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EVIDENCE - ADMISSIBILITY OF HOSPITAL RECORDS AS BUSINESS ENTRIES

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EVIDENCE — ADMISSIBILITY OF HOSPITAL RECORDS AS BUSINESS ENTRIES — It has long been established that entries made in the regular course of a business are admissible in evidence as an exception to the hearsay rule if the witness who had knowledge of the records is unavailable to testify, either because of death, insanity, illness, or absence from the jurisdiction.[1] The necessity that is required for all exceptions to the hearsay rule is present in the unavailability of the witness for one of the above reasons. The circumstantial guaranty of trustworthiness of the record is found in that there is no motive to falsify the record.[2] But in order for a record to fall within this exception to the

[1] 3 WIGMORE, EVIDENCE, 2d ed., § 1521 (1923).
[2] Ibid., § 1522.

hearsay rule, it is necessary that it be made in the regular course of some business, contemporaneously with the transaction to which it relates, and it must be written.[3] In recent years a new necessity has been found, namely, the practical impossibility, because of the complexities of modern business, of obtaining all of the persons who made the record to testify in court as to its contents. And the same difficulty presents itself in an attempt to account for the unavailability of all of the persons who had a hand in the making of the entry. Because of this, the courts have permitted the entry to be introduced in evidence upon the testimony of the keeper of the record, or of one who knows the method used in its compilation.[4] The types of records that have been considered to be business entries, and thus admissible under this exception, have been somewhat limited. Professor Wigmore for some time advocated the inclusion of hospital records as business entries,[5] but it has been only recently and with reluctance that the courts have admitted them, and then oftentimes only by virtue of statute. Following the report of the Commonwealth Fund Committee, in which they advocated the adoption of a model act to govern the admission of business entries as evidence,[6] a comparatively small number of states have enacted legislation of this kind, either the model act or an act of similar nature. The extent of this comment is to show: (1) in what states hospital records have been held not to be admissible as business entries, the states where there has been no decision on the subject, and the states where the status of the rule is in doubt; (2) the states where hospital records have been held to be admissible, and whether they are so by virtue of the common law, or only because of statute; (3) the authentication which is necessary; and (4) the purposes for which the record may be used.[7]

[3] Ibid., §§ 1523-1528.

[4] Ibid., § 1530.

[5] Ibid., § 1707.

[6] "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation and calling of every kind." MORGAN (COMMONWEALTH FUND LEGAL RESEARCH COMMITTEE), THE LAW OF EVIDENCE; SOME PROPOSALS FOR ITS REFORM 63 (1927).

[7] There has been no attempt here to consider certain related subjects, such as the admissibility of hospital records as public records, as past recollection, as aids to memory of the witness, or under the workmen's compensation acts. Neither has the question whether or not a hospital record is a privileged communication been considered.

I.

The courts of only four states (Delaware, Georgia, Kentucky and Mississippi) have definitely held that hospital records are not admissible. These courts all assign as the reason for their holding the assertion that such records are hearsay and do not come within any recognized exception to the hearsay rule.[8] It is difficult to see the logic of the reasoning of these courts. Hospital entries have the same circumstantial guaranty of trustworthiness that other business entries have, in that there is no motive to falsify the record. In fact, it might be said that this motive to falsify is more likely to be absent in the case of hospital records than it is in other types of business entries. The record is for the purpose of aiding the physicians in their treatment of the cases that are in the hospital, and as the reputation of the hospital is built upon its ability to save lives, the more correct the record, the better the reputation of the hospital. The record is invariably written, and made in the regular course of the business of the hospital. And it is made contemporaneously with the transactions to which it relates. The necessity may be found in this business as well as in others in the death, insanity, illness, or absence from the jurisdiction of the person who has knowledge of the records. And certainly the now well recognized necessity of the complexities of modern business is very apparent in a busy hospital, where to take a nurse or doctor off duty may result in serious consequences. The most apparent criticism would be that the statements in the record are in a large degree nothing more than the opinions of the persons who placed them there. This is especially true when they are diagnoses of ailments. But those records also contain much that is not opinion. The temperature of the patient from day to day, the medicine administered, his pulse, the date of his admission, the date of his discharge, the date of his death, the visits made by the doctor, operations if any, and many other pertinent matters that are more than opinion. If the courts are reluctant to admit the record as to statements that may be opinion because they feel that the opposing party should have a chance to cross-examine the physicians on those matters, the argument has much merit. But should that argument also exclude statements that are purely fact, and often provable only by the record? The records should be admitted for some purposes if not for

[8] *Delaware:* McMahon v. Bangs, 5 Penn. (Del.) 178, 62 A. 1098 (1904); Grossman v. Delaware Electric Power Co., 4 Harr. (34 Del.) 521, 155 A. 806 (1929). *Georgia:* Metropolitan Life Ins. Co. v. Mapp, 38 Ga. App. 30, 142 S. E. 564 (1928); Mutual Benefit Health & Accident Assn. v. Bell, 49 Ga. App. 640, 176 S. E. 124 (1934). *Kentucky:* National Life & Accident Ins. Co. v. Cox, 174 Ky. 683, 192 S. W. 636 (1917); Consolidated Coach Corp. v. Garmon, 233 Ky. 464, 26 S. W. (2d) 20 (1930). *Mississippi:* Metropolitan Life Ins. Co. v. McSwain, 149 Miss. 455, 115 So. 555 (1927).

all. A distinction may be drawn between those entries that are fact, and those that are opinion, such as diagnoses; but an exception may also well be made as to those matters of diagnosis that are at present so well known to medicine that the opinion of an experienced physician thereon is tantamount to the stating of a fact.

The largest list of states in this analysis of decisions is of those that have not passed on the subject one way or another. They are: Arizona, California, Colorado, Florida, Indiana, Maine, Missouri, Nebraska, Nevada, New Mexico, North Carolina, Oregon, South Carolina, South Dakota, Utah, Virginia, West Virginia, and Wyoming.

The answer to the question whether hospital records are admissible as business entries is in doubt in some ten states. This uncertainty results either because what seems to be an applicable statute has not as yet been construed or because the attempts to introduce the hospital records have not met with the requirements laid down by the courts for the admission of such records. Idaho,[9] Kansas,[10] Massachusetts,[11] and North Dakota,[12] have statutes under which it would seem that the hospital record should be admissible. However, of these states, only Kansas has had a decision[13] testing the statute, and there the court held that the record was not admissible because it was unnecessary, as the nurse could have testified as to the details, and the reading of the record inflamed the minds of the jury against the defendant.

The decisions in Arkansas,[14] Iowa,[15] New Hampshire,[16] Oklahoma,[17] Tennessee,[18] and Vermont[19] express a willingness on the part of the courts to admit hospital records as business entries. Yet in the cases that have come up in all of those states, the court has rejected the record because it has not been properly authenticated. The requirements for authentication in those states are not particularly burdensome. Only Oklahoma[20] demands that the maker of the record be the one to authenticate it, the other five states being willing to accept the

[9] Idaho Gen. Laws (1939), c. 106.

[10] Kan. Gen. Stat. Ann. (1935), § 60-2869.

[11] Mass. Gen. Laws (1932), c. 233, § 78.

[12] N. D. Comp. Laws (1913), § 7909.

[13] Bowman v. Coyle, 124 Kan. 492, 260 P. 643 (1927).

[14] Bankers' Reserve Life Co. v. Harper, 188 Ark. 81, 64 S. W. (2d) 327 (1933).

[15] Butler v. St. Louis Life Ins. Co., 45 Iowa 93 (1876).

[16] St. Louis v. Boston & Maine R. R., 83 N. H. 538, 145 A. 263 (1929).

[17] Metropolitan Life Ins. Co. v. Bradbury, 179 Okla. 253, 65 P. (2d) 433 (1937).

[18] Hill v. National Life & Acc. Ins. Co., 11 Tenn. App. 33 (1929); Bolden v. State, 140 Tenn. 118, 203 S. W. 755 (1918).

[19] Osborne v. Grand Trunk Ry., 87 Vt. 104, 88 A. 512 (1913).

[20] Metropolitan Life Ins. Co. v. Bradbury, 179 Okla. 253, 65 P. (2d) 433 (1937).

record on the same proof that is required for any other type of business entry. Those who have sought to introduce the records either have not known the requirements for their authentication, or have not taken the trouble to accomplish this rather simple task.

2.

The remaining states, fourteen in number, have, either by statute or by decision, admitted hospital records in evidence as business entries. These states are: Alabama, Connecticut, Illinois, Louisiana, Maryland, Michigan, Minnesota, New York, Ohio, Pennsylvania, Rhode Island, Texas, Washington, and Wisconsin.

Of these states, seven at present have statutes under which such records are admitted.[21] The other seven permit the records by decision at common law.[22]

The seven states that admit hospital records in evidence at common law without the benefit of statute admit them as business entries, coming under the exception to the hearsay rule. In most of these states the decisions admitting the records came only after much litigation. And usually the decisions that admit the record either overrule or attempt to distinguish prior cases wherein such records were rejected for one reason or another, because they were previously classed as hearsay, or because they were not properly authenticated.

3.

The question of the proper authentication of the record has caused much confusion in the decisions. In those states that have adopted the model act, it would seem that the record would be admissible by proving only the things set forth in the act; that the record was made of an act, transaction, occurrence or event; that it was made in the

[21] Conn. Gen. Stat. (Supp. 1935), § 1675c; La. Gen. Stat. Ann. (1939), § 1067.1 [the Louisiana statute is very much narrower in scope than are the statutes of the other states, by its terms applying only to the records of the charity hospitals of the state]; Md. Ann. Code (Flack, Supp. 1935), art. 35, § 54A; Mich. Pub. Acts (1935), No. 15; N. Y. Civ. Prac. Act (Cahill, 1937), § 374a; R. I. Gen. Laws (1938), c. 538, § 1; Wis. Stat. (1937), § 327.25.

[22] Barfield v. South Highlands Infirmary, 191 Ala. 533, 68 So. 30 (1915); Boss v. Illinois Central R. R., 221 Ill. App. 504 (1921); Kimber v. Kimber, 317 Ill. 561, 148 N. E. 293 (1925); Lund v. Olson, 182 Minn. 204, 234 N. W. 310 (1931); Schmidt v. Riemenschneider, 196 Minn. 612, 265 N. W. 816 (1936); Taaje v. St. Olaf Hospital, 199 Minn. 113, 271 N. W. 109 (1937); Reed v. Hensel, 26 Ohio App. 79, 159 N. E. 843 (1927); Pickering v. Peskind, 43 Ohio App. 401, 183 N. E. 301 (1932); Mutschman v. Petry, 46 Ohio App. 525, 189 N. E. 658 (1933); Loder v. Metropolitan Life Ins. Co., 128 Pa. Super. 155, 193 A. 403 (1937); McGine v. Industrial, etc., Ins. Co., 124 Pa. Super. 602, 189 A. 889 (1937); McCoy v. State, 106 Tex. Crim. 593, 294 S. W. 573 (1927); Murgatroyd v. Dudley, 184 Wash. 222, 50 P. (2d) 1025 (1935).

regular course of a business, and it was the regular course of such business to make the record; and that it was made at the time of, or shortly after, the happening of the act, transaction, occurrence or event. The terms of the statute do not demand that the maker be produced, or that his unavailability be accounted for. Nor does it have to be shown that the maker had personal knowledge of the facts in the record before it is admissible. In *Johnson v. Lutz*,[23] the New York court stated that the purpose of the act was to admit the entries without the necessity of calling as witnesses all persons who had a part in the making of them. Conceivably under the act the trial judge could demand as many witnesses as he desired, for the act states that the record will be admissible in evidence "if the trial judge shall find that it was made in the regular course of any business. . . ." However, in no case under the act has a court demanded more than one witness to authenticate the record. The Connecticut statute has an added clause which explicitly states that it will be unnecessary to produce the persons who made the record or who had personal knowledge of the facts recorded, nor is it necessary to show that such persons are unavailable.[24] This may be implicit in the model act in the other states, as the act does not require the presence of these persons, or an accounting as to their unavailability. In the Maryland case of *Wickman v. Bohle*,[25] the record was proved by the doctor who had charge of the case, and so necessarily the person who had personal knowledge of the facts stated in the record. And in *Gile v. Hudnutt*,[26] the record was presented to the Michigan court by the nurse who had charge of it. Whether these courts will demand the person who made the record or the person who has knowledge of the facts therein, if that person is available, is an open question. Such a demand would seem to be unnecessary. There is no reason why any other person connected with a hospital cannot as well make the authentication. In general the states that have adopted the act have applied it to accomplish the purpose for which it was intended, namely, to make the introduction of hospital records into evidence a simpler task. Most of them will admit the record when it is shown that the conditions of the statute are complied with, and when the record is identified by one who is in some manner familiar with it. In Wisconsin, despite a very definite requirement of the statute that the record must be authenticated by the person who made it, or, on a

[23] 253 N. Y. 124, 170 N. E. 517 (1930).

[24] "Such writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses." Conn. Gen. Stat. (Supp. 1935), § 1675c.

[25] 173 Md. 694, 196 A. 326 (1937).

[26] 279 Mich. 358, 272 N. W. 706 (1937).

showing of his unavailability for certain enumerated reasons, by the person who has custody of the entries, the court[27] refused to reverse a judgment where a hospital record was introduced without the testimony of the nurses who made it, or a showing that they were unavailable. The court said that it did not feel that the record was prejudicial, since it was identified by a doctor, and undoubtedly correct. By the terms of the Louisiana act, it would seem that the only authentication of the record that is necessary is that it be signed by certain specified persons.[28] Before the passage of this statute, the court demanded that the record be identified by the doctor who made it.[29] Whether this requirement will be carried over under the statute is yet an open question.

In those states where the records are admissible by judicial decision alone, and in those states where the courts have rejected the records although expressing a willingness to admit them if properly authenticated, the requirements for authentication are substantially those stated by Professor Wigmore.[30] It is necessary to show the manner and method of the keeping of the record, and that it was kept in the regular course of business, that there was a duty or authority to make the record, and that it was made contemporaneously with the transaction.[31] Only Pennsylvania deems it necessary that there be proof that at the time of the making of the record there was no reason to falsify it, and Pennsylvania also requires that it be shown that the person who is responsible for the records has knowledge of the facts therein stated.[32] It is also necessary to have the record authenticated either by the person who made it, or by some other person on a showing that the person who did make the record is unavailable as a witness.[33]

[27] Beilke v. Knaack, 207 Wis. 490, 242 N. W. 176 (1932).

[28] "Whenever a certified copy of the chart or record of either of the charity hospitals of this state, signed by the director, assistant director, superintendent or secretary-treasurer of the board of administrators of the hospital in question. . . ." La. Gen. Stat. Ann. (1939), § 1067.1.

[29] Lado v. First National Life Ins. Co., 182 La. 726, 162 So. 579 (1935).

[30] See supra, notes 1 to 5.

[31] Boss v. Illinois Central R. R., 221 Ill. App. 504 (1921); Lund v. Olson, 182 Minn. 204, 234 N. W. 310 (1931); Pickering v. Peskind, 43 Ohio App. 401, 183 N. E. 301 (1932); Paxos v. Jarka Corp., 314 Pa. 148, 171 A. 468 (1934); Hill v. National Life & Accident Ins. Co., 11 Tenn. App. 33 (1929); McCoy v. State, 106 Tex. Crim. 593, 294 S. W. 573 (1927).

[32] Paxos v. Jarka Corp., 314 Pa. 148, 171 A. 468 (1934); Loder v. Metropolitan Life Ins. Co., 128 Pa. Super. 155, 193 A. 403 (1937).

[33] Grossman v. Delaware Electric Power Co., 4 Harr. (34 Del.) 521, 155 A. 806 (1929); Boss v. Illinois Central R. R., 221 Ill. App. 504 (1921); Wright v. Upson, 303 Ill. 120, 135 N. E. 209 (1922); Kimber v. Kimber, 317 Ill. 561, 148 N. E. 293 (1925); Lund v. Olson, 182 Minn. 204, 234 N. W. 310 (1931); St. Louis v. Boston & Maine R. R., 83 N. H. 538, 145 A. 263 (1929); Pickering v.

4.

The answer to the question what the record will be permitted to prove is equally as unsettled and confusing as is the answer to the question of authenticity. It is settled, in those states that admit the records at all, that they are admissible to prove those things that come within the classification of facts. These have been held to include the age of the patient, date of his entry and discharge, date of his death, the medicine administered, his temperature and pulse, the visits made by the doctor, and other matters of this type.[34] And it is equally as well established that the records are not admissible to prove those things that are patently hearsay, such as statements told to the maker of the record by the patient, or by unidentified third persons who have no duty to impart the information.[35] The difficult problem arises in the question whether the records are admissible to show the diagnosis by the doctor of the patient's ailment. A number of states have held that the record is admissible to show this diagnosis,[36] and there has been no attempt in those cases to distinguish on the ground of the type of disease, or the expertness of the person making the examination. The Pennsylvania courts, however, have gone into the matter quite thoroughly, and present a distinction based mainly on the qualifications of the doctor making the diagnosis. In *Paxos v. Jarka Corporation*,[37] the court said:

Peskind, 43 Ohio App. 401, 183 N. E. 301 (1932); McCoy v. State, 106 Tex. Crim. 593, 294 S. W. 573 (1927); Osborne v. Grand Trunk Ry., 87 Vt. 104, 88 A. 512 (1913); Murgatroyd v. Dudley, 184 Wash. 222, 50 P. (2d) 1025 (1935).

[34] Kimber v. Kimber, 317 Ill. 561, 148 N. E. 293 (1925); Dolan v. Metropolitan Life Ins. Co., 11 La. App. 276, 123 So. 379 (1929); Lado v. First National Life Ins. Co., 182 La. 726, 162 So. 579 (1935); Globe Indemnity Co. v. Reinhart, 152 Md. 439, 137 A. 43 (1927); Wickman v. Bohle, 173 Md. 694, 196 A. 326 (1937); Gile v. Hudnutt, 279 Mich. 358, 272 N. W. 706 (1937); Lund v. Olson, 182 Minn. 204, 234 N. W. 310 (1931); Schmidt v. Riemenschneider, 196 Minn. 612, 265 N. W. 816 (1936); Palmer v. John Hancock Mutual Life Ins. Co., 150 Misc. 669, 270 N. Y. S. 10 (1934); Sommer v. Guardian Life Ins. Co., 253 App. Div. 763, 300 N. Y. S. 938 (1937); Pickering v. Peskind, 43 Ohio App. 401, 183 N. E. 301 (1932); Ribás v. Revere Rubber Co., 37 R. I. 189, 91 A. 58 (1914); Conlon v. John Hancock Mutual Life Ins. Co., 56 R. I. 88, 183 A. 850 (1936); Bolden v. State, 140 Tenn. 118, 203 S. W. 755 (1918); McCoy v. State, 106 Tex. Crim. 593, 294 S. W. 573 (1927); Murgatroyd v. Dudley, 184 Wash. 222, 50 P. (2d) 1025 (1935).

[35] Sadjak v. Parker-Wolverine Co., 281 Mich. 84, 274 N. W. 719 (1937); Geroeami v. Fancy Fruit & Produce Corp., 249 App. Div. 221, 291 N.Y.S. 837 (1936); Reed v. Hensel, 26 Ohio App. 79, 159 N. E. 843 (1927); Dunn v. Buschmann, 169 Wash. 395, 13 P. (2d) 69 (1932).

[36] Wright v. Upson, 303 Ill. 120, 135 N. E. 209 (1922); Wickman v. Bohle, 173 Md. 694, 196 A. 326 (1937); Sadjak v. Parker-Wolverine Co., 281 Mich. 84, 274 N. W. 719 (1937); Stone v. Goodman, 241 App. Div. 290, 271 N. Y. S. 500 (1934); Conlon v. John Hancock Mutual Life Ins. Co., 56 R. I. 88, 183 A. 850 (1936).

[37] 314 Pa. 148 at 153-154, 171 A. 468 (1934).

> "such evidence must be the opinion of a person so qualified as an expert in a field as to be capable of drawing a sound conclusion concerning a condition not visible but reflected circumstantially by the existence of other visible and known symptoms."

In that case the records were rejected because the court felt that the doctor who made the examination did not have the necessary knowledge, and the records were merely his opinions. The same result was reached in *Leed v. State Workmen's Insurance Fund*,[38] where the record attempted to show blindness, and the examination was made by an interne whom the court did not consider sufficiently an expert to make his statements more than opinions. However, in *Loder v. Metropolitan Life Insurance Co.*,[39] the court admitted the record to show alcoholic neuritis, chronic valvular heart disease, and chronic gastritis, obviously because they felt that the doctor who made the diagnosis was sufficiently expert in his field. The reason given for the refusal to admit the record in evidence when the court feels that the statements can be no more than mere opinions is that in such a situation the opposing party will wish the opportunity to cross-examine the person who made the diagnosis on the opinion so expressed. The argument has much merit. The court has made no attempt to distinguish between diagnosis of those ailments that are of such a character that only an expert can correctly interpret them, and those that have become so well known to medicine as to be standard so that the statement of any physician as to them is tantamount to actual knowledge of an existing fact. If the court is going to distinguish between fact and diagnosis, and between the attributes of the physician in every situation, it may well also distinguish between diagnoses of different types of ailments in order that hospital records will be used to their best advantage. The main difficulty with the Pennsylvania rule is that it means that in every case where a hospital record is introduced, the court will have to look to the qualifications of the doctor who made the diagnosis, and determine whether he is an expert in his field. Perhaps it would be better if hospital records were excluded entirely as to diagnosis—doctors are not infallible, and the record would still be available to prove facts, which is about all that can be proved by any other business entry. But it is submitted that if the distinction suggested by the Pennsylvania courts, or the distinction between the different types of ailments diagnosed, can be made without too much difficulty, this solution is very nearly the perfect one for the situation, in that it reduces to a minimum the hazards of allowing mere opinions to go to the jury.

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[38] 128 Pa. Super. 572, 194 A. 689 (1937).

[39] 128 Pa. Super. 155, 193 A. 403 (1937).