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Are the Records of Mental Hospitals Privileged in Mental Incompetency Adjudications

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ARE THE RECORDS OF MENTAL HOSPITALS PRIVILEGED IN MENTAL INCOMPETENCY ADJUDICATIONS?

I. *Introduction.*

This article will deal with the use as evidence of hospital records when they are offered as hearsay evidence[1] of the matters recorded, namely, the diagnostic findings of the examining physician or psychiatrist as to the mental incompetency of the patient.[2] Particular emphasis will be placed on the situation in Wyoming. Because the entries involve hearsay and lie in an area of expert opinion, numerous problems are presented, including questions of whether the patient is voluntary or involuntary, paying or non-paying, and whether the hospital is public or private. As exceptions to the hearsay rule, both the Uniform Business Records as Evidence Act[3] (hereafter called the Business Entries Act) and the Uniform Official Reports as Evidence Act[4] (hereinafter called the Official Entries Act) must be considered in the light of the Physician-Patient Privilege Statute.[5]

The term "hospital records" in general means the records and charts kept as a part of the case history of all patients in a mental hospital. They are usually made by psychatrists,[6] other doctors, and nurses who at various times enter on these records items pertaining to the care or progress of the patient, or the evaluation of his mental condition. It is obvious that such a record, if offered as evidence without calling all of the individuals who made the notations or entries, is hearsay and is inadmissible unless it can be brought under an exception to the hearsay rule.[7] We shall first discuss the admissibility of hospital records in general, then narrow the discussion to the records of mental hospitals.

II. *Hospital Records Admitted Under the Uniform Business Records as Evidence Act.*

The hearsay exception which admits business entries is built upon the basic assumption that records kept in the regular course of business are generally accurate and may therefore be used in case of necessity as evidence of the truth of matters recorded.[8] However, as McCormick has pointed out, courts have been slow to extend the principle of this exception to such non-

1. McCormick, Evidence, Sec. 225 (1954): "Hearsay evidence is testimony in court or written evidence of a statement made out of court . . . offered as an assertion to show the truth of matters asserted therein . . ."
2. For a general discussion, see Hale, Hospital Records as Evidence, 14 So. Calif. L. Rev. 99 (1941).
3. Wyo. Stat. Sec. 1-172 (1957).
4. Wyo. Stat. Sec. 1-166 (1957).
5. Wyo. Stat. Sec. 1-139 (1957).
6. San Francisco vs. Superior Court, 37 Cal. 2d 227, 231 P. 2d 26 (1951). A psychiatrist is generally recognized as an individual who is licensed to practice general medicine and who has had such additional training in the field of mental disorders as is deemed sufficient by a hospital for admission to practice therein, or is deemed sufficient by the American Board of Psychiatry for admission to its membership rolls.
7. Annot. 169 A.L.R. 670 (1947).
8. McCormick, Evidence Sec. 290 (1954).

commercial establishments as hospitals. Thus, in some instances, it has been necessary to resort to the hearsay exception for official statements (to be later discussed) to get into evidence records of public hospitals or the hospital records required by law.[9] Many states have special statutes regulating the admission of hospital records.[10] Wyoming, having no such specific statute, must rely on more general statutes together with the common law hearsay exceptions to justify the introduction of hospital records as evidence.

In order for hospital records to be admissible under the common law exception of entries in regular course of business, it is essential that they satisfy three probative requirements.[11] First, they must be made contemporaneously with he acts to which they purport to relate. Second, there must have been present at the time no contemplative motive for falsification. And, third, they must have been made by a person having knowledge of the facts set forth or one competent to predicate a medical and scientific opinion of the facts. It has been said that most courts would today permit hospital records to be admitted upon the same conditions of meeting the requirements of regularity, personal knowlege, contemporaneousness, production of participants and the like, as are prescribed for business records.[12]

Wyoming has adopted the Uniform Business Records as Evidence Act.[13] The term "business" is defined[14] to include "every kind of business, profession, occupation, calling or operation of institutions whether carried on for profit or not." This statute embodies a definition of business so broad as to leave no doubt that hospital records come within its terms, thus simplifying and modernizing the requirements for the admission of business entries.[15] Hence, it is no longer necessary that a Wyoming court reply upon the common law business entries exception to justify the admissibility of hospital records.

III. *Hospital Records Admitted Under the Public Documents or Official Entries Act.*

Wyoming in 1941 adopted the Uniform Official Reports as Evidence Act[16] which provides in Section 1-166 that "written reports or findings of fact made by officers of this state on a matter within the scope of their duty as defined by statute shall insofar as relevant be admitted as evidence of matters stated therein."

The public documents or official statements exception to the hearsay rule is growing rapidly.[17] This exception involves a record made by a public

9. Ibid.
10. These are compiled in 6 Wigmore, Evidence Sec. 1707 (3d ed. 1940).
11. 32 C.J.S. Evidence Sec. 728 (1942).
12. 32 C.J.S. Evidence Sec. 728 (1942).
13. Wyo. Stat. 1-170 to 1-173 (1957).
14. Wyo. Stat. 1-171 (1957).
15. McCormick, The Use of Hospital Records as Evidence, 26 Tulane L. Rev. p. 373 (1952).
16. Wyo. Stat. Sec. 1-165 to 1-169 (1957).
17. Braham, Case Records of Hospitals and Doctors as Evidence Under the Business Records Act; 21 Temple L. Quart. 113 (1948).

official who is under a duty to record the event or condition. A written statement of a public official which he had a duty to make is admissible as evidence of the facts recorded.[18] Most hospital records are kept under direction of law. But, the obvious limitation is that at common law this exception does not apply to hospitals conducted as private institutions, unless the proponent can point to some statute requiring private hospitals to keep the kind of records he is offering.[19] The Wyoming Statutes provide that the "superintendent of the (State Mental Hospital) . . . shall cause to be kept a fair and full account of all his doings[20] indicating among other things that medical records shall be kept. Wyoming also requires that " . . . the superintendent of the hospital shall, within ten days after the admission of such patient, forward to the office of the board, a record of such patient. . ."[21] A report on the admission of each patient must also be filed.[22] The above provisions of the statutes would seem to indicate that there is a duty imposed upon the superintendent to keep such records pertaining to the individuals admitted, regardless of whether they are voluntary or involuntary patients. It follows that these records would come within the official statements exception to the hearsay rule and would be admitted as prima facie evidence of the facts therein.

The admissibility of hospital records as either business records or as official reports may violate the privilege for communications between a patient and his physician,[23] and this problem will next be discussed.

IV. *Physician-Patient Privilege.*

In states such as Wyoming which recognizes the physician-patient privilege, hospital records may be excluded from evidence because of the privilege. A court in the District of Columbia held under a statute similar to Wyoming's that the information obtained by a psychiatrist of a public mental hospital while attending an inmate comes within the provisions of the statute and makes such confidential information inadmissible.[24]

The object of the statute making communcations between physicians and patients privileged is not primarily to disqualify the physician from testifying, but rather to enable the patient to secure medical aid without betrayal of confidence.[25] The patient may, however, waive objection and permit the physician to testify. In other words, the privilege is the privilege of the patient and not the physician; if the patient assents, the court will compel the physician to answer, or allow the hospital records prepared by the physician in evidence.[26]

18. 5 Wigmore Evidence Sec. 1639 (3d. ed. 1940).
19. 26 Tulane L. Rev. p. 371 (1952).
20. Jordan v. Nickell, 253 S.W.2d 237 (Ky., 1952).
21. Wyo. Stat. Sec. 25-639 (1957).
22. Wyo. Stat. Sec. 25-40 (1957).
23. Wyo. Stat. Sec. 1-139 (1957).
24. Taylor vs. U.S. 222 F. 2d 398 (D.C. Cir. 1955). See also 54 Mich L. Rev. 424 (1956).
25. 8 Wigmore, Evidence, See 2380a (3d. ed. 1940).
26. Wolf vs. People, 117 Colo. 279, 187 P. 2d 926, 927 (1947).

Apart from questions of waiver, other factors considered are the extent to which the privilege is affected by the presence of third persons and the extent to which third persons gain knowledge through regular routine participation in, or access to, the hospital records. Since this privilege is purely of statutory origin,[27] the problem is one of statutory wording and interpretation. The courts have taken two distinct attitudes with reference to the construction of such statutes. Some courts have held that such statutes are remedial in their nature and should be liberally construed, while others have taken the view that they are in derogation of the common law and should be strictly construed.[28] It often happens in hospitals that third persons are present during the otherwise confidential communications. These persons are usually nurses, interns, psychologists or other staff members.

The general rule seems to be that this privilege applies only to physician and patient and does not include a third person who might be present, unless such third person is aiding the physician, or is necessary as a means of communication between physician and patient.[29] The Wyoming Statute requires that the practitioner be a licensed physician.[30] Although the act would encompass the psychiatrist, since he is an individual who is licensed to practice medicine,[31] it is probable that the court would not extend the privilege to include a clinical psychologist who does not normally have a license to practice medicine, but who is recognized as qualified in the treatment of mental disorders, and in the testing and evaluation of persons who are mentally ill or insane. The functions of clinical psychologists and their relations to patients or inmates are nearly identical to those of the psychiatrist. Therefore, if the privilege is to include the psychiatrist, should it be construed to encompass the psychologist? Sound reasoning would seem to dictate that the requirement of a license to pracice medicine for inclusion within the privilege should not be extended to psychologists, unless their work is done under the immediate direction of a licensed physician.

Distinctions are made between the case where the patient is examined only as to his mental fitness,[32] and the case where he is treated for mental illness.[33] In the former, the communications are not privileged because the purpose of the usual doctor-patient relationship, the seeking of treatment, is not present. In these situations communications to clinical psychologists would not be privileged.

When the patient is committed for examination only, the issue of the statute's applicability relates to the broad question of whether the necessary

27. McCormick, Evidence See 101 (1954).
28. Annot. 107 A.L.R. 1491 (1937).
29. Mullin-Johnson Co. vs. Pennsylvania. Mutual Life Ins. Co. 2 Fed. Supp. 203, 204 (D.C. Cal. 1933).
30. Wyo. Stat. Sec. 1-139 (1957).
31. 47 N.W. Univ. L. Rev. 384 (1952).
32. Hopkins vs. State 212 Miss. 772, 55 So. (2d) 467 (1951). See also Annot. 107 A.L.R. 1491 (1937).
33. Lincott vs. Hughbanks 140 Kan. 353 37 P.2d 26 (1934).

relationship exists between a state hospital psychiatrist and a committed inmate.[34] The Wyoming Supreme Court in a recent decision[35] has shed some light upon this area. The defendant, accused of murder, had been committed by court order to the state hospital and to a private physician for examinations to determine whether he was sane. Later at the trial it was contended by the defendant's counsel that the communications by the defendant to the physicians who testified for the state were privileged. The court held that "there is no merit in that contention," pointing out that these physicians were not the personal physicians of the defendant, but physicians employed to find out whether the defendant was sane or insane, and thus his communication to them was not privileged, and they could properly testify for the state. It can be concluded from this decision that whenever an individual is committed by court order to the state hospital or to a physician for an examination merely to determine his sanity, the communication will not come within the doctor-patient privilege. This conclusion is in harmony with respected authorities who take the view that in criminal insanity cases policy may dictate that the privilege be lifted in order to permit the better administration of justice.[34]

An opposite result would occur where the patient is committed for treatment rather than examination. Since the physician or psychiatrist must encourage the patient to divulge his innermost thoughts, his statements to the physician-therapist should fall within the protection of the statute.[37] Accordingly, most courts have held that the privilege applies to communications between public hospital physicians and patients committed for treatment.[38] This seems to be true in civil as well as criminal proceedings where there is a question of the patient's sanity. A civil case decidedly in point (which goes even beyond the decision of the Wyoming court) held that doctors could not, over the objection of the patient or the patient's personal representative, testify about anything found by them on examination of the patient at state hospital for the insane.[39] It is interesting to note, however, that in the same case the court held that where the question of the mental soundness of a person is at issue, a non-expert who has had an opportunity to observe the person may state his opinion as to the mental soundness of the person, having first given the facts upon which his opinion is based.[40]

The question arises as to whether the otherwise privileged character of the records may be overridden by their public nature. Although, it is uni-

34. 54 Mich. L. Rev. 424 (1956).
35. State vs. Riggle 76 Wyo. 1, 298 P.2d 349 (1956). See also Fisher vs. Small 166 A 2d. 744. and Garska vs. Harris 109 N.W. 2d 520.
36. 8 Wigmore, Evidence Sec. 2385 p.825 (3d ed. 1940), 45 A.L.R. 1357 (1926, 2 A.L.R. (2d) 647 (1948); these references include other situations where the privilege is denied for policy reasons.
37. 54 Mich. L. Rev. 425 (1956).
38. See for example McGrath vs. State 104 N.Y.S. 2d. 882 (1950).
39. Lincott vs. Hughbanks 140 Kan. 353, 37 P.2d 26 (1934).
40. Ibid.

versally agreed that the physicians entries are included in medical records of a hospital, query whether the privilege should include the records of a state hospital where the medical character of the records is overridden by the public nature of the books.[41] A Mississippi court has held that it was erroneous for the lower court to exclude as privileged the testimony of physicians based on the records of a hospital for the insane which was required by law to make and keep a record of the patients.[42] The opinion stated that the privileged communications statute does not apply to cases where the law itself requires the disclosure of the condition of the patient. This decision is in accord with several other decisions in this area.[43]

V. *Conclusion.*

In viewing the overall picture today, the prevailing view appears to be that where the court order is solely for the examination of the patient, the diagnostic findings of qualified physicians (who are usually psychiatrists), no matter how difficult and debatable the inferences to be drawn from the data presented may be, are admissible in evidence when embodied in hospital records to the same extent that they would be received if the expert were personally present on the stand. However, in the situation where the patient is or has been admitted for treatment, and the records of this treatment are later offered in a proceeding which seeks a finding of the mental competency of the patient, the records will not be admissible unless there is a waiver by the patient or his personal representative. The first conclusion is representative of the growing recognition by courts of the value and importance of hospital records as aids to the court in the investigation of medical facts, while through the second conclusion the court recognizes the importance to the patient of securing medical aid without revelation of his confidences.

In light of the severe criticism to which the physician-patient privilege is currently being subjected it is time for the legislature to review the various statutes which bear on the problem, at least as far as they apply to inmates of state hospitals and of state hospital psychiatrists and psychologists.

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41. 8 Wigmore Sec. 2382 P. 820 (3d ed. 1940).
42. Morley vs. State 174 Miss. 568, 165 So. 296 (1936).
43. Marx vs. Parks 39 SW (2d) 270 Tenn. (1931). Wills vs Nat. Life and Acc. 162 N.E. 822 Ohio (1928).