; but nothing therein contained shall be admissible as evidence which has reference to the question of liability."[29]

It is disappointing to note that such little knowledge and so much confusion has been demonstrated by a number of courts on the admissibility of such important evidence as hospital records.

In view of the purposes for which these records are admitted into evidence, the underlying principles of the hearsay rule are not violated. They are not allowed to prove matters of opinion or liability for the injury, but stand merely as specific evidence of the condition of the patient—the absolute facts of physical manifestation. For that reason, they should be considered admissible because they probably are true, as any record made in the regular course of business by persons with no motive for falsifying the entries.

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[27] 158 Wash. 696, 291 P. 1101 (1930).

[28] 209 Mo. App. 460, 239 S. W. 894 (1922).

[29] (1932). Tercentenary Edition of The General Laws of the Commonwealth of Massachusetts, Vol. 2, Chapter 233, section 79. See also Vol. 1, Chapter 111, section 70; Vol. 2, Chapter 152, section 20.